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**An Appraisal of the Mutual Impact between Globalization
and Human Rights in Africa**

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**Submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy**

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1.01 Abstract

Globalization has become one of the defining features of the contemporary world, and is, no doubt, having some impact on human rights. In examining the nature of the impact with particular reference to Africa, this Thesis challenges the conventional scholarship which has so far concentrated on the impact of globalization on human rights, ignoring the possible impact of human rights on processes of globalization, and argues that in order to obtain a holistic view of the relationship between globalization and human rights, sufficient attention must equally be given to the corresponding impact of human rights norms on processes of globalization. In support of this formulation, three levels of analysis are adopted in the Thesis, namely; international, regional and national systems.

It is argued that at the international level, the impact of human rights norms on processes of globalization is evidenced by the fact that international economic institutions such as International Monetary Fund (IMF), World Bank and World Trade Organization (WTO), which initially ignored human rights norms in their policies, programmes and operations, have now embraced such norms. At the regional level, the African Charter on Human and Peoples' Rights, embodying human rights norms attentive to the African condition, has been used to constrain processes of globalization. Finally, using three African countries, namely, South Africa, Nigeria, and Kenya as case studies, it is demonstrated that at the national levels, human rights norms are also impacting on processes of globalization, as the activities of transnational corporations, and those of governments based on the dictates of economic globalization, are being challenged by human rights NGOs and other social movements.

It is on this score that the 'Mutual Impact thesis' is formulated, the contention being that for a proper understanding of whether the impact of globalization on human rights is positive or negative, a debate that has engaged the attention of some writers, the preliminary issue of the corresponding impact of human rights on globalization must also be taken into account.

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Finally, I give thanks to God Almighty for making this dream a reality. He compelled me to take this bold decision at the most challenging period of my life. I affirm that His banner over us is that of Love. May His Name be Glorified.

1.06 Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature -----

Name -----

Part One

Globalization and Human Rights: General Theoretical Framework

This part of the thesis seeks to examine the general theoretical issues involved in this discussion of the relationship between globalization and human rights. It examines the problematic issue of the definition of globalization and the controversy that has trailed the human rights corpus over the years, examining these issues and controversies within the three historical phases of African history, namely, pre-colonial, colonial and post-colonial periods. The views of writers concerning the impact of globalization on the promotion and protection of human rights are also discussed as ideal-typical positions, and appraised. The central argument of the thesis is also presented in this part, namely, that the relationship between globalization and human rights is not a linear one, but evidences a mutual impact between the two.

This formulation sets the scene for the discussion carried out in the subsequent chapters.

1.07 Introduction

The world is undergoing tremendous social, economic and technological transformation. Relations between states are being re-defined and restructured to accord with changing social and economic realities. Such changes are not necessarily novel and, to some extent, can be said to have historical parallels. At a particular point in history the changes were driven by the desire for territorial expansion, with some states acquiring and dominating other territories and implanting their cultural norms and values on those societies.¹ In the ancient world, nations explored other territories for the purposes of enhanced trade and commerce. Thus, in earlier processes of social and economic change, developments in some ways similar to what has come to be regarded as globalization can be identified. Nevertheless, the material nature of contemporary globalization is distinct from the previous phases of globalization and it is these distinct features that have accentuated the impact of globalization on human rights, and, as I will argue in this thesis, the corresponding impact of human rights on the globalization process. As Alison Brysk has aptly noted:

The current wave of globalization does surpass previous eras in the breadth, scope, and intensity of the combination of connection, cosmopolitanism, commodification, and communication. It is this combination of norms, flows, institutions, and markets that has particular political consequences for human rights.²

Africa was not immune to these developments. Indeed, the continent was the object of acquisition and control by other regions of the world, notably Europe. Such changes were largely fuelled by economic and technological considerations and the need for hegemonic control of those territories. As Immanuel Wallerstein has shown in his world system

¹ D.J. Bederman, 2008, *Globalization and International Law*, New York: Palgrave Macmillan, pp.4-5.

² A. Brysk, 2002, 'Transnational Threats and Opportunities', A. Brysk, ed. *Globalization and Human Rights*, California: University of California Press, pp.1-16 at 6.

theory,³ such developments represent a phase in the processes of globalization. Significantly, the changes are also affecting some of the established organizing principles of state relations such as state sovereignty. Thus, the Westphalian conception of sovereignty which accorded untrammelled regulatory power to the state has been considerably attenuated by the emergence of other actors on the international scene.⁴ Although this has not led to the end of the nation state as predicted by Kenichi Ohmae,⁵ it has nevertheless resulted in a significant re-conceptualization of the role of the state in national and international relations, described as the 'relative miniaturization of the state'.⁶ In a way, this development is related to the weak state consensus which sees the state as an inherently oppressive institution which must therefore be weakened as a pre-condition of the strengthening of civil society.⁷ But as Boaventura de Sousa Santos has observed, 'this liberal consensus is plagued by a dilemma: since only the state can produce its own weakness, it takes a strong state to produce it efficiently and sustain it coherently'.⁸ However, whether the state is implicated in the production of its own weakness or is merely responding to external forces, the reality is that these pressures have impacted greatly on state sovereignty. Indeed, Heinz Klug has succinctly summarised the three sets of pressures being mounted on state sovereignty by the process of globalization.⁹

First, the very nature, scope and capacity of the sovereign state is[sic]being changed from above by processes of economic, political, legal and military interconnectedness. Second, the nation-state is being challenged from below by local groups, movements and nationalisms questioning its status as a representative and accountable power system; and third, the nature and dynamics of national political systems are being reshaped by the 'claims of interlocking

³ I. M. Wallerstein, 2000, *The Essential Wallerstein*, New York: The New Press, pp.71-102.

⁴ S. Strange, 1996, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge: Cambridge University Press, pp.3-7.

⁵ K. Ohmae, 1995, *The End of the Nation State: The Rise of Regional Economies*, New York: The Free Press, pp.11-13. His argument concerning the emergence of a 'borderless world' has however proven to be hugely valid.

⁶ B. de Sousa Santos, 2002, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, London: Butherworths LexisNexis, p.489.

⁷ Ibid., p.315.

⁸ Ibid.

⁹ H. Klug, 2000, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge: Cambridge University Press, p.52.

political decisions and outcomes among states and their citizens', created by global interconnectedness.

The result of these pressures is that the sovereignty of the state as the sole subject of international law has been severely fragmented with international organizations, non-governmental organizations, transnational corporations and movements, as well as individuals playing some roles in the international system and the nation-state providing the 'locus for constant renegotiation, realignment and reassignment of jurisdictional powers'.¹⁰

Admittedly, these developments have had tremendous impact not only on the ability of states to exercise their sovereign rights, but also their capacity to protect human rights. This is particularly problematic since the assumption in the liberal conception of rights is that the state is the classic duty bearer and the major agency for the protection of human rights.¹¹ It follows that any development that displaces the role of the state in the exercise of its sovereign power is bound to affect its fulfilment of these assigned roles.

Perhaps even more fundamental is the fact that the effect of such developments on the sovereignty of states is usually uneven. Thus the impact of contemporary processes of globalization on the advanced Western states has been significantly different from the impact on Third World countries, in particular, African countries. While several reasons can be given for this uneven impact, it seems obvious that in the normal current of events, some states are strategically positioned to cushion the effects or even influence the direction of such developments in ways that minimize the negative impacts in their territories. On the other hand, other less privileged states – and this is where African states unfortunately belong – are unable to influence the direction of such processes and are therefore more vulnerable to them.¹² This is the conventional, non-critical interpretation of contemporary developments and explanation for the devastating effect of globalization on African states including its impact on the enjoyment of human rights in

¹⁰ Ibid., p.55.

¹¹ This assumption has, however, been severely criticized. See for example, B. Rajagopal, 2003, *International Law from Below: Development, Social Movements, and Third World Resistance*, Cambridge: Cambridge University Press, pp.186-189; U. Baxi, 2006, *The Future of Human Rights*, 2nd ed. Oxford: Oxford University Press, pp.246-248.

¹² This conventional narration is embodied for example, in paragraph 5 of the United Nations Millennium Declaration adopted at the 55th Session of the General Assembly on 18 September 2000, as well as the Algiers Declaration of the African Heads of State at the 35th Summit of the Organization of African Unity, predecessor of the African Union.

these countries. While I recognize the validity of some of these conclusions – even though their premises may be debateable – the central focus of my thesis is on the corresponding impact of human rights on the globalization process. This is because it is too often assumed that the relationship between globalization and human rights is necessarily a linear one with globalization impacting on human rights and the latter not having any corresponding effect on the former.

Accordingly, I seek to demonstrate that the analytical framework underpinning this assumption is inadequate, and contend that in order to properly analyze the relationship between globalization and human rights, the conventional wisdom that informs that position ought to be jettisoned. I have sought to do this using three levels of analysis; namely, through locating the African Charter on Human and Peoples' Rights within the context of globalization; examining the relationship between international economic institutions and human rights; and through exploring the national dimensions of the relationship in some selected African countries. This approach entails reliance on the growing awareness of, and deployment of, human rights norms by international economic institutions in their policies and practices at the international level, while at the national levels, I will also show that human rights norms have been used to influence the nature and direction of the globalization process in important respects. In this connection, my argument is that theorists seem to have ignored this hugely insightful development because the form of human rights often deployed to carry out this assignment is the hegemonic version which focuses more on formal constitutional structures rather than the substantive counter-hegemonic version. It is the malleability of the human rights corpus, especially in its institutionalized form, which makes it susceptible to being used to serve either hegemonic or counter-hegemonic purposes.¹³

The contention that the relationship between globalization and human rights is not a uni-directional dynamic is buttressed by the fact that the history of human rights reveals its deep involvement with, and impact on the processes of globalization.¹⁴ As I will show in discussing the dimensions of globalization, political, social and cultural aspects of globalization embody, and are facilitated by, human rights norms. Thus the contemporary

¹³ N. Stammers, 2009, *Human Rights and Social Movements*, London: Pluto Press, pp.102-130.

¹⁴ M. R. Ishay, 2008, *The History of Human Rights from the Ancient Times to the Globalization Era*, California: University of California Press, pp.118-144; N. Stammers, 2009, note 13, pp.193-201.

export of fundamental human rights, which are included in the constitutions of newly independent states and those emerging from authoritarian regimes, is also a manifestation of processes of globalization. This is obvious from the constitutions and judicial interpretations of such provisions in Canada and several African states such as Nigeria, South Africa and the recently adopted Kenyan Constitution, 2010. Gavin Anderson put this point succinctly when he stated that ‘...the successful export of a judicially administered charter of fundamental rights is itself a high profile example of globalization’.¹⁵

An analogy for the mutual impact thesis here advanced can be found in human relations. When two persons come together either as husband and wife, partners, or friends, each will have an impact on the behaviour, worldview and activities of the other as the relationship blossoms. It cannot always be a uni-directional flow. However, whether the impact of one on the other will be positive or negative depends on a number of factors, and it is only after this mutual impact has been taken into account that we can fully and properly determine whether the impact is positive or negative. Interposing this to the relationship between the processes of globalization and human rights, my contention is that a preliminary inquiry about the mutual impact is a condition precedent for determining whether the impact of the one on the other is positive or negative. I argue that this preliminary enquiry, which is generally absent in the conventional analysis, holds the key to a proper exploration of the relationship between globalization and human rights. It is this (observed) lacuna in the existing literature that this thesis seeks to address in order to provide a more solid foundation for exploring the relationship between the two terms.

1.07.1 Methodology

This research mainly adopts the socio-legal approach in understanding the relationship between globalization and human rights. The adoption of this approach is informed by the conviction that the interdisciplinary perspective it offers will facilitate proper understanding of the political, economic, and ideological dimensions underpinning the relationship between globalization and human rights. It enables us to transcend the

¹⁵ G. W. Anderson, 2005, *Constitutional Rights after Globalization*, Oxford: Hart Publishing, p.4.

doctrinal analysis of legal texts and apply theoretical perspectives from other social sciences in order to buttress the central argument of the thesis. Specifically, I have gone beyond the examination of the law as contained in international conventions, law reports, statutes and other texts to examine the rationale for such legal rules and how the rules have been used by human rights activists and social movements to catalyze progressive developments in Africa.

I have also used relevant primary and secondary sources of law applicable to the relationship between globalization and human rights. The primary sources used include the International Bill of Rights, comprising the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, and the International Covenant on Economic, Social and Cultural Rights, 1966. In addition, regional and sub-regional treaties such as the African Charter on Human and Peoples' Rights, 1981, and the Treaty of Economic Community of West African States, 1975 have been used. I have equally made reference to relevant provisions of the Articles of Agreement of the IMF, World Bank as well as the Marakesh Treaty establishing the World Trade Organization. Other primary sources include the constitutions of states such as the 1996 Constitution of South Africa, 1999 Constitution of Nigeria, and the Kenyan Constitution, 2010.

The secondary materials used include Communications presented and determined by the African Commission on Human and Peoples' Rights, cases decided by the Constitutional Court of South Africa, the Nigerian Supreme Court and the West African Community Court of Justice. Some of these Communications and decisions have either established or elaborated fundamental principles of human rights and how these have impacted on the globalization process in the continent. The existing academic literature on the subject has also been used to provide the foundation for the arguments advanced in the thesis.

Finally, I have used three sub-Saharan African countries, namely, South Africa, Nigeria, and Kenya as case studies to show the impact of human rights norms on the globalization process. The choice of these states is based on their strategic importance in their respective regions in Africa and their central role in developments in the continent.

The insights revealed from the case studies have been used in support of the argument advanced in this thesis.

1.07.2 Structure of the Thesis

In order to develop the argument of this thesis, the work is organized in three parts. Part one containing Chapters 1 and 2, deals with the theoretical and conceptual perspectives of the relationship between globalization and human rights. Chapter 1 commences with an examination of the nature of globalization and explores the difficulties inherent in its definition. It is contended that the difficulty in defining globalization is traceable, in large part, to the multidimensional and contradictory nature of the process. Thus, while there are globalizing tendencies, very often we also find processes of localization which seem to attenuate or limit the extent of the globalization process. This gives importance to the distinction drawn between globalized localism and localized globalism by Professor Boaventura de Sousa Santos.¹⁶ On the relationship between globalization and human rights, I have classified the conventional modes of analysis of the subject into three. The first category consists of writers who see globalization as having a positive impact on human rights while the second; a diametrically opposed view is that the impact is necessarily negative. The third category, eclectic in its approach, contends that the impact of globalization is not necessarily positive or negative, but that whether it will entail any of the aforementioned consequences depends on how it is used in any particular set of circumstances. The problems inherent in this instrumental interpretation of globalization have been highlighted, alongside those of the other two categories.

This is followed by a formulation of the central argument of my thesis that the relationship between globalization and human rights is not a uni-directional dynamic, but a mutual, two-way relationship. In support of this contention, I argue that human rights norms have been used to influence the nature of globalization in particular contexts. The recent embrace of human rights by international economic institutions was used in support of this argument together with the role of human rights NGOs and social movements in actualising important changes in the international economic system.

¹⁶ B. de Sousa Santos, 2002, note 6, p.179.

Chapter 2 focuses on the place of Africa in the process of globalization. It examines the three periods of the continent's history; namely, pre-colonial, colonial and post-colonial periods. In the pre-colonial era, the relationship between Africa and the rest of the world was initially predicated on ordinary trade relations, but the sad aspect of this period was the entry into that relationship of the slave trade. This entailed massive deployment of young Africans from the continent to the 'New World' to work in the plantations. African rulers of the period acted as agents for the procurement of able-bodied Africans for sale to European traders for a pittance, a situation that I argue, parallels the activities of contemporary African leaders who dispose of the resources of their countries and stock the proceeds in foreign banks for their own personal benefits while crippling the economies of their countries.

During the colonial period and especially after its formalization at the Berlin Conference of 1884-85, African territories were partitioned among European powers namely, Belgium, France, Germany, Great Britain, and Portugal. Incidentally, no participants or delegates represented any of the territories to be partitioned. The result was that some ethnic groups were shared into two or more states, a phenomenon that largely accounts for the internecine civil wars and conflicts in several African countries today. The post-colonial period saw the expectations of Africans for improvement in their living conditions upon the attainment of political independence by their countries dashed by the predatory and selfish inclinations of African political leaders leading to the current state of underdevelopment of the continent. This underdevelopment is manifested in several dimensions, including the gross violations of human rights. This is not for lack of institutional programmes by African states.

Starting from the period of their attainment of independence, African states had formulated some economic development programmes in order to be integrated into the international economy. This has meant the adoption of the prescriptions of international economic institutions such as IMF, World Bank, and WTO. However, these institutions, which have been described as constituting an 'unholy trinity' by Richard Peet,¹⁷ played a major role in emasculating the economies of African states under the banner of structural adjustment programmes. Rather than assist in the development of the economies of these

¹⁷ R. Peet, 2009, *Unholy Trinity: The IMF, World Bank and WTO*, 2nd ed. London: Zed Books.

states, the economic policies engineered by these institutions, especially the IMF and World Bank, greatly led to gross impoverishment resulting in some African states being classified today as ‘failed states’.¹⁸ Expectedly, this has also led to extensive human rights violations. Consequently, initiatives such as New Partnership for Africa’s Development (NEPAD) and African Peer Review Mechanism (APRM) have been constituted to catalyze the economic development of Africa and promote good governance, respect for human rights, and the rule of law.

Having set the context for the study and located Africa within the globalization framework, I commence buttressing the main argument of the thesis in Part Two, which consists of chapters 3 and 4. Chapter 3 examines the connection between the African Charter on Human and Peoples’ Rights and the processes of globalization. The argument here is that the adoption of the Charter itself was influenced by international developments and pressures, and that African states have also used some of the provisions of the Charter to underscore their position in the globalization process. Using three particular human rights norms embodied in the African Charter; namely, right to self-determination, right to disposal of natural wealth and resources and the right to development, I argue that these rights have had a significant impact on the globalization process in Africa, in the same way that the nature and texture of the rights have been impacted upon by the processes of globalization. The implication of this is that the impact of globalization on human rights at the national levels has also been influenced by local practices and attitudes about human rights which give shape and context to globalization. The attendant contestation has been manifested in a number of response measures by African states. I try to show, for example, that although African states fought for, and secured the adoption of, some Resolutions of the United Nations General Assembly on the economic sovereignty of states in the 1970s, they have, ironically, and perhaps in deference to the challenges and demands of globalization, entered into several bilateral agreements with Western countries that impede their exercise of those sovereign rights.

¹⁸ See the 2011 Failed States Index, which indicates that twenty-seven African states are among the first fifty failed states in the world. Available at: www.fundforpeace.org/global/?q=fsi-grid2011 last accessed 13 December 2011.

Chapter 4 advances the argument about the mutual impact of globalization and human rights by looking at the role of human rights in the policies and programmes of the three key international economic institutions, the World Bank, IMF and WTO. The argument presented is that while initially these institutions distanced themselves from human rights by insisting on a technocratic interpretation of their mandates, over the years they have now begun to integrate human rights norms in their policies, programmes and operational procedures. In support of this argument, reference has been made to the operational guidelines of the World Bank in respect of development projects involving indigenous peoples, and the displacement of such persons in the course of Bank-funded projects. For the IMF, its recent adoption of the Poverty Reduction Strategy Papers (PRSPs) is highlighted as indicative of a willingness and commitment to the integration of human rights principles in its operations. The World Trade Organization has also begun to shed its lack of interest for human rights, and now accepts the involvement of non-governmental organizations in its operations. I argue however, that these modest attempts at invoking human rights norms in their operations have not had much impact because of the nature of human rights adopted by the institutions. The contention is that they have merely adopted the hegemonic version of human rights rather than a counter-hegemonic version, the former being more concerned with reliance on formal constitutional structures and processes.

In the third and final part of the thesis containing chapters 5, 6 and 7 I take a step further by looking at the nature of the relationship between globalization and human rights in respect of three key African states; namely, South Africa, Nigeria, and Kenya (in that order). Chapter 5 examines, with a focus on South Africa, the global pressures that led to the adoption of the South African Constitution and the role of globalization in the kind of rights eventually inserted in that constitution. I also examine the adoption of the broad-based Black Economic Empowerment programme by the South African government to redress the injustices perpetrated against the black majority under apartheid. The constraints that bedevil this neo-liberal scheme are also examined. The adoption of bilateral investment treaties with several states is also discussed within the framework of the present analysis as a measure that has highlighted the mutual impact of globalization and human rights.

Chapter 6 on the Nigerian perspective examines the resistance to the deleterious effects of globalization on human rights by NGOs and other social movements in the country. The protests by the Nigerian Labour Congress against the government's increases in the price of petroleum products as dictated by the IMF and World Bank is examined alongside those of women from the oil producing Niger Delta region of the country against the marginalization of human rights by the transnational corporations in their area. I categorize these protests as emanations of 'globalization from below' challenging 'globalization from above'. The oppressed women of the Niger Delta were able to rise up to challenge the continued denial of their social and economic rights by the transnational corporations operating in their areas. Chapter 7 examines the Kenyan perspective especially the response to the December 2007 post-election crisis which eventually led to the adoption of the 2010 Constitution. I situate the adoption of the constitution within the context of the impact of globalization, as some of its provisions, especially those on the enforceability of social and economic rights draw significantly on the South African Constitution. The struggle of the Endorois people in Kenya for the recognition of their rights, which eventually materialized through a recent decision of the African Commission on Human and Peoples' Rights, is also considered as indicative of the triumph of human rights over (oppressive) hegemonic forces. In the same vein, the deployment of human rights norms by a coalition of national and international civil society organizations facilitated the recognition of workers' rights and their human rights by a transnational corporation, Del Monte in Kenya.

Finally, I conclude the thesis by underscoring the need for a new approach to understanding the relationship between globalization and human rights. The conventional narration of this relationship shields us from critically examining the possible impact of human rights norms on the globalization process, and it is only when we begin to look at the relationship as one of mutual impact that human rights norms can become a more effective tool for an emancipatory project so badly needed in Africa.

Chapter 1

Globalization and Human Rights: Theoretical Perspectives and Prospects

1.1 Introduction

This chapter examines the theoretical underpinnings of the nature, forms and dimensions of globalization and human rights, and the relationship between them. While as separate subjects, globalization and human rights have attracted considerable academic and other general analysis, the mutuality of the relationship between them, and how the same can be deployed to enhance human progress, has largely remained unclarified.¹ This is more worrisome in Africa where proper analysis of this relationship can be of great relevance to current efforts to promote economic development of the continent, since no development can be meaningful without adequate consideration of its human rights components.² This lack of sufficient elaboration has accentuated the misunderstanding that exists regarding the proper relationship between globalization and human rights.

Since the central focus of this thesis is upon the impact of the interaction between globalization and human rights in Africa, this chapter essentially sets the stage for further exploration of the dynamics involved in that relationship. It does so by looking at the nature of globalization, human rights and the key issues that explicate their understanding. This entails discussion of the forms of globalization, and the arguments that have trailed

¹ This is perhaps not totally surprising since according to Adamantia Pollis ‘...only recently has scholarly analyses concerned itself with the relationship between globalization and rights’, A. Pollis, ‘Human Rights and Globalization’, 2004, 3 *Journal of Human Rights*, pp.343-358 at 344; J.L. Dunoff, 1999, ‘Does Globalization Advance Human Rights? 25 *Brooklyn Journal of International Law*, 125-139 at 125 also makes the same point.

² The relationship between development and human rights has been sufficiently articulated in international instruments wherein development is seen as an integral part of fundamental human rights. Thus Article 1 of the UN Declaration on the Right to Development states that: ‘The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’. The Copenhagen Declaration on Social Development, 1995 is also to the same effect.

the evolution, relevance and application of human rights, particularly within the African context. The foundational analysis also prefaces some of the key arguments that will be canvassed in this work by highlighting the problematic issues involved in the discourse. It is driven by the belief that an understanding of these preliminary issues is crucial to appreciation of the contours of the relationship between globalization and human rights. Drawing from three interrelated developments that underpin the relationship, I conclude the chapter by underscoring the central argument that in Africa, not only is globalization affecting human rights, but the theory and practice of human rights are also having some impact on the globalization process.

1.2 Nature of Globalization

Globalization is one of the most pervasive, but deeply contested processes and developments in contemporary society. This is evident in the avalanche of writings and essays focusing on particular aspects of the process.³ Writers have thus disagreed not only on its actual definition, but also its nature, historical origins, relevance and impact in society. Indeed, David Held and Anthony McGrew have described debates about it as ‘one of the most fundamental debates of our time.’⁴ Although in a sense, globalization can be said to be a new term for an age-old process of social and economic transformation, the extensive scope of its operation has led to its present dominant position in contemporary discourse. It is this pervasiveness of globalization that has led one writer to argue, perhaps unreflectively, that it is a new human right.⁵ This explains why so many socio-economic and even political developments are attributed either directly or indirectly to globalization. Not only has this broadened the scope of its

³ According to Alex MacGillivray, as at December 2004 there were over 5,000 titles in print on globalization, and he asserts that writings on globalization have become ‘a crowded field’. A. MacGillivray, 2006, *A Brief History of Globalization: The Untold Story of our Shrinking Planet*, London: Constable and Robinson, p.1. The number has, of course, increased in the last seven years with the growing awareness of the salience of the process.

⁴ D. Held and A. McGrew, 2002, *Globalization and Anti-Globalization*, Cambridge: Polity Press, p.ix. Gavin Anderson on his part identifies the present period as ‘a time of globalization’, G. Anderson, 2005, *Constitutional Rights after Globalization*, Oxford and Portland, Oregon: Hart Publishing, p.1.

⁵ M.D. Pendleton, 1999, ‘A New Human Right – The Right to Globalization’, 22 *Fordham International Law Journal*, pp.2052-2095.

coverage, it has done so in a manner that makes concise analysis of the term increasingly difficult as the following definitional problems show.

1.2.1 Definitional Problems

As with many important social and economic phenomena, the definition of globalization has been inherently problematic. This is partly because as a multi-faceted process, perhaps in the mould of the proverbial elephant touched by seven blind men, it is perceived by writers from different perspectives. While some have emphasized the economic aspect of the process, others focus on its political, cultural or even technological dimensions.⁶

Allied to this multi-dimensional nature is the problem of how to construct a definition that will be acceptable to the various disciplines implicated in the globalization process. How can one effectively define a process that has become an important expository principle for fields as diverse as sociology, economics, politics, science, technology, law, among others? Nevertheless, it is possible to discern a common thread running through the various interpretations of the process and these commonalities should be constitutive elements of any meaningful definition.

Emphasizing the time-space compression and the stretching of social relations in the modern era, Anthony Giddens defines globalization as ‘the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa’.⁷ He recognizes the fact that this entails a dialectical process since such local happenings may move in an opposite direction from those that shape them. However, in addition to its brevity, this definition does not help us to distinguish between globalization and such other concepts as internationalization, liberalization, universalization, and Westernization. Taking cognizance of this inadequacy, Jan Scholte⁸ contends that an important new insight is

⁶ Some writers have seen the economic dimension as the driving force and most fundamental aspect of the process. However, such positions very often exaggerate the importance of this aspect of globalization since technological or even cultural aspects could, in some circumstances, be more influential.

⁷ A. Giddens, 1990, *The Consequences of Modernity*, Cambridge: Polity Press, p.64.

⁸ J.A. Scholte, 2003, ‘What is Global about Globalization’, D. Held and A. McGrew, eds., *The Global Transformations Reader: An Introduction to the Globalization Debate*, 2nd ed. Cambridge: Polity Press, pp. 84-97 at 84.

provided when globalization is identified as deterritorialization or as the growth of supra-territorial relations between people. According to him, a fundamental quality of supraterritoriality is that it describes circumstances where territorial space is transcended in contrast to the other four terms that are to some extent explainable by reference to territorial relations.

While admitting that ‘globalization is very hard to define,’⁹ Boaventura de Sousa Santos prefers a definition that is more sensitive to the social, political, and cultural dimensions of contemporary society. For him, globalization is ‘the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local’¹⁰ He draws attention to two significant aspects of this definition:

i) That in the conditions of the Western capitalist world system there is no genuine globalization because what we call ‘globalization’ is always the successful globalization of a given localism. His explanation for this is that there is no global condition for which we cannot find a local root, a specific source of cultural embeddedness.

ii) Globalization entails localization, and we live in a world of localization as much as we live in a world of globalization. He illustrates this with the globalization of English Language as the *lingua franca* which has entailed the localization of other potentially global languages, such as French.¹¹ Similarly, the globalization of the Hollywood star system has entailed the ethnicization of the Hindu star system or other actors. He therefore submits that the full meaning and explanation of any given process of globalization can only be identified if we equally consider the adjacent processes of re-localization occurring in tandem and intertwined with it. From this analysis, he makes the controversial formulation that there is strictly no single entity called globalization, but rather ‘globalizations’ and, suggests that we should always use the term in this plural sense.¹² He argues that what we call globalization consists of sets of social relations which inevitably change, and, since ‘globalizations’ are bundles of social relations; these

⁹ B. de Sousa Santos, 2002, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, 2nd ed. London: Butterworths, LexisNexis, p.178.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

are bound to involve conflicts resulting in the emergence of winners and losers.¹³ It may be said that Santos's description of globalization in these terms underlines his interpretation of its impact on human rights, as will be shown later.

His general definition and description of the globalization process has close similarities with that proffered by Roland Robertson who states that 'we may best consider contemporary globalization in its most general sense as a form of institutionalization of the two-fold process involving the universalization of particularism and the particularization of universalism.'¹⁴

There is some force in the last two definitions particularly when globalization is viewed from an ideological perspective. This is because the actual nature and social impact of globalization has been shielded by venerated attempts to cast it in an entirely economic, non-political and non-ideological garb. It is projected as the best economic and social value for humankind that must be embraced by all states and individuals. Yet, a close analysis of the main pillars of globalization and how these have been used in contemporary society shows that it is a process strewn with, and deeply enmeshed in, ideological contexts with far-reaching implications for its relationship with human rights.

Nevertheless, there are formidable difficulties in defining globalization with the use of such social and economic correlates. As they stand, the definitions do not immediately draw attention to the constituent elements of the process and how they have come either to be universalized or particularized, as the case may be. Moreover, they are not sufficiently comprehensive and represent particular interpretations of the globalization process thus further limiting our understanding of the process.

It is perhaps in recognition of these difficulties that Robert Holton has argued that a useful definition of globalization must emphasize three key aspects, namely; a) the intensified movement of goods, money, technology, information, people, ideas and cultural practices across political and cultural boundaries; b) the inter-dependence of social processes across the globe, such that all social activities are profoundly interconnected rather than separated off into different national and cultural spaces; c) consciousness of and identification with the world as a single place, as informs

¹³ Ibid.

¹⁴ R. Robertson, 1992, *Globalization: Social Theory and Global Culture*, London: Sage, p.102.

cosmopolitanism, religion or earth-focused environmentalism.¹⁵

This comprehensive approach to the definition of globalization is also adopted by David Held, et al who defines it as:¹⁶

A process (or a set of processes) which embodies a transformation in the spatial organization of social relations and transactions - assessed in terms of their extensity, intensity, velocity and impact - generating transcontinental or interregional flows and networks of activity, interaction, and the exercise of power.

According to them, this inclusion of the four spatio-temporal dimensions of globalization namely; the extensity of global networks, the intensity of global interconnectedness, the velocity of global flows, and the impact propensity of global interconnectedness helps to differentiate globalization from more spatially delimited processes such as localization, nationalization, regionalization and internationalization. It also provides a framework and basis for a quantitative and qualitative assessment of historical patterns of globalization.¹⁷ More importantly, such a comprehensive approach draws attention to the multi-dimensional nature of globalization and the interactions between the various dimensions of the process. Equally signal, is the fact that the various interpretations of globalization emphasize its deeply contested nature. It is therefore not surprising that John Wiseman has described it in the following words:¹⁸

Globalisation is the most slippery, dangerous and important buzzword of the late twentieth century. It is slippery because it can have many meanings and be used in many ways. It is dangerous because too often it is used as a powerful and simplistic justification for the endless expansion of unregulated capitalist relations into every part of life in every corner of the globe. It is important because debates about globalisation can illuminate a world in which time and space have been so dramatically compressed that distant actions in one corner of the globe have rapid and significant repercussions on people and places far away.

¹⁵ R. Holton, 2005, *Making Globalization*, New York: Palgrave Macmillan, p.15.

¹⁶ D. Held, et al, 2003, 'Rethinking Globalization', D. Held and A. McGrew, (eds.) *The Global Transformations Reader: An Introduction to the Globalization Debate*, 2nd ed. Cambridge: Polity Press, p.68 hereafter 'Transformations Reader'. The same definition is given in D. Held, et al, 1999, *Global Transformations: Politics, Economics and Culture*, Cambridge: Polity Press, pp.16-17 hereafter 'Global Transformations'.

¹⁷ D. Held, et al, 2003, 'Transformations Reader', note 16, p.69.

¹⁸ J.R. Wiseman, 1998, *Global Nation? Australia and the Politics of Globalisation*, Cambridge: Cambridge University Press, p.1.

Nevertheless, taken together, the afore-mentioned definitions highlight various dimensions of contemporary globalization which are considered next.

1.2.2 Dimensions of Globalization

While there is wide-ranging debate about the definition of globalization, there does seem to be some modicum of consensus that it is a multifaceted phenomenon with several, including economic, political, social and technological, dimensions. The contestation inherent in debates about globalization is equally evident in discussions of the various dimensions of the phenomenon, a situation that presents peculiar challenges for the development of a generally acceptable conception of the process. This will be buttressed by a brief examination of some of the dimensions of globalization.

1.2.2.1 Economic Globalization

This is one of the key dimensions of globalization. It refers to the worldwide spread of industrial production and new technologies promoted by unrestricted mobility of capital and unfettered freedom of trade as well as the various interactions that take place between states *inter se* and between them and other non-state actors engaged in international economic transactions. Specifically, it has been said to refer to the ‘long-distance flows of goods, services, and capital, as well as the information and perceptions that accompany market exchange and the organization of the processes linked to these flows’.¹⁹

Although there has been noticeable increase in the volume of international trade over the years, it is instructive to bear in mind the cautionary words of Paul Hirst et al before categorizing such developments as economic globalization. According to them, ‘the increasing salience of foreign trade and considerable and growing international flows of capital are not *per se* evidence of a new and distinct phenomenon called globalization’.²⁰ This is because similar changes had been features of the international economy before 1914. Thus, as pervasive as the economic globalization buzzword is, it has received critical assessment by writers. In particular, from the African perspective, its fundamental principles have generated intense debate because of the nature of the global division of

¹⁹R.O. Keohame and J. S. Nye, Jr. 2003, ‘Globalization: What’s New? What’s Not? (And So What?)’, D. Held and A. McGrew, (eds.) ‘*Transformations Reader*’, note 16, pp.75-83 at 76.

²⁰ P. Hirst, et al, 2009, *Globalization in Question*, 3rd ed., Cambridge: Polity Press, p.19.

labour and the unequal exchanges it promotes.²¹ Two main developments account for this state of affairs. First, under the current neo-liberal economic system, and following Immanuel Wallerstein's world system theory,²² the core, and to some extent, the semi-peripheral states produce manufactured goods while the peripheral states produce raw materials, agricultural products, minerals, and oils. Within this framework, the pricing system ensures that manufactured goods cost more than products from the peripheral states resulting in perpetual terms of trade deficits for these states and their consequent underdevelopment.²³

Second, the current international economic system accords a prominent role to the market and its capacity to efficiently allocate resources in a rational manner. This neo-liberal philosophy privileges investors and compels states to take legal and institutional measures to promote and protect private property rights. As Stephen Gill points out, in order to attract foreign investment, often given as the panacea for economic development, states, particularly those in the developing world, are constrained to adopt policies that encourage investors even when such measures run contrary to their social welfare imperatives.²⁴ Allied to this, is the adoption of the 'Washington Consensus'²⁵ prescriptions of a liberal economy with its emphasis on limited government, privatization, import liberalization, market-driven economic policies, removal of subsidies etc. The end result of such measures is a minimalist state less involved in the provision of basic welfare services for its citizens with far-reaching implications on the capacity of the state to protect human rights particularly in dependent African economies.

²¹ G.K. Kieh, Jr., 2008, 'The New Globalization: Scope, Nature and Dimensions', G.K. Kieh, Jr., ed. *Africa and the New Globalization*, Surrey: Ashgate Publishing Limited, pp.17-19.

²² I. Wallerstein, 2000, *The Essential Wallerstein*, New York: The New Press, pp.89-90; T.R. Shannon, 1996, *An Introduction to the World-System Perspective*, Colorado: Westview Press, pp.85-125 provides a lucid description of the role of these three components in the inter-state system.

²³ G.K. Kieh, Jr. 2008, note 21, p.18.

²⁴ S. Gill, 2000, 'The Constitution of Global Capitalism', Paper presented to a Panel: The Capitalist World, Past and Present at the International Studies Association Annual Convention, Los Angeles, 2000 available www.theglobalsite.ac.uk/press/010gipdffll, accessed October, 18, 2008.

²⁵ This is partly a reference to the location of the headquarters of these institutions in Washington D.C. Even more importantly, it is also used with reference to the fact that these institutions venerate market-based economic policies and prescriptions reflecting largely the economic and political scripts of Western countries led by the United States of America. Except otherwise stated, reference to the term in this work implies this latter interpretation.

1.2.2.2 Technological Dimension

Advancement in technology has also been an important dimension of contemporary globalization. To a large extent, it determines the nature and scope of some of the other dimensions of globalization. Modern technology has resulted in unprecedented communication worldwide, in the same way that its use in markets enables people from different countries to strike financial deals within minutes, often without seeing each other. Moreover, the use of modern technology has facilitated social interaction through the mass media via television, radio, newspapers and now, the Internet. Indeed, as will be shown later, the Internet is one of the products of technology which has become an invaluable instrument for mobilizing and building network of opposition against globalization.²⁶

While some of these technological innovations have led to improvements in social and economic life worldwide, they have also generated tremendous challenges, particularly on how the fall-outs of technological advancement can be husbanded in the overall interest of humankind. In this connection, reference may be made to the environmental problems associated with contemporary globalization. In particular, the issue of global warming is one that has attracted considerable international concern in recent times. It has been shown that a necessary connection exists between the unusual increases in the temperatures of various bodies of water such as oceans, seas, rivers and lakes arising from industrial and economic activities, and the various disasters such as typhoons, tsunami, wild fires, and flooding being witnessed by several states in recent times.²⁷ Equally disturbing is the increase in air, land and water pollution which often come through the use of pesticides, inappropriate disposal of toxic wastes and oil drilling activities. Sadly, extant international regulatory mechanisms have not kept pace with these developments, and even the adoption of the Kyoto Protocol²⁸ has not led to any noticeable reduction of greenhouse gases, with the United States' refusal to sign the Protocol posing a major challenge to its international enforcement.

²⁶ A. Pollis, 2004, note 1, p.352.

²⁷ J. Larson, 2004, 'Toward Global Meltdown?' *The Globalist*, February 16, pp.1-5; The imperative of international regulation of these environmental problems is examined in B.R. Doos, 1991, 'Environmental Issues Requiring International Action', W. Lang,(ed.) *Environmental Protection and International Law*, London: Graham and Trotman/Martinus Nijhoff, pp.1-58.

²⁸ United Nations Convention on Climate Change which came into force in 2005.

1.2.2.3 Social Globalization

This aspect of globalization consists of a broad range of issues such as health, education, basic amenities such as water and other services. In relation to health, it can be said that globalization has led to the spread of diseases such as HIV/AIDS, SARS, the avian bird flu and, very recently, the swine flu. The spread of these diseases often takes place through movement of people from one place to another which has been greatly facilitated by the increase in communication and the dramatic shrinking of the world by technology.²⁹ In addition, the adoption of the neo-liberal conception of economic relations has meant reduction of public expenditure on health facilities thus incapacitating states in dealing with the problems associated with these diseases.³⁰ Similarly, the implementation of the neo-liberal ideology within the educational sector has led to the increased commodification of education, and, in some countries, the corporate take-over of the sector. Indeed, the increasing emphasis on efficiency by educational institutions has resulted in a situation where education, which is an essentially non-market and social welfare issue, is converted into an area of commercial activity.³¹ The impact of these measures is even more debilitating in Africa where the state ought to play a major role in social and economic development initiatives considering the continent's level of underdevelopment.

The new revolution in communications have also enabled information to be transmitted to the most remote parts of the world instantaneously as the events are taking place. Conversely, information from such remote parts of the globe is readily transmitted to other parts at the same speed, with the result that developments in one region of the world often have profound consequences for individuals, communities and states in other regions. However, due to the structural imbalance and unequal access to these facilities among the core, semi-peripheral and peripheral states, the social and cultural impacts of

²⁹D. Fidler, 1996, 'Globalization, International Law, and Emerging Infectious Diseases' 2 *Emerging Infectious Diseases*, pp.77-84 at 78.

³⁰ Ibid.

³¹G.K. Kieh,Jr. 2008, note 21, p.24.

such communications and developments have been enormous, leading to growing concerns about cultural imperialism.³²

Equally noteworthy is the consumerist economy manifested in McDonaldization or Americanization synonymous with the globalization process. This partly accounts for the increased level of resistance against the process in recent years as aptly captured in Benjamin Barber's analogy of a 'Jihad versus McWorld'.³³

1.2.2.4 Political Globalization

One of the most important areas where the impact of globalization has been manifested in the political arena is in relation to the concept of sovereignty. To be sure, the concept as envisioned under the Westphalian system and elaborated by theorists has been dramatically transformed.³⁴ While the non-interference principle was regarded as sacrosanct and given ample recognition as one of the fundamental tenets of the United Nations Charter, as well as those of other regional and sub-regional organizations, states are today either voluntarily and expressly or tacitly and implicitly losing substantial aspects of their sovereignty to inter-governmental organizations and even transnational corporations in deference to the emergence of a 'borderless world'.³⁵ It has therefore been said that globalization has introduced the notion and practice of 'multiple sovereignties'.³⁶ Accordingly, it can be said that while the concept of sovereignty has by no means been rendered redundant, state sovereignty today jostles for recognition alongside novel forms of political power and sites of authority.³⁷

Within the ambit of political globalization, it is fitting to recognize the growing influence and importance of the United Nations Organization in the international scene. Notwithstanding its inadequacies, the organization has become an important instrument

³² J. Tomlinson, 1991, *Cultural Imperialism*, London: Pinters Publishers, p.36; J. Oloka-Onyango, 2005, 'Who is Watching Big Brother? Globalization and the Protection of cultural rights in present-day Africa', *5 African Human Rights Law Journal*, pp.1-26 at 3.

³³ B. Barber, 2004, 'Jihad vs. McWorld', F.J Lechner and J. Boli (eds.) *The Globalization Reader*, 2nd ed. Oxford: Blackwell Publishing Ltd, pp.29-35.

³⁴ E.N. V. Kleffens, 1953, 'Sovereignty in International Law' 82 *Hague Recueil Des Cours*, pp.5-130 at 117-126.

³⁵ K. Ohmae, 1990, *The Borderless World*, London and New York: Collins.

³⁶ G.K. Kieh, Jr. 2008, note 21, p.22.

³⁷ D. Held, et al, 1999, note 16, p.86.

for securing international peace and security.³⁸ It plays an important role in peace-keeping during civil conflicts, and peace-building in post-conflict states. Other regional and sub-regional organizations have also taken a cue from the visibility of the United Nations in this regard. Thus the African Union (AU) is at present playing a crucial role in peace keeping in several African countries, notably, Sudan, Somalia, and Democratic Republic of Congo. Similarly, the Economic Community of West African States (ECOWAS) intervened in the Liberian crisis in 1991 without the consent of the then Liberian government under Samuel Doe, and is still playing an active role in the current political crisis in Niger and Guinea Bissau.

One disturbing aspect of contemporary political globalization, however, is the emergence, since the collapse of the Soviet Union, of the United States as the singular super-power in the international system and its predilections to dictate what happens worldwide, while other states either have to toe its line or be coerced into accepting their position. The enormous problems that such a posture creates for the international system are highlighted by the dilemma confronting America and its allies regarding their continued presence in Afghanistan and Iraq due to the growing opposition to these measures in their states.³⁹

1.2.2.5 Legal Dimension

Closely related to, but no less significant than political globalization, is the legal aspect of the phenomenon. Legal globalization which has taken various forms can be traced to the spread of Roman law in medieval times. The *lex mercatoria* that attended increased commercial activities in the ancient world can be said to be the progenitor of contemporary globalization of the legal field.⁴⁰ Legal globalization according to

³⁸ This is the primary function of the organization as specified in Article 1 of the United Nations Charter. For an assessment of its performance of this duty, see, P. Sands and P. Klein, (eds.) 2001, *Bowett's Law of International Institutions*, London: pp.53-55.

³⁹ The dilemma involved in this situation is aptly captured in S. Veitch, 2007, 'Not in Our Name? On Responsibility and its Disavowal' 16 *Social and Legal Studies*, pp.281-300 at 281-282; while the extent of the attendant harm caused to the innocent ones in this campaign is examined in T. Pogge, 2008, 'Making War on Terrorists: Reflections on Harming the Innocent', 16 *The Journal of Political Philosophy*, pp.1-25 at 22-23.

⁴⁰ In the words of Santos, it 'is probably the oldest form of globalization of the legal field', B. de Sousa Santos, 2002, note 9, p. 209.

Professor de Sousa Santos refers to a situation where ‘... the change in the state law of a given country have been decisively influenced by formal or informal international pressures by other states, international agencies or other transnational actors’⁴¹ As indicated, such processes are not new and in relation to the regulation of the economy and commercial life, reference may be made to the various projects for the unification and restatement of law on these subjects such as the International Institute for the Unification of Private Law (UNIDROIT) and Convention on the International Sale of Goods (CISC,1980)

However, the use of legal rules under the contemporary phase of globalization has been unique in the sense that even international financial institutions have appropriated the concept and become ardent missionary agents by stressing the immense benefits of good governance and rule of law particularly in Third World and other transitional economies. The rule of law with its imperial dimension of low-intensity democracy is now being promoted as the panacea to the social, economic and political problems bedevelling these states.⁴² Since the circumstances that gave rise to this advocacy and the prospects of such projects within the human rights framework will be discussed later, it suffices here to mention that in actualization of the ‘Washington Consensus’ prescriptions, legal rules have been used to structure, formalize, and legitimize the main features of the current global financial and trade regime driven by the IMF, World Bank and WTO. The quest for the globalization of human rights also raises a number of problematic questions as would be shown later. What is clear, however, is that the hegemonic forces recognize the emancipatory capacities of law and human rights and seek to appropriate their language to achieve their purposes. Consequently, one of the challenges confronting human rights theorists and activists is how to disentangle them from this appropriation and recuperate their emancipatory potentials in the overall interest of humankind.

⁴¹ Ibid., p. 194.

⁴² T. Carothers, 1998, ‘The Rule of Law Revival’, 77 *Foreign Affairs*, March/April, pp.95-106 at 95 where he cautions that ‘...this sudden elevation of rule of law as panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary’. An even more scathing analysis of the global rule of law rhetoric is contained in U. Mattei and L. Nader, 2008, *Plunder: When the Rule of Law is Illegal*, Oxford and New York: Blackwell Publishing Ltd, pp.196-202.

1.2.2.6 Historical Dimension of Globalization

In respect of the historical dimension of globalization, the crucial issue has been how to locate the phenomenon in historical context. In other words, the question may be asked, is globalization new? Or is it a new form of an old phenomenon? If the answer is the latter, what point in history can it be traced to?

Even as we attempt to examine the various positions on this historical dimension of globalization, it is necessary to bear in mind the cautionary words of Stephen Mennell that ‘any attempt to pinpoint the exact beginning of a major social transformation such as globalization is likely to prove misleading.’⁴³ He argues that in a sense, this is because ‘some of the processes which in this century have made the human world one have been at work in human societies as long as the species *homo sapiens* has existed.’⁴⁴

This caution appears to have been validated by the disagreement concerning the exact historical dimension of globalization. While some writers have contended that globalization is a unique process unprecedented in human history, others have sought to locate the phenomenon in particular periods of human history. Anthony Giddens argues that ‘the first phase of globalization was plainly governed primarily by the expansion of the West,’⁴⁵ whereas Wallerstein’s focus on expansive cross-border processes of agrarian and mercantile capitalism traces it to the 15th century. On their part, Held and McGrew contend that globalization can be traced back to the 19th and 20th century when writers such as Saint-Simon and Karl Marx recognized how modernity was integrating the world, but that the term ‘globalization’ began to be used only in the 1960s and early 1970s.⁴⁶

However, the contention that globalization is a new development is stoutly resisted by David Bederman who argues that although some of the manifestations of globalization may be novel, that does not make contemporary globalization legally unprecedented.⁴⁷ He contends that history has seen at least three extraordinary epochs of globalization before this contemporary period. The first of these phases was in classical antiquity which ended around 500CE, while the second great era of globalization began around

⁴³ S. Mennell, 1994, ‘The Globalization of Human Society as a Very Long-term Social Process: Elias Theory’, M. Featherstone, (ed.) *Global Culture: Nationalism, Globalization and Modernity*, London: Sage Publications, pp.359-371 at 359.

⁴⁴ Ibid.

⁴⁵ A. Giddens, 1990, *The Consequences of Modernity*, Cambridge: Polity Press.

⁴⁶ D. Held and A. McGrew, 2002, note 4, p.1.

⁴⁷ D. Bederman, 2008, *Globalization and International Law*, New York: Palgrave Macmillan, p.x.

1450CE and is the period generally referred to as the ‘age of exploration’. The third phase of globalization which he describes as ‘the true age of empire’ subsisted between 1850 and the outbreak of the First World War in 1914 and it featured striking economic and financial interdependence around the world.⁴⁸

Equally signal is the fact that Bederman identifies several phases or episodes of ‘de-globalization’ in human history, a point that will have resonance in our subsequent consideration of the human agency involved in the globalization process. These were in the second century BCE, the later Middle Ages, the Long Depression of 1873-1896 and the Great Depression of the 1930s.⁴⁹

It must be mentioned, however, that while this periodization of the historical trajectory of globalization may be appropriate for analytical purposes, due recognition must be given to the permeation of each period by the preceding phase, since, in reality, social and economic relations can hardly be compartmentalized in pigeon-holes. Nevertheless, it is recognition of the relevance of the historical context of the globalization process that has compelled David Held et al to have a re-think and now place emphasis on a spatio-temporal approach to globalization as a way of identifying the unique and peculiar features of each phase of the process.⁵⁰

1.2.3 The Myth or Reality of Globalization

Closely related to the historical analysis of globalization is the question whether globalization is actually a myth or a real phenomenon in contemporary society. Two groups of writers have emerged espousing these positions. While the globalists hold that it is a real phenomenon, the sceptics seem to rely partly on the historical trajectory of societal development to argue that there is nothing spectacular about contemporary developments to justify the emphasis placed on it and its categorization as ‘globalization.’

For the sceptics, according to Held and McGrew, a more valid conceptualization of current trends is captured by the terms internationalization, and regionalization. Their

⁴⁸ Ibid., p.8.

⁴⁹ Ibid., p.44.

⁵⁰ D. Held, et al, 2003, note 16, *ibid.*

argument is that from the historical perspective, current global changes, though significant and distinctive, are not necessarily unprecedented and only evidence heightened levels of internationalization compared to previous periods. Drawing from ‘an ideal-typical conception of a globalized economic system,’ Paul Hirst et al, for instance, argue that the extent of social and economic changes in contemporary society has been exaggerated.⁵¹ Other sceptics identify globalization as nothing more than an ideological construction, indeed, a myth, which is used to justify and legitimize the neo-liberal global project designed to consolidate Anglo-American capitalism within the world’s major regions.⁵² This argument is buttressed by the fact that the globalization buzzword became widespread when the economic philosophy of deregulation, privatization, structural adjustment, and limited government became the sing-song of global financial institutions such as International Monetary Fund⁵³ and the International Bank for Reconstruction and Development.⁵⁴ In tandem with this line of critique is the Marxist position which sees globalization as essentially the promotion of Western capitalism *writ large*. It is contended that even the multilateral economic institutions are nothing but new forms of imperialism at the services of Western capitalist states.⁵⁵

While the globalists do not deny that globalization may well serve the interest of powerful Western states, they disagree that it is an ideological construction or a symbol of Western imperialism. Although they recognize the important role of economic forces in constituting globalization, their contention is that globalization is itself a reflection of real structural changes in the scale of modern social organization, and in doing so they give equal status to other dimensions of social change, through a multi-dimensional conception of globalization. The globalists argue that to reduce globalization to its purely economic or technological dimensions is inappropriate since the forces that shape modern societies are more complex and cut across several fields. They posit that globalization is driven by a confluence of forces and embodies dynamic tensions. These tensions are

⁵¹ P. Hirst, et al, 2009, note 20, p.18.

⁵² J. Petras and H.Veltmeyer, 2001, *Globalization Unmasked: Imperialism in the 21st Century*, Nova Scotia and London: Fernwood Publishing and Zed Books, p.11.

⁵³ Hereinafter referred to as ‘the IMF’.

⁵⁴ Hereinafter referred to as ‘the World Bank’.

⁵⁵ H. Veltmeyer, 2004, ‘The Antinomies of Anti-globalization’, H. Veltmeyer, ed. *Globalization and Anti-globalization*, Aldershot: Ashgate Publishing Limited, p.179.

manifest embodiments of globalization which pull and push societies in different directions, thus engendering contradictory developments such as: co-operation and conflict, integration and fragmentation, inclusion and exclusion, convergence and divergence, order and disorder.⁵⁶

The globalists stress the significant re-configuration of the organizing principles of social life and world order as a result of globalization evident in the transformation of dominant patterns of socio-economic organization, the territorial principle and the question of power. Also within the globalist strand are the transformationalists who highlight the tremendous impact of globalization on state sovereignty. Their contention is that the enormous powers of the state as envisaged under the Westphalian model have been greatly eroded and most of these powers are now exercised by international institutions and transnational corporations.⁵⁷ This transformation has fundamental implications for human rights, since the current paradigm assigns primary responsibility for the protection of these rights to the state. Where the capacity of a state to perform the basic functions of statehood is greatly diminished - as is sadly the case with most African states - pithily described as 'half-impotent sovereigns'⁵⁸ - it means that their capacity to protect human rights is equally put to question.

However, one central thread which seems to run through the globalist literature is their acceptance of the process as one that is a necessary outcome of changes in the social and economic structure of society. Accordingly, all we can do is adapt our institutions and processes to meet the challenges posed by this development which is already transforming the nature, structure and context of state institutions.

It is my contention however, that this adoption of the inevitability of globalization and its irreversibility has impeded radical transformative changes in contemporary economic and social relations as it privileges the adaptive imperatives. The approach is not only

⁵⁶ D. Held and A. McGrew, 2003, 'The Great Globalization Debate: An Introduction', D. Held and A. McGrew (eds.) 2003, *The Global Transformations Reader: An Introduction to the Globalization Debate*, 2nd ed. Cambridge: Polity Press, pp.1-50 at 7.

⁵⁷ S. Strange, 2004, 'The Declining Authority of States', F.J. Lechner, and J Boli (eds.) *The Globalization Reader*, 2nd ed. Oxford: Blackwell Publishing Ltd, pp.219-224 at 220.

⁵⁸ This description by Professor Vernon in 1967 is as true today for most African states as it was when the statement was made. R. Vernon, 1967, 'Long-Run Trends in Concession Contracts', *Proceedings of the American Society of International Law*, pp.81-89 at 84.

unprogressive, but hugely *ahistorical* as shown by the different phases of globalization and de-globalization mentioned earlier which evidence the role of human agency in the processes.

1.2.4 Forms of Globalization

There are two basic forms of globalization; usually presented as dialectical opposites. These are hegemonic or neo-liberal globalization and counter-hegemonic globalization.⁵⁹ The same binary classification has also been designated as ‘globalization from above’ and ‘globalization from below’.⁶⁰

As is apparent, this classification underscores an ideological orientation, and like most issues relating to globalization, is not necessarily adopted by other writers on the subject. Indeed, while acknowledging the multifaceted nature of the process and its contradictory impact in society; most writers have not drawn the distinction between these forms of globalization.⁶¹ It is however my contention that the categorization enables us to have a clearer understanding of the nature of the process, and utilizing the ideological underpinnings of globalization provide the necessary lens for that assignment. Moreover, the classification will prove helpful in illuminating the central arguments of this thesis as it will be shown how counter-hegemonic globalization is being used to oppose the deleterious effects of hegemonic globalization on human rights.

1.2.4.1 Neo-Liberal Globalization

This is the form of globalization driven by the neo-liberal ideology of free markets, as determined by the dominant Western states, and it gives considerable prominence to the role of international economic institutions and multinational corporations. According to

⁵⁹ P. O’Connell, 2007, ‘On Reconciling the Irreconcilables: Neo-liberal Globalisation and Human Rights’, 7 *Human Rights Law Review*, pp.483-509 at 488-495.

⁶⁰ R. Falk, 2002, ‘Interpreting the Interaction of Global Markets and Human Rights’, A. Brysk, (ed.) *Globalization and Human Rights*, California: California University Press, pp.61-76 at 61; also B. de Sousa Santos and C. Rodriguez-Garavito, 2005, *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge: Cambridge University Press.

⁶¹ Even David Held, Anthony McGrew and their associates who have written extensively on globalization do not make this categorization.

Santos there are two forms of hegemonic globalization, namely, globalized localism, and localized globalism.⁶²

He argues that globalized localism is a process whereby a given local phenomenon is successfully globalized, such as the worldwide operation of transnational corporations, the transformation of the English language into *lingua franca* or even the worldwide adoption of American copyright laws on computer software.⁶³ In the context of this thesis, it relates to a situation whereby the European conception of human rights rooted in the liberal philosophical paradigm has been successfully projected as the global human rights regime. On the other hand, localized globalism, 'entails the specific impact of transnational practices and imperatives on local conditions that are thereby altered, restructured in order to respond to transnational imperatives.'⁶⁴ These include free trade enclaves such as export-processing zones in semi-peripheral states, deforestation and massive depletion of natural resources to pay foreign debts etc. Santos argues that the core countries - the leading Western capitalist states - specialize in globalized localisms, while the peripheral countries - the dependent Third World states - are imposed with a choice of localized globalisms thus creating a web of localized globalisms and globalized localisms in the international system.

1.2.4.2 Counter-hegemonic Globalization

This is the alternative model of globalization and represents what has also been described as globalization from below. It is focused on the struggles against social exclusion and domination animated by unequal power relations.⁶⁵ This process is driven by the victims of neo-liberal globalization, the marginalized and their spokespersons.⁶⁶ Thus counter-hegemonic globalization is basically a manifestation of discontent with the dominant neo-liberal globalization and an attempt to construct and project alternatives to that paradigm. It relies on the role and potential of social movements, groups, human rights and other

⁶² B. de Sousa Santos, 2002, note 9, p.179.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ B. de Sousa Santos, 2005, 'Beyond Neo-liberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality', B. de Sousa Santos and C. Rodriguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge: Cambridge University Press, pp.29-63 at 29.

⁶⁶ P. O'Connell, 2007, note 59, p.493.

Non-Governmental Organizations and other democratic forces. Santos highlights two forms of counter-hegemonic globalization, namely, subaltern cosmopolitanism and the common heritage of humankind. The former refers to a constellation of groups such as South-South dialogues, trade unions, human rights organizations and other transformative NGOs that network internationally with the objective of maximizing their emancipatory potentials, while the common heritage of humankind focuses on issues that relate to the sustainability of human life on earth, such as environmental concerns on the protection of the ozone layer, the Amazon, the Antarctica or the oceans. Perhaps it is recognition of the immense transformative potentials of these counter-hegemonic forces that they are not received with favour by the leading Western countries who either attempt to co-opt them or engineer divisive forces that militate against their effectiveness.

1.2.5 Summation on Globalization

To sum up, it may be said that the existing controversies concerning the nature and relevance of globalization in contemporary society epitomize the complex nature of the phenomenon itself. The above analysis has thrown up three key elements involved in any discourse on globalization. First, it has underscored the fact that globalization is a multi-dimensional phenomenon implicated in developments in several fields of human endeavour; economic, technological, social, political, etc. which makes its concise definition problematic. Moreover, the dimensions of globalization are also contested terrains, thus adding to the magnitude of the problem. Some of these contestations centre around the descriptive or normative approach to the subject while others have focused on the ideological orientation. Thus, while cognizant of the ideological underpinnings of these disputations, I have adopted an approach which draws from the expository benefits of both the descriptive and normative aspects in so far as they assist in clarifying the main theme of this work.

Second, the analysis of the forms of globalization presented has brought to the fore the inexorable fact that while the hegemonic conception venerates neo-liberal economic policies and relations, counter-hegemonic globalization focuses on alternative strategies to that conception, and, with respect to human rights, seeks among others, to reinvent and deploy the emancipatory capacities of the human rights corpus in achieving that goal.

This insight will prove invaluable in the discussions in subsequent chapters of this work. Finally, the determination as to whether globalization is novel, unprecedented, or, on the contrary, a myth and an ideological construct raises a number of issues that have resonance for any meaningful discussion of its impact on human rights or the impact of the latter on it. Before proceeding to that analysis however, it is necessary to examine the nature of human rights and its emergence in contemporary society.

1.3 Nature of Human Rights and their Deployment

In order to explore and assess the mutual impact between globalization and human rights, it is important to have a clear understanding of what we mean by ‘human rights’. This preliminary inquiry is crucial because, over the years, human rights have been the subject of a multiplicity of discourses, practices, and struggles by people from diverse backgrounds such as philosophers, theologians, lawyers, sociologists, politicians and civil society activists to achieve particular objectives.⁶⁷ This ensemble of discourses and practices deploying human rights has made it difficult to formulate a unifying theoretical framework encompassing it. Conceptually, and emblematic of the various discourses and approaches, human rights have been perceived from different angles. For instance, from a philosophical perspective, it has been said to be ‘a set of moral principles whose justification lies in the province of moral philosophy’.⁶⁸ On this account, they are regarded as moral rights or claims by individuals, which may or may not have been recognized by a particular legal system.

For legal positivists, human rights are a set of claims by individuals which have been recognized and legitimized by any particular legal system. The notion of human rights therefore presupposes the existence of a legal relationship between the right-holder and the duty-bearer.⁶⁹ As will be shown later in this work, the concept of ‘right’ and the

⁶⁷ C. Douzinas, 2007, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, Abingdon: Routledge-Cavendish, pp.8-9. According to Costas Douzinas: ‘No single theory can capture the multiplicity of discourses, practices, agencies, events and struggles that are using the term ‘human rights’’. p14.

⁶⁸ J.J. Shestack, 1998, ‘The philosophic foundations of human rights’, 20 *Human Rights Quarterly*, pp.201-234, at 202.

⁶⁹ For an analysis of the use and relevance of jural correlatives, see, W.N. Hohfeld, 1913, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, 23 *Yale Law Journal*, pp.16-59 at 28-37. An appraisal of the rights debate and Hohfeld’s contribution to same is contained in J.W. Singer,

correlative ‘duty’ is one of the problematic issues within the human rights corpus, and is particularly acute in relation to solidarity rights such as the right to development. The bone of contention is whether the duty to guarantee the right to development is one vested on the international community or group of states, namely, the developed states; and if this is so, how is such a duty to be enforced?

Human rights have also been referred to as ‘a major strategy for resisting the dictates of power and dissenting from the intolerance of public opinion’.⁷⁰ On this account, human rights are imbued with an emancipatory potential and its central goal from inception has been to resist public, and, to some extent, private domination. As Costas Douzinas points out, ‘human rights are part of a long and honourable tradition of dissent, resistance and rebellion against the oppression of power and the injustice of law’.⁷¹ It is this conception of human rights and the insight it provides that is adopted in this work in assessing its mutual impact with processes of globalization.

Notwithstanding these diverse discourses, it can be said that, *in general*, human rights are those ‘rights which a person enjoys by virtue of being human, without any supplementary condition being required’.⁷² They are held by all human beings irrespective of any other rights or duties that they may have in any other capacities, for example, as workers, members of families or associations. Although theoretically, all human beings have these rights, not all enjoy *all* their human rights, nor are the rights enjoyed equally in different nations or even within a state.⁷³ Traditionally, human rights have been classified into three broad categories, referred to as ‘generations’ of rights.⁷⁴ On this score, civil and political rights are regarded as first generation rights, with economic, social and cultural rights as second, while solidarity rights, such as right to development, right to ownership of the common heritage of humankind and right to a

1982, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’, *Wisconsin Law Review*, pp.975-1059 at 968-994.

⁷⁰ C. Douzinas, 2007, note 67, p.12.

⁷¹ *Ibid.*, p.13.

⁷² C. Tomuschat, 2003, *Human Rights: Between Idealism and Realism*, Oxford: Oxford University Press, p.3; J. Donnelly, 2007, *International Human Rights*, 3rd ed. Boulder, Colorado: Westview Press, p.18.

⁷³ *Ibid.* This is buttressed by the disparity in the level of enjoyment of human rights between citizens of developed Western states and, for example, those from developing African states.

⁷⁴ K. Vasak, 1977, ‘A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights’, 11 *UNESCO Courier*, pp.29-32 at 29.

safe environment are regarded as third generation rights.⁷⁵ The first generation rights are said to be negative rights in the sense that their respect requires the state to do nothing to interfere with individual liberties. On the other hand, the second generation rights are positive rights as they require the affirmative action of the state for their implementation. The third generation rights are regarded as solidarity rights as they focus on group and collective rights indicative of the increasing recognition of the salience of community life in the overall benefit of humankind. Although this classification, with the attendant historical periodization, may be useful for analytical purposes, it does not reflect the indivisibility, dynamism and interrelationships existing between the various rights.⁷⁶ What is more, for present purposes, the mutual relationship between globalization and human rights is not limited to any identifiable 'generation' of rights, but encompasses the various categories. However, as I demonstrate later, the development crisis in Africa, growing realization of the need to make visible social and economic rights, and peoples' rights, and how these are linked with the processes of globalization, compels more focus to be given to these sets of rights in this Thesis.

One other issue of crucial importance in human rights discourse is the role of the state in the promotion and protection of human rights. It must be acknowledged that one of the main features of contemporary society is the organization of the world system on the basis of sovereign states, with constitutional arrangements incorporating human rights norms. Needless to say there is also an international regime of human rights to which virtually all sovereign states have subscribed as a kind of international code of moral conduct.⁷⁷ Flowing from this, in conventional human rights jurisprudence, the state is regarded as the primary duty-bearer. The rationale for the attachment of this duty on the state is that since its institutional structures are more likely to result in human rights violations, responsibility for its redress should be vested on the state.

However, this approach has created three major challenges for the contemporary human rights system. First, it has led to an unnecessary restriction of the scope of entities that have duties for human rights violations. Thus transnational corporations and other

⁷⁵ Ibid.; J. O'Brien, 2001, *International Law*, London: Cavendish Publishing Limited, pp.481-482.

⁷⁶ For a criticism of this classification and periodization of rights, see, N.J. Udombana, 2003, *Human Rights and Contemporary Issues in Africa*, Lagos: Malthouse Press Limited, p.48; A. Clapham, 2006, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press, p.86.

⁷⁷ B. de Sousa Santos, 2002, note 9, p.282. This is discussed in the next subsection.

actors in the international scene are excluded from the purview of duty-bearers, notwithstanding for instance, the global dimension and detrimental effects of their activities on human rights.⁷⁸ Yet, it is obvious that over the years, especially in this era of globalization, these other entities have been playing important roles in the international scene in ways that impact on the lives of people worldwide. This makes it imperative to challenge the monopoly of international legal subjectivity of states in order to make room for more actors as duty-bearers in relation to human rights.⁷⁹

Second, it has created an ambivalent situation where the prime violators of human rights are also given the duty of protecting such rights. In a way, this is traceable to the history of human rights which is complex and contradictory.⁸⁰ Although historically, human rights were conceived as a weapon against the state, to keep it under democratic control and prevent the violation of liberal rights, the fact that the rights against the state were granted by the state itself, resulted in the current ambivalence dogging the human rights corpus. This ambivalence is now more pronounced with the inclusion of social and economic rights and people's rights within the scheme, since as indicated earlier, the implementation of these rights depend on the positive action of the state.⁸¹ Accordingly, human rights policies have been used to serve the economic and geo-political interests of the hegemonic capitalist states.⁸²

Third, and related to the above, is the consequent appropriation of the language and practice of human rights by hegemonic states through their incorporation in national and international instruments. This incorporation, which institutionalizes human rights, puts it in a complex and ambiguous position in relation to power, facilitating their recasting and deployment by hegemonic states.⁸³ Through this mechanism, hegemonic states operating within the framework of the current capitalist system have successfully colonized the terms of key components of human rights such as freedom and emancipation. For instance, freedom has been co-opted and recast as 'market freedom' and the attendant privatization, while the language of democracy has equally been co-opted and recast in its

⁷⁸ A. Clapham, 2006, note 76, pp.41-46.

⁷⁹ Ibid., pp.56-58.

⁸⁰ B. de Sousa Santos, 2002, note 9, p.280; M.R. Ishay, 2004, 'What are human rights? Six historical controversies', 3(3) *Journal of Human Rights*, pp.359-371 at 359-362.

⁸¹ B. de Sousa Santos, 2002, note 9, p.281.

⁸² Ibid., p.271.

⁸³ N. Stammers, 2009, *Human Rights and Social Movements*, New York: Pluto Press, p.104.

‘low-intensity’ variety, limiting it to the most formal political transactions of regular elections.⁸⁴ These re-invented neo-liberal terms, in their alluring articulation, have been adopted by African states under the framework of the New Partnership for Africa’s Development (NEPAD) as will be shown later in this work.

Notwithstanding the ambivalent role of the state in respect of human rights outlined above, it is refreshing to observe that there has, simultaneously, been a continuing struggle by human rights NGOs, all over the world in defence of oppressed social classes and groups, articulating more inclusive human rights protection mechanisms. In other words, a counter-hegemonic human rights discourse and practice has been developing side by side the hegemonic conception. In the words of Boaventura de Sousa Santos:

In sum, alongside the dominant discourse and practice of human rights conceived as a globalized Western localism, a counter-hegemonic discourse and practice of human rights conceived as a cosmopolitan politics has been developing. The central task of emancipatory politics of our time, in this domain, consists in transforming the conceptualization and practice of human rights from a globalized localism into a cosmopolitan project.⁸⁵

A counter-hegemonic politics of human rights will facilitate the recuperation of the emancipatory potential and the utopian character of human rights and rid human rights of its imperial context which ‘brutalizes both the victim and the victimizer’.⁸⁶

Since states continue to be both the major violators and guarantors of human rights, it is natural that the focus of human rights struggles would revolve around them. Nevertheless, given that the conditions underlying both violations and guarantees of human rights seem to be increasingly beyond the reach of the nation-state, coupled with recent transformations in the world system, the adoption of a new approach to human rights to confront the new globally organized violations through global struggles against them has become imperative.⁸⁷

Additionally, the relative incapacity of states to counteract human rights violations, especially those arising from the operations of the global economy, due to the impact of

⁸⁴ E. Christodoulidis, 2009, ‘Strategies of Rupture’, *Law and Critique*, pp.3-26, at 9.

⁸⁵ B. de Sousa Santos, 2002, note 9, p.271.

⁸⁶ *Ibid.*, p.279.

⁸⁷ *Ibid.*, p.289.

localized globalisms and globalized localisms, suggests the deployment of other forms of global advocacy for the promotion and protection of human rights.⁸⁸ These should include, broadening the scope of existing positive obligations on states to protect human rights, whether or not these were infringed by state or non-state actors,⁸⁹ and extending the notion of rights-bearers to include entities incapable of bearing duties, namely nature and future generations.⁹⁰ This will transcend the Western conception of rights which venerates the binary relationship between right-holders and duty-bearers, in whose terms only those susceptible of being duty-bearers are entitled to be right-holders. This is where the role of Non-Governmental Organizations (NGOs) becomes important as vehicles for articulating and advocating for social change. Although human rights NGOs are heterogeneous, politically and socially,⁹¹ it can be said that, *in general*, their increased advocacy, both nationally and globally, have contributed to the emergence of a cosmopolitan consciousness on human rights.⁹² While the use of legal actions may sometimes be productive, human rights NGOs can be more effective if they operate as grassroots movements through a process of coalition building and political mobilization of the oppressed and marginalized members of society.⁹³ Such political strategies must resist being reducible to, or co-optable by the order they seek to resist.⁹⁴

The need to resist the growing inequality and social injustice in the world system gives salience to the agitation for, and relevance of the right to development, within the context of this work. Initially formulated by Keba M'Baye, the right to development was enshrined in the African Charter on Human and Peoples' Rights, and subsequently adopted by the General Assembly of the United Nations in the Declaration on the Right to Development. As a globalized localism, therefore, it has become an important source for a normative framework relating to development. The central merit of the right to

⁸⁸ Ibid., p.283.

⁸⁹ G. Anderson, 2004, 'Social Democracy and the Limits of Rights Constitutionalism', 17(1) *Canadian Journal of Law and Jurisprudence*, pp.31-59, at 53.

⁹⁰ B. de Sousa Santos, 2002, note 9, p.297.

⁹¹ This is because while some are deeply embedded in grassroots movements with socialist orientations, others subscribe to a liberal, individualistic conception of human rights, and are even funded to advance these interests.

⁹² B. de Sousa Santos, 2002, note 9, p.284.

⁹³ G. Anderson, 2004, note 89, p. 59.

⁹⁴ E. Christodoulidis, 2009, note 84, p.9. The extent to which human rights NGOs in Africa have been able to adopt and apply these strategies in resisting the dictates of economic globalization in order to advance human rights will be examined in chapters 4, 5 and 6 of this Thesis.

development is its comprehensive conception of development as an effective strategy for the realization of human rights.⁹⁵ On this account, since developing countries are not in a position to guarantee compliance with economic and social rights, because of their level of underdevelopment, the international community should play a role in their development to enhance the protection of these rights. This linkage between development and human rights projects the right to development as both an individual and a collective right. In this connection, Article 1 of the Declaration states:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁹⁶

However, its non-specific identification of right-holders or duty bearers, weak conceptual foundations, and state-centred focus has been the object of criticism from both the hegemonic and radical discourses on human rights.⁹⁷ The crucial question is whether, as presently conceived, the right to development both under the African Charter on Human and Peoples' Rights and the Declaration, provides a useful platform for struggles from below for the promotion of social and economic rights and interests of the ordinary people in Africa, an issue that will be examined later in this work.

In expressing faith in the potentials of counter-hegemonic conception of human rights, one is not unmindful of the problematic nature of the concept of rights, especially when combined with the word 'human' in the term 'human rights' which are next discussed.

1.4 Historical and Normative Dimensions of Human Rights

The concept of rights has a long lineage in legal and philosophical thought and has impacted greatly on the growth of ideas and the direction of societal development. Yet, its nature and scope remains largely contested. This difficulty becomes all the more

⁹⁵ See the Preamble to the Declaration which underscores the recognition of states that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'.

⁹⁶ Article 1 of Declaration on the Right to Development.

⁹⁷ For the neo-liberal hegemonic critique of the Declaration, see, J. Donnelly, 1984, 'The Right to Development: How not to link Human Rights and Development', C.E. Welch, Jr. and R.I. Meltzer, eds. *Human Rights and Development in Africa*, New York: State University of New York Press, pp.261-283, at 261, while a radical critique is provided in I. Shivji, 1989, *The Concept of Human Rights in Africa*, London: CODESRIA Book Series, p.82.

prominent when it is coupled with the word ‘human’ in the phrase ‘human rights’. Indeed, it can be said that the concept of human rights raises inscrutable normative problems that have far-reaching implications on its application in contemporary society. First, the word ‘rights’ attached to ‘human’ deriving as it does, from the philosophical conception of rights developed and embellished by the natural law school has carried with it, perhaps unwittingly, the burdens associated with the term under that philosophical paradigm.⁹⁸ These include the contentious issues relating to inalienability of rights, their inherent nature, and enforcement in relation to the state. It bears mentioning that these issues continue to influence the direction of discourse on human rights today.

Second, the word ‘human’ in the term is also deeply problematic. Its use immediately raises the question of ascertaining what entities falling within the category of ‘human’ are beneficiaries of rights. While at first glance this may seem obvious, a critical lens will reveal how difficult its resolution can be, particularly when account is taken of issues relating to the commencement of human life. The concept of personhood itself has generated intense controversy in legal discourse.⁹⁹ When does a foetus in the womb commence existence as a human being? Is it when she becomes viable in the womb or upon birth? What happens if, while in the womb, she is injured by the act of a third party in a manner that affects her basic rights upon birth? A related issue, but at the other end of the spectrum, concerns the difficulty in determining when human life actually comes to an end. This has acquired tremendous relevance in recent times with the advancement in medical technologies that has enabled organ and tissue transplants to be carried out. If a brain from a ‘dead’ body is transferred to another ‘living’ body whose brain is dead, how do we deal with issues of human rights that arise with this change in human being?

⁹⁸ The concept of rights has been the subject of intense philosophical debate starting from its attribution to a divine origin by Thomas Aquinas through its denigration by Alasdair MacIntyre, the latter seeing belief in it as no more than a ‘belief in witches and unicorns’. A. MacIntyre, 1985, *After Virtue: A Study in Moral Theory*, 2nd ed., London: Duckworth, at 69. Yet, it has remained an important legal and political idea particularly with its transformation and re-christening as human rights in the middle of the 20th century.

⁹⁹ N. MacCormick, 2007, *Institutions of Law: An Essay in Legal Theory*, Oxford: Oxford University Press, p.79.

Perhaps even more dilemmatic is the issue of human cloning and how to categorize the resulting entity in terms of rights entitlement.¹⁰⁰

Another normative problem with 'human rights' is whether its present framing is not necessarily restrictive of the entities that ought to be beneficiaries of rights. As indicated earlier, this is more acute now with the increased vertical and horizontal expansion of the frontiers of international law resulting in entities other than states playing important roles in the international system. Specifically, the increasing role of transnational corporations requires that they be included in the category of beneficiaries of rights, and not restricted only as duty bearers as the Universal Declaration of Human Rights seems to suggest.¹⁰¹ These theoretical issues emphasize the need for a reconstruction of the human rights discourse not only to make it more holistic and inclusive, but to adequately respond to changes in socio-economic realities.

The fourth problem with human rights is one that has been the subject of considerable controversy among jurists over the last few decades. It is the question of determining the normative basis of 'human rights'. Are they rights that have been certified as universal or do they have their origin in particular cultural backgrounds? If the first proposition holds sway, which countries performed the certification? Were all the regions of the world represented in the process? If it is the latter position, what is the justification for seeking to promote or project it as a template to be applied in other cultural environments? This is by no means a simple question as will be seen later in this work, and it is one that will continue to dog the contemporary human rights corpus if it is not sufficiently addressed in a manner that recognizes the input of other cultures to the human rights project.¹⁰²

Perhaps these normative problems can best be understood against the background of the transition from a concentration on the 'rights' discourse to its re-christening and

¹⁰⁰ I do not pursue the controversies concerning these issues here as they only bear tangential relevance to the central argument of my thesis. Suffice it to note that they constitute some of the challenges confronting the contemporary human rights system.

¹⁰¹ A. Clapham, 2006, note 76, p.56; W. Freidmann, 1969, 'The Extension of Subjects of International Law Beyond the States', *Hague Recueil des Cours*, (1969-11) pp.120-130 at 121-124.

¹⁰² M. Mutua, 2001, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42 *Harvard International Law Journal*, pp.201-245; B. de Sousa Santos, 2002, 'Toward a Multicultural Conception of Human Rights', B. Hernandez-Truyol ed., *Moral Imperialism: A Critical Anthology*, New York: New York University Press, pp.39-60, at 55-57 where he outlines conditions for the attainment of this multiculturalism.

elaboration as ‘*human rights*’ in the second half of the 20th century. To be sure, although there had been earlier enunciations in this regard by medieval philosophers, rights discourse assumed greater prominence in late 18th century liberal political philosophy which emphasized the right of an individual to his or her liberty, property, freedom of speech and other rights, and the fact that these rights are inalienable. Within this conception, the primary function of the state, deriving from the social contract theory, is to protect these rights.¹⁰³ It was under this atmosphere, that those seminal documents such as the American Declaration of Independence, 1776, and the French Declaration of the Rights of Man and of the Citizen, 1789 were adopted, and they have remained fundamental referents of political thinking in contemporary liberal discourse.¹⁰⁴ The natural law remains the basic foundation for this analysis which postulates that all human beings have rights by virtue of their common humanity - and these rights are universal. From such theoretical formulations, it was therefore a short distance to the adoption of the Universal Declaration of Human Rights in 1948 soon after the establishment of the United Nations in 1945. This Declaration, which is now regarded as the ‘spiritual parent’¹⁰⁵ or ‘grundnorm’ of international human rights, represented an attempt to view human rights issues from an international perspective. This is because prior to its adoption, expressions of concern about human rights were limited to the confines of national territories.¹⁰⁶

Flowing from the UDHR, we now also have the two covenants, namely, International Covenant on Civil and Political Rights, ICCPR and the International Covenant on Economic, Social and Cultural Rights, ICESCR adopted in 1966, which together constitute the international human rights regime. These instruments, as well as other international human rights conventions, have been ratified by a large number of states as

¹⁰³ J. Locke, 1980, *Second Treatise of Government*, C.B. MacPherson ed., Indianapolis: Hackett Publishing Company Inc., p.73, J. Donnelly, 1990, ‘Human Rights and Western Liberalism’, A.A. An-Naim and F.M. Deng, eds. *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, D.C: The Brookings Institution, pp.31-55 at 33.

¹⁰⁴ C. Brown, 1999, ‘Universal Human Rights: A Critique’, T. Dunne and N.J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge: Cambridge University Press, pp.103-127 at 105.

¹⁰⁵ H. J. Steiner, 1988, ‘Political Participation as a Human Right’, 1 *Harvard Human Rights Yearbook* 1988, pp.77-134 at 79.

¹⁰⁶ Notable examples were the Petition of Rights, 1618, the American Declaration of Independence and the Virginia Declaration both of 1776, and the French Declaration of the Rights of Man and the Citizen, 1789.

a testament of their respect for, and concern about, the protection of human rights. It is this ‘universal’ recognition and acceptance that has led Louis Henkin to make the celebratory declaration that:¹⁰⁷

Ours is the age of rights. Human rights is[sic] the idea of our time, the only politico-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today’s 170 states - old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed. Human rights is[sic] the subject of numerous international agreements, the daily grist of the mills of international politics, and a bone of continuing contention among super powers.

While such celebration may, to some extent, be justifiable in relation to the adoption of international human rights instruments,¹⁰⁸ the same cannot be said about the actual practice of human rights. This is because human rights violations are still so common world-wide that the temptation is strong to say that it has assumed the colour of international recognition and acceptance; even in the advanced Western countries where, in Upendra Baxi’s terms, the politics *of* human rights appears to be the current phenomenon in contradistinction to the politics *for* human rights.¹⁰⁹ It is a depressing reality that rather than genuine concern for the promotion and protection of human rights, the language of human rights is being increasingly appropriated by some states, groups and institutions to serve particular political and ideological purposes. If doubts exist about this contention, one only needs to cast one’s eyes on the numerous violations of human rights, on both sides, in the current *war of terror* and *war on terror* which has

¹⁰⁷ L. Henkin, 1990, *The Age of Rights*, New York: Columbia University Press, p.xvii. In another celebratory mood, Professor Henkin referred to the UDHR as the ‘birth certificate of the Human Rights Movement’, L. Henkin, 1999, ‘The Universal Declaration at 50 and the Challenge of Global Markets’, 25 *Brooklyn Journal of International Law*, 1999, 17-25 at 19.

¹⁰⁸ It must be stressed that even the adoption of human rights instruments is susceptible to a number of problems. First, states may adopt such treaties at the international level and fail to domesticate them in their municipal systems. Second, it is common practice that some states sign these treaties with several reservations. Third, even when they are domesticated, the issue of enforcement is an entirely different matter.

¹⁰⁹ U. Baxi, 2006, *The Future of Human Rights*, 2nd ed. New Delhi: Oxford University Press, pp.57-58; P. Gready, 2003, ‘The Politics of Human Rights’, 24 *Third World Quarterly*, 2003, pp.745-757 at 749.

resulted in immeasurable human suffering.¹¹⁰ More worrisome is the fact that legal rules and institutions are frequently organized to legitimize human suffering as the United Nations' sanction on Iraq and the previous apartheid policy in South Africa showed.¹¹¹ Add to this the ambivalence and hypocrisy of Western powers, particularly the United States of America, to questions of human rights world-wide - in preaching one thing for other states - and doing something different, especially when its allies are involved, and the picture is complete.

If the practice of human rights is suffering this fate in Western countries, the situation is not only precarious but extremely ignoble in Third World countries, especially, Africa with the highest number of failed, failing and fragile states.¹¹² Without doubt, Africa has witnessed extensive violations of human rights from pre-colonial, through colonial, to the present post-colonial era. Even the adoption in 1981 of the African Charter on Human and Peoples' Rights and other subsequent international instruments, commendable as these steps are, has not significantly changed the situation. The Liberian, Sierra Leonean, and Rwandan pogroms vividly attest to this fact, in the same way that the current situation in Somalia, Sudan, and Democratic Republic of Congo remain epic embarrassments to the continent. In light of this, the adoption of such international human rights instruments by states may therefore be no more than public relations gimmicks to show that they belong to the 'human rights club', a design to cover up massive human rights abuses in their countries. In their contrived ingenuity to dilute the force of the human rights system, some African leaders and their academic apologists have sought refuge in the argument about the inapplicability of similar human rights

¹¹⁰ U. Baxi, 2005, 'The "War on Terror" and the "War of Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law: Prefatory remarks on two "Wars"' 43(1&2) *Osgoode Hall Law Journal*, pp.7-43 at 8-10.

¹¹¹ S. Veitch, 2007, *Law and Irresponsibility: On the Legitimation of Human Suffering*, Oxon: Routledge-Cavendish, pp.13-19.

¹¹² Somalia, Zimbabwe, Sudan, Chad and Democratic Republic of Congo, have been classified as failed states. A graphic account of the pathetic situation in Somalia is contained in J. Gettleman, 2009, 'The Most Dangerous Place in the World', *Foreign Policy*, March/April 2009 Issue 171, pp.60-69. A critique of the current categorization of failed states is contained in C.T. Call, 2008, 'The Fallacy of Failed States' 2008, 29 *Third World Quarterly*, pp.1491-1507; N. Chomsky, 2007, *Failed States: The Abuse of Power and the Assault on Democracy*, London: Penguin Books, pp.108-110 arguing that the invocation of the concept is imprecise and susceptible to too many interpretations.

norms in different environments under the rubric of relativism. It is to that issue, and its counterpart universalism, that I now turn.

1.5 Universalism versus Relativism

The Universal Declaration of Human Rights which was adopted in 1948 represents a landmark development in international human rights jurisprudence. Influenced by the devastating effects of the Second World War, and the need to move away from the massive human suffering that it engendered, the Declaration states in its preamble that ‘disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.’¹¹³ It notes further that:

...the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.¹¹⁴

The Declaration is thus proclaimed as ‘a common standard of achievement for all peoples and all nations...’¹¹⁵ This proclamation of a universal standard and projection of international consensus on the contents of human rights has however generated controversy over the years.

The criticism can be classified into the process argument and the substance argument. The *process argument* contends that the procedure that led to the adoption of the Declaration cannot be said to be universal as it did not encompass all regions of the world. It draws its strength, first, from the fact that at the time of adoption of the Declaration in 1948, several African and Asian countries were still under one form of colonial rule or the other and so did not participate in the adoption of the Declaration. It may be mentioned that it was only in the 1960’s that most African states gained independence from their colonial masters and became ‘sovereign’¹¹⁶ states. Their views were therefore not taken

¹¹³ Preamble to the Universal Declaration of Human Rights, 1948.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ The extent of sovereign powers that these states have in international relations is a matter of intense controversy. It is certainly true that the concept of sovereignty has been diluted in its application to African countries. A. Anghie, 2004, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, pp.104-105.

into consideration in the adoption of those ‘universal’ standards. Second, even the composition of the drafters of the Declaration did not adequately represent the interests of all regions of the world with the result that the Western influence and dominance is prominent.¹¹⁷ Considering the configuration of political power at that time, it is however doubtful if their participation would have mattered most, but the fact of such non-participation has created a serious legitimacy deficit that has dogged the Declaration leading to persistent calls for Asian, African or other conceptions of human rights.

Drawing from this procedural incompleteness, the *substance argument* insists that the current human rights corpus is not universal and it would therefore be wrong to seek to impose it on the rest of the world. It would seem that the tone for this relativist position was set early enough by the submission of the American Anthropological Association to the Drafting Committee of the Declaration in 1947 when it declared *inter alia*:¹¹⁸

Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.

It is argued that to project a system that is evidently Western in origin to the rest of the world as a template is wrong. Their argument is that since values are culture-specific, reflecting the cultural norms, values and religious beliefs of particular societies, it is wrong to impose the current human rights corpus, which is evidently Euro-centric, on the rest of the world. In the words of Chris Brown, ‘it is implausible to think that rights can be extracted from liberal polities, de-contextualized and applied as a package worldwide.’¹¹⁹ This is even more objectionable when it is cast in ‘civilizing’ missionary garb.¹²⁰

¹¹⁷ V.A. Leary, 1990, ‘The Effect of Western Perspectives on International Human Rights’, A.A. An-Naim, and F.M. Deng (eds.), *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, D.C: The Brookings Institution, pp.15-30 at 20.

¹¹⁸ ‘Statement on Human Rights’, *American Anthropologist*, (New Series), Vol.49 No.4 Oct-Dec. 1947 pp.539-543 at 542; An assessment of this ‘Statement’ and the recent ‘Declaration of Anthropology and Human Rights’, 1999 is contained in K. Engle, 2001, ‘From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999’ 23 *Human Rights Quarterly*, pp.536-559.

¹¹⁹ C. Brown, 1999, note 104, p.111; I. Shivji, 1989, note 97, p.51.

¹²⁰ M. Mutua, 2001, note 102, p.233.

Although there is some merit to the views about the cultural specificity of human rights values, which makes the wholesale use of the contemporary human rights corpus as a template inappropriate, we must not lose sight of the fact that extreme relativism can very often be an instrument for dictatorial regimes to rely on in committing all kinds of human rights abuses in their countries. Moreover, relativism makes it impossible for human rights violations in particular countries or cultures to be condemned by outsiders as the affected practices may be legitimately acceptable in such cultural settings. Thus some cultures may permit torture, violence against women, amputation, etc. It is in consideration of these issues that the legitimacy crisis can be resolved only through cross-cultural dialogue to generate a more universally acceptable architecture of human rights.¹²¹ This is predicated on the understanding that no culture is complete, and both Western and other cultural enunciations of human rights have a lot to benefit from such cross-cultural approach.¹²² Taking cognizance of this, it will be shown that the African Charter on Human and Peoples' Rights is peculiarly distinctive by recognizing the cultural circumstances that embellish rights and duties in Africa,¹²³ an approach that could serve as a veritable reference point for further elaboration world-wide.

1.6 Relationship between Globalization and Human Rights

As indicated earlier, globalization is today one of the most pervasive social and economic phenomena in contemporary society. It directly or indirectly affects all aspects of our lives - either positively or negatively. When we make local and international calls from our mobile telephones, book air travels through the Internet, buy McDonald's cake in Ghana or South Africa, or buy Kenyan foods from African shops in London or Glasgow, we are imperceptibly participating in the globalization process. Similarly, young

¹²¹ This position is ably canvassed by Boaventura de Sousa Santos, and Makau Mutua. B. de Sousa Santos, 2002, note 9, pp.278-280; M. Mutua, 2001, note 104, p.245.

¹²² Ibid.

¹²³ M. Mutua, 1995, 'The Banjul Charter and the African Fingerprint: An Evaluation of the Language of Duties' 35 *Virginia Journal of International Law*, pp.339-380 at 368; J.A.M. Cobbah, 1987, 'African Values and the Human Rights Debate: An African Perspective' 9 *Human Rights Quarterly*, pp.309-331 at 320.

Cameroonian and Nigerian girls who 'agree' to be transported from their homes to Italy and other European countries with the promise of better jobs, are only responding to the imperatives of increased commodification of social and economic relations embodied in globalization. It is axiomatic that such opportunities and interactions have far-reaching implications on the social and economic conditions of individuals world-wide. From this perspective, it is generally accepted that globalization has tremendous impact on human rights. However, it is in the area of ascertaining the nature and extent of the impact that we find wide divergences between various theorists. A close analysis of the views advanced by theorists on this subject yields three categories of writers - those who focus on the beneficial aspects of the relationship between globalization and human rights, those who highlight the deleterious aspects, and those who take a more eclectic position, predicating their view on the premise that if properly husbanded, globalization can be conducive to the promotion of human rights.

It is my contention that these positions represent a conventional, uni-dimensional mode of analysis of the relationship between globalization and human rights. In focusing exclusively on whether globalization impacts positively or negatively on human rights, they ignore the possibility of human rights also having some impact on the globalization process. Their analysis presumes the existence of an independent-dependent relationship in which globalization is cast as the independent variable and human rights the dependent variable. I argue that this is an inherently limited conception, and only a holistic approach which acknowledges the mutual impact of both globalization and human rights on each other will provide a proper understanding of the contours of the relationship between them. In this regard, I will show that not only does globalization impact on human rights, as is generally accepted, but that human rights norms are also affecting and reshaping the nature and context of the globalization process. This argument is based on three main pillars.

First, as indicated earlier, historically, human rights were conceived of, and emerged as an emancipatory weapon against the state to keep the latter under control and prevent authoritarianism, and this conception is being increasingly deployed to constrain and reshape the dimensions of the globalization process. Second, it will also be shown that there has been a dramatic change in language and orientation by international economic

institutions - the key agents of contemporary globalization - whose development mantra now includes good governance, transparency, and rule of law, all of which incorporate human rights norms. This transformation is a clear departure from their previous *modus operandi* which had no consideration for human rights in their policies and programmes. Third, the growing influence, activities and immense potentials of human rights NGOs and other social movements have equally generated fundamental impacts on the globalization process. Accordingly, it is only when we begin to look at the relationship between globalization and human rights from the mutual impact perspective that humanity can effectively reconstruct and restructure the globalization process for the benefit of all. Before elaborating this argument however, it is necessary to say more about the three schools of thought on the relationship between globalization and human rights previously mentioned.

1.6.1 Perspectives on the relationship

Deriving from the general recognition of the pervasive and intrusive nature of globalization, it is accepted that it also has some effect on human rights. This is because it necessarily engenders social, political, economic and even cultural transformations. The transformation being precipitated by globalization is often compared to that inflicted on European states by capitalism in the 18th century which transformed the social structure of Western societies to the present atomized, individualized societies.¹²⁴ Not surprisingly, it has been described as the 'Second Great Transformation' by Professor Rhoda Howard-Hassmann.¹²⁵ The impact of such transformation on the social and economic conditions of people can be said to be more critical in Africa due to the traditional and communal mode of social organization. While most theorists accept this transformation as a universal truth, the same cannot be said of their positions on the nature and extent of the impact. Thus as indicated, some writers argue that it is a progressive development creating numerous opportunities for people world-wide. Others hold that its effects are negative while a third

¹²⁴ K. Polanyi, 2001, *The Great Transformation: The Political and Economic Origins of our Time*, Boston: Beacon Press, pp.42-44.

¹²⁵ R.E. Howard-Hassmann, 2005, 'The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization', 27 *Human Rights Quarterly*, pp.1-40 at 3-6.

category adopts an eclectic position. These positions and their supporting arguments will now be examined in some detail before outlining my own theoretical construct.

1.6.2 Beneficial Impact of Globalization on human rights

It is clear that globalization has led to the tremendous transformation of society. Starting from its early origins to the contemporary phase, it is indisputable that globalization has wrought fundamental changes in the nature and structure of society. Relying on economic interpretations of social reality, some writers have regarded such changes as progressive. This school of thought maintains that over the years there has been tremendous improvement in living conditions world-wide with a consequent positive impact on human rights. In a book appropriately titled: *In Defense of Globalization*¹²⁶ Jagdish Bhagwati, picking on particular aspects of social and economic life such as democracy, poverty, women, and environment contends that globalization has had a significant and beneficial effect on society. According to him, it has a human face and ought to be extolled and further promoted. Put simply, the argument is that trade enhances growth which reduces poverty and this in turn impacts positively on human rights. Thus globalization does not perpetuate human rights violations but has rather greatly decreased the prevalence of such violations.¹²⁷

One other feature of this paradigm of thinking is the equation of contemporary market economy with globalization which possesses the capacity ultimately to enhance human rights. On this score, the market is projected as one of the most sophisticated products of civilization, and the only arrangement capable of generating sustained increases in prosperity, guaranteeing liberal democracies and enhancing individual welfare.¹²⁸ Accordingly, only further intensification of the globalization process can reduce the present inequality and persistent poverty in the world. We are therefore urged to ignore the 'siren voices'¹²⁹ of those opposed to globalization principally because it is the absence of globalization, if anything, that contributes to the maintenance or increase in the

¹²⁶ J. Bhagwati, 2007, *In Defense of Globalization*, Oxford: Oxford University Press, pp.30-31.

¹²⁷ Ibid.

¹²⁸ M. Wolf, 2004, *Why Globalization Works*, New Haven and London: Yale University Press, p.319.

¹²⁹ Ibid., p. 320.

disparities between countries.¹³⁰ From this perspective, globalization is necessarily seen as a good thing because it promotes allocative and productive efficiency, which in turn increases overall social and economic welfare.¹³¹

Support for this position is sometimes located in historical context through a comparison between the present economic situation and conditions several years back:

There is extensive evidence that the global economy has brought prosperity to many different areas of the globe. Pervasive poverty dominated the world a few centuries ago; there were only a few rare pockets of affluence. In overcoming that penury, extensive economic interrelations and modern technology have been and remain influential. What has happened in Europe, America, Japan, and East Asia has important messages for all other regions, and we cannot go very far into understanding the nature of globalization today without first acknowledging the positive fruits of global economic contacts.¹³²

However, Amartya Sen acknowledges the existence of gross inequality today both international and intra-national and posits that the central question is how best to share the potential gains of globalization between the rich and poor countries and among different groups within a country, and therefore advocates institutional reform as the panacea.¹³³

For Rhoda Howard-Hassmann, contemporary globalization, which represents the second great transformation, is impacting on human rights and will ultimately lead to the latter's advancement.¹³⁴ Adopting a temporal approach, she argues that although in the short-run globalization could have a negative impact on human rights, in the medium and long-run, 'globalization may well create a world of increased prosperity, democracy, and the protection of human rights.'¹³⁵ Accordingly, since globalization is inevitable and is changing societies in the fashion that capitalism did in Europe from the end of the 18th century, the obvious negative short-term effects must be endured. In response to Howard-

¹³⁰ M.A.A. Warner, 1999, 'Globalization and Human Rights: An Economic Model', 25 *Brooklyn Journal of International Law*, pp.99-112 at 108.

¹³¹ Ibid.

¹³² A. Sen, 2004, 'How to Judge Globalization', F.J. Lechner and J. Boli eds., *The Globalization Reader*, Oxford: Blackwell Publishing, pp.16-21 at 16.

¹³³ Ibid, p.21.

¹³⁴ R. E. Howard-Hassmann, 2005, note 125, p.5.

¹³⁵ Ibid.

Hassmann's formulation, I am compelled to adopt one of Karl Marx's classic criticisms of economists such as Adam Smith and Ricardo who focused on how wealth is acquired and who, according to Marx, saw poverty as 'the pang which accompanies every child birth.'¹³⁶ Specifically, Howard-Hassmann's prescription that we endure the temporary pains of globalization now hoping for a brighter tomorrow is even more problematic as it rules out the possibility of the globalization process being reshaped or restructured in the short term in order to enhance human rights. This paints the picture of human helplessness regarding the globalization process. Moreover, the indeterminacy embedded in her temporal analysis makes it extremely difficult to ascertain how long we have to wait before receiving the proclaimed benefits of globalization on human rights. These and other inadequacies of this school of thought will become more manifest when we examine the other positions on the relationship between globalization and human rights.

1.6.3 Negative Impact

In the same way that some writers have extolled the globalization process, others have in equal measure deplored the deleterious aspects of the process on human rights. It would seem however that an increasing number of recent writings on the subject have highlighted the negative effects of globalization on human rights.¹³⁷ Theorists who belong to this group can be classified into two; namely, those who look at it from an ideological perspective, and those who appraise the process within the neo-liberal paradigm.

Those who adopt an ideological approach regard globalization as an imperial project of Western capitalism that can never yield any positive fruits.¹³⁸ Their central argument is that since globalization is a neo-liberal project with pre-determined political and economic objectives, it cannot promote, but rather only undermine human rights. Accordingly, it is impossible to reconcile the need for the promotion of human rights with

¹³⁶ Karl Marx, 1977, *Selected Writings*, D. McLellan, ed., Oxford: Oxford University Press, p. 211.

¹³⁷ Notable examples include P. O'Connell, 2007, note 59; A. Pollis, 2004, note 1; J. Oloka-Onyango, 2005, note 32; and H.S. Kanzira-Wiltshire, 2008, 'Globalization Nonsense upon Stilts? Reflections on Globalization and Human Rights Nexus', 14 *East African Journal of Peace and Human Rights*, pp.125-147.

¹³⁸ J. Petras and H. Veltmeyer, 2001, *Globalization Unmasked: Imperialism in the 21st Century*, Nova Scotia and New York: Fernwood Publishing and Zed Books, p.12.

neo-liberal globalization since the latter is inherently inimical to the protection of human rights.¹³⁹ Moreover, the ‘magic of laissez-faire’ which underpins the neo-liberal globalization project has failed in terms of its announced goals as the period has been characterized by substantially increased gaps of material welfare within and between countries, and increased marginalization especially of the least fortunate elements in society.¹⁴⁰ It is said that globalization has led to the widening of existing social and economic inequities as the poor are getting poorer at a faster and harsher rate.¹⁴¹ To be sure, while the globalization process is universal, its negative impact is felt more in developing countries, because of the dependent nature of their economies, their lack of domestic economic capacity and weak social infrastructure.¹⁴²

Highlighting the unequal exchanges that constitute the present capitalist world economy, and situating it within a radical ideological orientation, Santos argues that this has led to the emergence of ‘a new global social apartheid’ between rich countries and poor countries, and, within the national societies, between the rich and the poor.¹⁴³ Attributing this to hegemonic globalization, he states evocatively: ‘People are not poor, they are impoverished; they do not starve, they are starved; they are not marginal, they are marginalized; they are not victims, they are victimized.’¹⁴⁴ This viewpoint underscores the need for interrogating the globalization process and the extent of its complicity in the imposition of this level of human suffering and how an alternative approach can be adopted to eliminate these negative consequences.

The second category of writers who have identified the negative effects of globalization are those who use the mirror of the existing neo-liberal paradigm to find globalization deficient in important respects. One key aspect of their formulation is the

¹³⁹ P. O’Connell, 2007, note 59, p.484.

¹⁴⁰ Ibid, p.491.

¹⁴¹ O.O. Ajayi, 2005, ‘Globalization and the Politics of Marginality’, O. Vaughan et al, eds., *Globalization and Marginalization*, Ibadan: Sefer Books Ltd, pp.201-235 at 215.

¹⁴² M. Khor, 2003, *Globalization and the South: Some Critical Issues*, Ibadan: Spectrum Books Ltd. p.13.

¹⁴³ B. de Sousa Santos, 2002, note 9, p.290.

¹⁴⁴ Ibid, p.289. The same point was made by Michel Camdessus then Managing Director of IMF in the following words: ‘The widening gaps between rich and poor within nations, and the gulf between the most affluent and most impoverished nations, are morally outrageous, economically wasteful, and potentially socially explosive’, M. Camdessus, 2004, ‘The IMF at the start of the twenty-first century: What has been learned? On which values can we establish a humanised globalisation’, D. Vines and C.L. Gilbert eds., *The IMF and its Critics: Reform of Global Financial Architecture*, Cambridge: Cambridge University Press, pp.417-432 at 422.

concern for a restructuring of the process under the present paradigm in such a way as to deal with the unpleasant aspects of the process. A leading voice in this group is Joseph Stiglitz. According to him, it is now increasingly clear to all that globalization has failed to live up to the expectations of its advocates. This is because not only has it not resulted in economic growth in some cases, but even where this has occurred, it has not brought benefits to all, the net effect being that only the few well-off have benefitted at the expense of many who are poor.¹⁴⁵ He adds that there is now an understanding that many of the problems with globalization are of our own making, as a result of the way globalization has been managed, and he consequently calls for a reform of globalization:

Globalization can be reshaped, and when it is, when it is properly, fairly run, with all countries having a voice in policies affecting them, there is a possibility that it will help create a new global economy in which growth is not only more sustainable and less volatile but the fruits of this growth are more equitably shared.¹⁴⁶

This concern for restructuring the global system derives from the conviction that it is the emphasis on market fundamentalism or the imperatives of the ‘Washington Consensus’ underpinning the globalization process, and the consequent inequality this has engendered, that has made it a threat to open society.¹⁴⁷ Concerted efforts must therefore be made to deal with these deleterious effects to guarantee the sustenance of the present neo-liberal paradigm in the overall interest of all.

1.6.4 Eclectic Position

The third school of thought consists of writers who have taken a middle course in the debate about the impact of globalization on human rights. One common thread running through the arguments of theorists in this category is that they see globalization as having both positive and negative impacts. The implication of this is that whether the beneficial or negative aspects will dominate in any given situation depends on how the process is applied. In other words, to them, globalization is an instrument that can be used to attain

¹⁴⁵ J. Stiglitz, 2002, *Globalization and its Discontents*, London: The Penguin Press, p.20.

¹⁴⁶ Ibid, p.22. This point is also elaborated in his subsequent book, J. Stiglitz, 2006, *Making Globalization Work*, London: Penguin Books, p.24.

¹⁴⁷ G. Soros, 1998, *The Crisis of Global Capitalism: Open Society Endangered*, London: Little, Brown and Company, p. xxii.

either a beneficial or negative end like every other human phenomenon. Although this position comes close to the neo-liberal strand of the negative model discussed above, it is distinguishable from the latter in not taking a definite stand on whether the impact of globalization on human rights is beneficial or negative. Thus in their comprehensive analysis, Robert McCorquodale and Richard Fairbrother, while not taking a stand either way, contend that it is important to be aware of the opportunities and dangers of globalization for the protection of human rights, and that through such awareness we can ‘seek to ensure that the dangers are diminished and the opportunities are taken.’¹⁴⁸

This perspective sees human rights as often carried by a variety of winds on both sides of globalization’s borders or divides, so making it an open question as to which side human rights will ultimately be secured. Accordingly, emphasis is placed on the relevance of contingency in the analysis of the effects of globalization on human rights since, in their view, globalization is neither inherently a friend nor a foe of human rights.¹⁴⁹ This is a non-essentialist, non-committal interpretation of globalization which emphasizes the fact that its effect on human rights will depend on how it is used.

1.6.5 Critique

It is my contention that these perspectives represent a conventional approach to the subject - an approach that has greatly impeded full understanding of the true relationship between globalization and human rights. Not only do they accentuate particular aspects of the relationship, they ignore the dynamics of social change underpinning human existence. In the first place, it seems patently simplistic and reductionist to view the relationship between globalization and human rights as a linear, uni-directional correlation wherein the former is seen as the independent variable and the latter, the dependent variable. As is well-known, the nature of such a relationship presumes that the dependent variable is always static and taken as a ‘given’ while the independent one is dynamic.

¹⁴⁸ R. McCorquodale and R. Fairbrother, 1999, ‘Globalization and Human Rights, 21*Human Rights Quarterly*, 735-766 at 766.

¹⁴⁹ J.L. Dunoff, 1999, ‘Does Globalization Advance Human Rights? 25 *Brooklyn Journal of International Law*, pp.126-139 at 138.

However, contrary to such assumptions, human rights are not static, but dynamic and always reflective of changes in societal norms and values. To take one example, the right to property was one of the leading rights that provoked the emergence of rights discourse and was said to be so fundamental that no government was allowed to interfere with it.¹⁵⁰ Today, that domineering picture of the right to property has been considerably attenuated, and it is now accepted that property rights can be interfered with by the state, the only condition being the payment of compensation in appropriate cases.¹⁵¹ Indeed, one of the key criticisms of contemporary globalization is that it seeks to re-invent the pre-eminence of this right which arose from the liberal paradigm, and secure the same largely for transnational corporations, often seen as the main drivers of the globalization machine.

Moreover, the globalization process itself – if it is to be meaningful and beneficial to humankind, to any degree, ought to have embedded in it some basic tenets or elements of human considerations. In other words, it should be influenced, shaped, and even structured in some ways, by the overwhelming imperative of human rights considerations. It is only in this context that one can properly situate, for example, the United Nations Declaration on the Right to Development which recognizes that development is a holistic concept embodying considerations of human rights.¹⁵² To move away from the problems inherent in the conventional interpretations of the relationship, it is suggested that a paradigmatic shift in the focus of analysis is required to enable sufficient consideration of the corresponding and countervailing influence of both concepts on each other and enrich the discourse.

An even more fundamental problem with the dominant beneficial perspective of the relationship is the direct or implicit acceptance of the inevitability, and irreversibility, of the globalization process. It is said that since social and economic relations evolve with inevitable changes in society, the globalization process cannot be stopped or impeded.

¹⁵⁰ Indeed, Article 17 of the Declaration of the Rights of Man and the Citizen declared it to be ‘inviolable and sacred’. M. Loughlin, 2000, *Sword and Scales: An Examination of the Relationship between Law and Politics*, Oxford: Hart Publishing, p.203.

¹⁵¹ However, relics of the old conception still rear their heads particularly on the extent of powers of eminent domain that a state has over private property, as illustrated in the conflicting interpretations of that power in American constitutional jurisprudence. See, D. Schneiderman, 2008, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge: Cambridge University Press, pp.48-56.

¹⁵² The United Nations Declaration on the Right to Development (4 Dec. 1986), UNGA Res.41/128

Informed by this understanding, the argument has been either that the process should continue as it is and be expanded,¹⁵³ or that we should endure it and seek to adapt our institutions and systems to this all-powerful phenomenon.¹⁵⁴

It is, however, my contention that far from being an uncontrollable phenomenon, the globalization process can actually be reshaped and restructured for the overall benefit of humankind. From a historical analysis of the process, where earlier phases of globalizations and de-globalizations can be identified, it is clear that conscious human actions have played a leading role in the nature, scope and extent of globalization. To buttress this, reference may be made first, to the fact that in the specific case of Africa, globalization can be traced to the contact with Europeans in the 15th century. This contact, which was initially predicated on ordinary trade relations, eventually transformed into the inglorious slave trade. It also led to colonialism which justified, and in several instances, made invisible, the massive human rights abuses that took place during that period. These processes were evidently carried out and planned by human agency. Second, the First World War, the Great Depression of the 1930s and the Second World War were periods when the globalization process was at its lowest ebb and had to be kick-started later by conscious human efforts. In the same vein, in contemporary times, international financial institutions such as the IMF and World Bank, which are today key agents of globalization were consciously created by humans while their present policies are being designed and ‘ably’ driven by human economic and political experts. It is thus obvious that contemporary globalization is not an uncontrollable phenomenon and can be restructured through human institutions. Drawing from this analysis, I argue that the impact of globalization on human rights in Africa is reflective of this leading role of human actions and agencies whether from the economic philosophy and imperatives of capitalism which necessitated the colonial project in the first place, or through the operations of international economic institutions.

A related issue inherent in the conventional narrative is the view that there are no alternatives to globalization. However, as the increasing level of social and economic activism in this area has shown, an alternative to globalization could be, and is indeed

¹⁵³ In the words of Martin Wolf, ‘the world needs more globalization, not less’. M. Wolf, 2004, note 128, p.320.

¹⁵⁴ R. Howard-Hassmann, 2005, note 125, p.3.

possible. It is the central argument of Santos and other activists in the World Social Forum¹⁵⁵ that a more beneficial and holistic alternative to globalization can actually be constructed, rather than the present neo-liberal globalization that marginalizes a large proportion of humankind.

The instrumentalist interpretation of globalization explicit in the eclectic position, and assumed in the neo-liberal strand of the negative paradigm, is also inherently problematic. This interpretation perceives globalization as ‘something’ that can be applied to any phenomenon to produce particular outcomes, instead of seeing it as a process of social change.¹⁵⁶

The conventional narrative also fails to take account of the fact that the relationship between globalization and human rights has paradigmatic and sub-paradigmatic dimensions. Thus even from their own premises, it is easy to notice that the impact of globalization on a particular human right may be positive from a paradigmatic reading but negative in a sub-paradigmatic dimension. This is manifest for instance, in the case of a cultural right such as the use of ancestral shrines by a particular community affected by the siting of an economic project in the area. The impact of the action may be seen as negative in preventing the community from staging their cultural festival at the designated area, but positive when that project prevents the sacrifice of human beings associated with the cultural festival.

It is submitted that these difficulties compel us to reconstruct the existing discourse on the relationship between globalization and human rights through the adoption of new strategies using a tool of analysis that takes cognizance of the reverse side of the relationship. That tool of analysis is provided by the ‘Mutual Impact Thesis’, which is next considered.

¹⁵⁵ An analysis of the relevance of the World Social Forum in the emancipatory project is given by B. de Sousa Santos, 2006, *The Rise of the Global Left: The World Social Forum and Beyond*, London and New York: Zed Books.

¹⁵⁶ For a criticism of an approach which regards globalization as the instrument for the changing character of the modern world rather than a process of social change, see J. Rosenberg, 2000, *The Follies of Globalisation Theory: Polemical Essays*, London and New York: Verso, pp.2-4.

1.7 Constructing a New Relationship: The Mutual Impact Thesis

The central argument of this thesis is that not only does globalization affect human rights as reflected in conventional literature, but that, human rights are also impacting on the globalization process. This is a manifestation of the important role of human rights as an instrument of progressive politics and resistance - a development that has a long-standing pedigree. However, before proceeding to buttress that argument, it is necessary to deal with an important preliminary issue that has resonance to the main argument. From the above analysis, it is clear that the globalization process is not only contested but inherently contradictory in nature. I argue that this contradictory nature is also manifested in its impact on human rights especially in Africa. Thus while in some areas it has facilitated the positive identification, adoption and application of certain human rights norms, it has correspondingly also had serious negative effects on some other rights in Africa. For instance, the use of stool slaves and the killing of twins in some African societies have been abolished with the advent of globalization.¹⁵⁷ However, the neo-liberal concept of individual autonomy embodied in globalization has also introduced some fundamental objectionable changes in the cultural norms and values of African societies. Mention may be made here of the recent 'Big Brother' Television reality show that caused a lot of discontent in several African countries,¹⁵⁸ as it was seen as a perversion of the treasured African cultural value that abhors public display of amorous relationships.

Having set the stage, we now consider what different approaches should inform a theoretical understanding of the relationship between globalization and human rights. To do so, we now turn to a fuller consideration of the three pillars underpinning the Mutual Impact Thesis.

¹⁵⁷ The work of the Scottish lady, Mary Slessor in Southern Nigeria is significant in this respect as her vigorous campaigns led to abolition of the practice of killing of twins in that part of Nigeria. Her exploits and travails in this venture are chronicled in W.P. Livingstone, 1925, *Mary Slessor of Calabar: Pioneer Missionary*, 3rd ed. London: Hodder and Stoughton. It is a fitting recognition that her image features on the current £10 note of Clydesdale Bank in Scotland, not to mention the numerous monuments in her memory in Nigeria.

¹⁵⁸ J. Oloka-Onyango, note 32, pp.2-3.

1.7.1 Emergence of Human Rights as an Emancipatory Script

The emergence of human rights has contributed immensely to the realization of progressive social, economic and political changes in society and has also impacted on the globalization process. In advancing this argument, I am not unmindful of the fact that the language of rights can, and has often been appropriated to serve hegemonic purposes or been transformed into a market-friendly conception.¹⁵⁹ However, these uses of the human rights corpus have usually come as a later development after their institutionalization and not at the initial point of emergence which had always been in the context of an emancipatory goal. It is this historical trajectory of the human rights corpus and the insight it offers to contemporary developments that animates my argument.

It is my contention that the form of rights discourse which gained prominence in the late 17th century arose as a result of the need to ensure that governmental powers were not used in an oppressive manner. The Lockean conception of rights was designed to check authoritarianism by ensuring that the rights of citizens were adequately protected by the state. This is indeed the rationale for the existence of the state. In the words of John Locke:

...The reason why men enter into society is the preservation of their property; and the end why they choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the members of the society, *to limit the power and moderate the dominion of every part and member of the society.*¹⁶⁰

The deployment of this emancipatory potential became more pronounced in the Virginia Declaration and American Declaration of Independence, 1776 and subsequently, the French Declaration of the Rights of Man and the Citizen 1789. The famous and often quoted phrase from the American Declaration is instructive:

We hold these truths to be self-evident, that all men [sic] are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.- That to secure these rights,

¹⁵⁹ U. Baxi, 2006, note 109, pp.252-264; see also, U. Baxi, 1998, 'Voices of Suffering and the Future of Human Rights', 8 *Transnational Law and Contemporary Problems*, pp.125-169 at 163-164.

¹⁶⁰ J. Locke, 1970, *Social Contract: Essays by Locke, Hume and Rousseau*, E. Barker, ed., London: Oxford University Press, p.184 (emphasis added).

Governments are instituted among Men, [sic] deriving their just powers from the consent of the governed,- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.¹⁶¹

Moving from this period to the internationalization of the human rights struggle especially after the Second World War, one notices the obvious re-christening of the struggle in the label of ‘human rights’. Thus the UN Charter underscores the need to stem the kind of state arbitrariness and authoritarianism that led to the Second World War. It is on this score that one of the purposes of the United Nations is the promotion of respect for human rights. The epitome of this was the Universal Declaration of Human Rights which proclaimed in its preamble that ‘... disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind...’¹⁶²

Within the African context, this recognition of the emancipatory potential of human rights was brought into sharper focus during the struggles for political independence by African peoples. Although primarily organizations established to actualize the attainment of political independence for these territories, the nationalist movements played an important role in shaping the relationship between the colonial masters and their subjects. Reference may be made to the activities of the Mau Mau Movement in Kenya, National Youth Movement in Nigeria, Convention Peoples Party in Gold Coast, now Ghana, and the African National Congress in South Africa. These organizations were instrumental in containing to a large extent, the imperialistic orientations of the colonial governments which eventually led to the grant or extraction of independence to their peoples. It is significant that these organizations fought for such rights as freedom to vote, equal representation, equal pay, and political independence. These historical antecedents show that over the years, human rights norms and practices have been influential in ways that seek to curtail existing patterns of organized power, and so impacted on the globalization process.

¹⁶¹ American Declaration adopted July 4, 1776. Similarly, Article 2 of the French Declaration states that ‘The aim of every political association is the preservation of the natural and inalienable rights of man;[sic] these rights are liberty, property, security, and resistance to oppression’.

¹⁶² Preamble of the Universal Declaration of Human Rights, 1948.

1.7.2 Impact of Human Rights on International Economic Institutions

The second area where the impact of human rights on globalization is evident is in the change in language and modus of operation by international economic institutions, such as IMF, World Bank and WTO. The recourse to the operations of these institutions is informed by three main considerations. First, the institutions constitute the engine room of the current globalization process as they set the economic agenda and provide the institutional framework for state action in economic matters. Second, their policies and activities in Africa, and indeed the Third World, have over the years, transcended the purely economic or financial sectors and had a tremendous effect on all aspects of life in these countries such as economic, social, environmental and even cultural matters. Finally, and deriving from the above, the interactions between these institutions and African countries have had fundamental implications not only for their operations, but also on the human rights of people in these countries.

Moreover, the central role of these international economic institutions has a historic tapestry. It may be recalled that the IMF and the World Bank were conceived and established after the devastating effects of the Second World War on Europe and the world as a whole and they were essentially to assist in promoting exchange control stability, and the economic development of states respectively. Together with the relatively new WTO,¹⁶³ these institutions have come to represent the locomotive driving the globalization machine. However, the Bretton Woods twins - the IMF and World Bank at the initial stages of their operations, particularly in their relations with Third World countries, appeared to have focused exclusively on economic considerations to the neglect of the attendant human implications of their policy prescriptions. This resulted in massive impoverishment and social discontent in countries that sought financial assistance from the institutions and they began to be seen as veritable instruments in the hands of Western capitalist states to perpetuate the underdevelopment of African states. This precipitated widespread agitations resulting in a change in their way of operating.

¹⁶³ The WTO came into existence on 1st January, 1995 following the Final Act of the Uruguay Round signed in Marrakesh, Morocco on 15 April, 1994. It is, to some extent, a replica of the International Trade Organization which was proposed in 1944 at the Bretton Woods Conference but could not be pursued further following its non-approval by the United States Congress.

But what interpretation do we have of this dramatic change in approach? The standard narrative is that these institutions on their own later began to adopt a more liberal interpretation of their constitutive instruments - their mandate - without reference to the social and political circumstances that necessitated the change in strategy.¹⁶⁴ My contention is that contrary to this narrative, these institutions were constrained to adopt a more liberal interpretation of their mandates under the Articles of Agreement because of the increased human rights and social activism of the period. It must be noted that arising from the failure of African states to meet the 'rising expectations' of their peoples that attended political independence, and recognition that this is attributable, in some measure, to the policies of these Bretton Woods institutions, a groundswell of opposition to the activities of these institutions sprung up, from human rights activists, women groups, environmentalists and peasants. The institutions had to respond to these pressures. In situating this issue within the broader context of the Third World, Balakrishnan Rajagopal aptly makes the point:¹⁶⁵

...the BWIs [Bretton Woods Institutions] did not come to occupy the positions that they do today either as a result of a functionalist logic to solve 'problems' or as a result of a gradual learning process, but as a consequence of a historically contingent and complex interaction with popular resistance to 'development' in the Third World. It is in this interaction that these institutions have invented and reinvented themselves as apparatuses of the management of social reality in the Third World.

This is further buttressed by the fact that, in the case of the World Bank, when the literal interpretation of its Articles prevailed in the first two decades of its operations, the lending focus was substantially on 'developed' countries such as Japan, Australia, Norway, Austria, Finland, France and Italy.¹⁶⁶ It was this increased agitation from Third World countries, coupled with the politics of ideological struggle between the West and East as to which group will secure the support of the Third World, that propelled Western states to facilitate the establishment of the International Development Agency (IDA) in

¹⁶⁴ A typical example of such narrative is contained in, I.F. I. Shihata, 1993, 'Human Rights, Development, and International Financial Institutions', 8 *American University Journal of International Law and Policy*, pp. 27-37.

¹⁶⁵ B. Rajagopal, 2003, *International Law from Below: Development, Social Movements, and Third World Resistance*, Cambridge: Cambridge University Press, p.97.

¹⁶⁶ *Ibid*, p.99 where detailed figures of such loans are given.

1961 with a specific focus on poverty alleviation - a mandate that dramatically expanded their area of coverage to include, education, health, rural development and agriculture.

Although much still needs to be done towards ensuring that these institutions deepen integration of human rights considerations in their operations through the adoption of the counter-hegemonic version as will be argued later, it is appropriate to acknowledge the role of human rights in facilitating this new focus.

1.7.3 Impact of Human Rights NGOs and Social Movements

The third pillar of my argument about the impact of human rights on the globalization process relates to the role of human rights organizations and social movements. The potential of human rights in catalyzing social change is manifest here. It must be mentioned that human rights NGOs now play an increasingly important role in the struggle to influence national and international policies especially those that have relevance to the enjoyment of human rights. Very often, such organizations operate as counter-hegemonic movements. Drawing from the emancipatory capacity of human rights as indicated earlier, human rights NGOs have catalyzed a number of changes in the international system. They have been able to do this through the creation of transnational networks and alliances, often facilitated by the Internet. If the suffering, consequent upon human rights violations within national states motivates human rights NGOs to act - as they often do - in defence of such rights, the increased level of inequality between Western and Third World states as a result of hegemonic globalization has compelled transnational opposition in order to redress the situation.

While the number, diversity and operations of these organizations can raise problematic issues,¹⁶⁷ within the scope of this work, it can be said that they have generally acted in a manner that has impacted greatly on the globalization process. We can identify four key areas where these organizations have actively promoted changes in the international economic system.

¹⁶⁷ One of the most challenging issues is that some human rights NGOs have become veritable agents and instruments of hegemonic capitalist forces on whom they rely for their funding and operations. A critique of human rights NGOs is given in U. Baxi, 2006, note 109, pp.216-233; I. Shivji, 1989, note 97, p.61.

a) United Nations agencies and other international economic institutions now accept the imperative of adopting human rights norms in developmental strategies due to the persistent pressure from human rights NGOs. Although it is arguable whether this serves a hegemonic or counter-hegemonic agenda – an issue to be taken up later - the point remains that there is now general acceptance of the imperative of applying a rights-based approach and ‘mainstreaming’ of human rights in development projects.

b) The vigorous campaigns by human rights NGOs and other anti-globalization activists against the deleterious effects of hegemonic globalization effectively prevented the adoption of the OECD’s proposed Multilateral Agreement on Investments (MAI).

c) Sensitization of the masses to the grave effects of globalization on their economic conditions, an awareness that has led to the resistance of certain policies and projects designed to further hegemonic globalization. The various anti-structural adjustment programme (SAP) riots in countries such as Nigeria, and Zambia, as well as opposition to the construction of some dams and similar anti-people projects across the continent are clear testaments of the impact and effectiveness of such protests.

d) Transnational corporations, through the prompting of human rights NGOs, have adopted a number of voluntary mechanisms for integrating human rights impact assessment in their operations. Mention may be made of the Voluntary Principles on Security and Human Rights and the Global Sullivan Principles adopted by some states, transnational corporations and a number of NGOs. Although as voluntary mechanisms, the effectiveness of such measures is necessarily limited, they nevertheless underscore the relevance of human rights NGOs and their activities in constraining the operations of these corporations.

It is thus apparent that human rights have had, and continue to have, tremendous impact on the globalization process. However, it remains an open question whether this will ultimately lead to the replacement of the current paradigm or be limited to humanizing the globalization process.

1.8 Conclusion

An attempt has been made in this chapter to highlight the foundational issues that define the central argument of this thesis. The issues discussed, I argue, provide the necessary

context and barometer for validation of the argument advanced. In this respect, attention has been drawn to the nature of globalization and the attendant problem of appropriately defining it. It has been shown that this difficulty is largely attributable to the fact that the globalization process necessarily implicates several disciplines of inquiry such as economics, sociology, science and technology, and law among others. From the definitional problems, I proceeded to the various dimensions of globalization as well as the crucial issue of whether globalization is a myth or reality, a new phenomenon, or one that has resonance in historical analysis. In order to provide an appropriate platform for the subsequent discussion of the relationship between globalization and human rights, I also highlighted the nature of human rights and the normative problems that have characterized its development over the years. In particular, attention focused on the internationalization of human rights discourse through the adoption of the Universal Declaration of Human Rights in 1948. This Declaration, which gave rise to the elaboration and adoption of subsequent international instruments, also fuelled its own controversy principally on account of the dichotomy between universalism and relativism. I have argued in support of the view that the solution to this controversy does not necessarily lie in acceptance of either of these positions but the use of a cross-cultural dialogue based on the understanding that through this mechanism, an international consensus on universally acceptable constellation of rights can emerge.

The central argument informing this thesis was also presented: that not only does globalization impact on human rights as conventional opinion has it, but human rights are also impacting on the globalization process in significant ways. It is only when we take account of this process that we can have a comprehensive understanding of the relationship between globalization and human rights. In support of this contention, reference was made to three main areas where the impact of human rights on contemporary globalization is discernible: the emergence of human rights as an emancipatory script, human rights impact on the activities of international economic institutions, and the role of human rights organizations in contemporary society. These points, which will be elaborated in subsequent chapters, show that we need to have a new approach to interpreting the relationship between globalization and human rights - not a linear one, where globalization impacts on human rights, but instead from a mutual

impact perspective. The foundational issues discussed in this chapter will have greater relevance when we examine the African historical experience with globalization since this has continued to determine the direction of social and economic development in the continent with far-reaching implications for human rights. That is the subject of the next chapter.

Chapter 2: Globalization and Human Rights in Africa: Setting the Context

2.1 Introduction

This chapter seeks to locate Africa within the globalization matrix by exploring the dynamics underpinning the interaction between globalization and human rights. Accounting for over one-tenth of the world's population, Africa remains the least developed of all the regions of the world with the largest number of persons living below the poverty level of less than one dollar a day.¹ It also has the sad record of having the highest number of ethnic and political conflicts² in recent times with the attendant violations of human rights. These unenviable statistics raise fundamental issues concerning the place of Africa in the globalization process and the role of human rights norms in that development. In order to unpack the issues, it is expedient to examine, first, the involvement of Africa with the earlier phases of the globalization process, and then the contemporary phase of the process. Using a human rights lens, the inquiry asks whether there is a historical link between the travails of African countries today and their past, particularly through the contact with Europe and other parts of the world.

In this connection, the analysis will be undertaken through the prism of the pre-colonial, colonial and post-colonial periods. This will, however, not involve any detailed historical excursion into these periods as the searchlight will be limited to those features that demonstrate the interaction between globalization and human rights and how such developments have influenced, and been influenced by, contemporary events. In order to properly factor in the human rights discourse within this compass, the chapter will also

¹ According to the New Partnership for Africa's Development (NEPAD), 'in Africa, 340 million people, or half the population, live on less than US\$1 per day', *The New Partnership for Africa's Development*, adopted in Abuja, Nigeria, October, 2001, paragraph 4.

² The current situation in Somalia, Sudan, and DRC epitomize the enormity of this problem, in the same way that the Sierra Leonean and Liberian crises engaged international attention in the 1990s. Somalia, for instance, has not had an effective central government since the overthrow of Mohammed Siad Barre in 1991. J. Gettleman, 2009, 'The Most Dangerous Place in the World', 171 *Foreign Policy*, March/April, pp.60-69 at 62-64.

examine the question whether human rights are entirely alien concepts or pre-existing notions in Africa. The contemporary conception and relevance of human rights in the continent and the fundamental impact of its norms on development initiatives such as the New Partnership for Africa's Development will also be examined as manifestations of the mutual impact between human rights and globalization. The analysis of these developments lead to the conclusion that although Africa's past has some connection with the enormous challenges facing the continent, the growing salience of human rights in the development process is indicative of the emergence of a new form of relationship with the processes of globalization.

2.2 Africa and the International System: Historical Perspective

There is no doubt that the pervasive influence of the globalization process is not limited to contemporary times nor is it spatially limited. Africa, like other regions of the world, has not escaped the pervading effects of globalization. Indeed, it can be said that in several respects, the impact of globalization on the continent has been, and continues to be, momentous.³ It is my contention that a meaningful understanding of this impact can only be obtained through historical analysis of the nature, contours and circumstances that gave rise to, and have sustained, the involvement of Africa with the globalization process. Such analysis will enable us to place in context the nature of the relationship between globalization and human rights in the continent. It will also provide a basis for assessment of the role of internal and external factors and institutions in the development or underdevelopment of the continent.

As a prelude, it is necessary to bear in mind that the incorporation of Africa into the globalization framework took three main forms. The first was through ordinary trade relations, between Africans and Europeans which later transformed into the slave trade, followed by direct colonization of Africa by European states, and lastly, the contemporary post-colonial period sometimes referred to as 'neo-colonialism'.⁴ To a large extent, these

³ N. J. Udombana, 2002, 'How Should We Then Live? Globalization and the New Partnership for Africa's Development', 20 *Boston University International Law Journal*, pp.293-354 at 302-319.

⁴ K. Nkrumah, 1965, *Neo-Colonialism: The Last Stage of Imperialism*, London: Thomas Nelson & Sons Ltd.

correspond to the three main periods in the conventional periodization of African history, namely; pre-colonial, colonial and post-colonial periods.⁵ I will take them in turn.

2.2.1 Pre-Colonial Period

Drawing from the historical dimension of globalization established earlier, it can be said that the involvement of Africa with the earlier phase of globalization can be traced to the contact between Africans and Europeans in the 15th century. This period, often described as the ‘age of exploration’⁶ in Europe, witnessed expeditions by Portuguese, English and Spanish explorers to open trade and colonial opportunities in Africa, among other areas. The epochal nature of that contact and the attendant interactions generated thereby has left an indelible mark on the present condition of Africa in the international system.⁷ From its very inception, the relationship was primarily based on trade between Africans and European agents especially the Portuguese, but this later developed, sadly, into the trade in human beings as Europeans realized the abundant human capital available in Africa which would be very useful for the then dominant agricultural mode of production that required physical labour.⁸

The discovery of the ‘New World’ by Christopher Columbus in 1492 added new impetus to this demand for labour. This development marked the beginning of the triangular trade between Africa, Europe and the New World whereby Africans were captured and sold to European merchants who sent them either to the West Indies or the ‘New World’ to work in the plantations.⁹ It is pertinent to mention that African rulers and traders were used as middlemen to procure the slaves. The slave trade was a very profitable ‘business’ for both European slave buyers and their African suppliers hence

⁵ As analyzed for instance, in P. Curtin, et al, 1995, *African History: From earliest times to Independence*, 2nd ed. Essex: Longman Group Limited.

⁶ D.J. Bederman, 2008, *Globalization and International Law*, New York and Hampshire: Palgrave Macmillan, p.7.

⁷ Recognizing the debilitating impact of this contact, Walter Rodney has argued in his seminal book that ‘African development is possible only on the basis of a radical break with the international capitalist system, which has been the principal agency of underdevelopment of Africa over the last five centuries’. W. Rodney, 1990, *How Europe Underdeveloped Africa*, London: Bogle-L’Ouverture Publications, p.7.

⁸ G.K. Kieh, Jr., 2008, ‘Introduction: From the Old to the New Globalization’, G.K. Kieh, Jr. ed. *Africa and the New Globalization*, Surrey: Ashgate Publishing Limited, pp.1-11 at 4.

⁹ T. Obadina, 2008, ‘Slave trade: a root of contemporary African Crisis’, *African Economic Analysis*, available: www.africaeconomicanalysis.org/articles/38/1/Slave-trade-a-root-contempor... accessed 13 May 2009.

there was opposition to its abolition, and the trade continued in many parts of Africa several decades after its formal abolition by Britain in 1807.¹⁰

It can therefore be said that the role played by African rulers and traders in the slave trade era largely parallels the role being played today by African political leaders ever willing to subjugate and mortgage the interests of their fellow citizens and nations for personal gains. The pauperization of the continent through corrupt leadership and the stashing away of public funds into private foreign bank accounts, are manifest examples reminiscent of the activities of earlier rulers under slave trade. As Tunde Obadina has pithily remarked:

‘The role of slave-trading African ruling classes in this market [triangular slave trade market] is not radically different from the position of the African elite in today’s global economy. They both traded the resources of their people for their own gratification and prosperity. In the process they helped to weaken their nations and dim their prospects for economic and social development’¹¹

To be sure, the slave trade had a profound impact on the economic, social, cultural and psychological life of African societies and peoples. Apart from the de-population of African societies and the grave human rights violations and suffering it engendered, it arrested and distorted the cultural and economic development of Africa. It promoted inter-communal wars which were waged to procure slaves with the attendant loss of human lives. Western industrialization through the emergent capitalism also benefited immensely from the slave trade. Ironically, while Europe invested the profits from slave trade in laying the foundation of a powerful economic empire, African rulers and traders were contented with consumption items that did not in any way aid the industrialization of the continent. It has thus been said that ‘the slave trade drew African societies into the international economy but as fodder for Western economic development’.¹²

¹⁰ Britain outlawed the African slave trade through the Slave Trade Act, 1807. However, since this Act merely contained penalties of £100 per slave for British violators and forfeiture of ships used for the exercise, it did not comprehensively deal with the matter. Consequently, in 1833 the Slavery Abolition Act which applied throughout the British Empire was enacted. Significantly, these statutory measures were the result of the untiring efforts of several British Anti-Slavery activists who focused on the dignity of human beings and regarded slavery as dehumanizing to humankind.

¹¹ T. Obadina, 2008, note 9, p.4.

¹² Ibid.

More importantly, the fact that Africans could be bought at such low prices as happened during the slave trade, significantly promoted the belief about white superiority over blacks. As the centuries passed and this inglorious trade and its consequences played out, this white superiority theory was further strengthened. According to Mueni wa Muiu, this theory received great impetus during the Enlightenment period when philosophers such as David Hume and Georg Hegel argued that Africans were naturally inferior to white people and had not contributed to culture and world history.¹³ Indeed, as would be shown in the next sub-section, this superiority theory was one of the driving forces for the colonization of Africa in the second half of the 19th century.

The overwhelming imperatives of the emerging capitalism also reinforced the need for the acquisition of colonies. Cecil Rhodes underscored the moving spirit of the period when he rationalized the adventure in the following words: 'we must find new lands, from which we can easily obtain raw materials and at the same time exploit the cheap slave labour that is available from the natives of the colonies. The colonies [will] also provide a dumping ground for the surplus goods produced in our factories.'¹⁴ In addition, the profitability of the unequal trade relations established between Africans and Europeans and the benefits of the slave trade led to considerable interest shown by European powers to colonize territories in Africa culminating in the infamous scramble for Africa - a scramble that reached its crescendo and had to be mediated by the Berlin Conference of 1884-85.¹⁵

2.2.2 Colonial Period

In discussing the colonial period and the experience of Africans during that period within the framework of this work, it is instructive to bear in mind the following essential points. First, the experience of colonialism by African peoples was not the same throughout the continent since the colonial powers adopted different methods in dealing with their

¹³ M. Muiu, 2008, 'Civilization on Trial: The Colonial and Post-Colonial State in Africa', XXV *Journal of Third World Studies*, pp.73-93 at 76.

¹⁴ R.I. Rotberg, 1988, *The Founder: Cecil Rhodes and the Pursuit of Power*, New York and Oxford: Oxford University Press, p.94. It is significant that Cecil Rhodes is the founder of what came to be known as Rhodesia, the present day Zimbabwe.

¹⁵ The imperial and economic dynamics of the Berlin Conference are examined in A. Anghie, 2004, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, pp.90-97.

acquired territories based on their overall colonial policies. Thus whereas Britain adopted the indirect rule approach in its territories as expounded by Lord Lugard,¹⁶ France applied the assimilation principle wherein its colonies were regarded as extensions of French territories, and, to some extent, accorded similar opportunities as in France. For instance, the few educated Africans in French colonies were given the opportunity to be elected into the French Parliament.¹⁷ The different approaches adopted by the colonial powers also influenced to a large extent, the form and nature of the anti-colonial struggles that ensued in those territories.¹⁸ Second, in terms of composition, Africa is not a homogenous entity but a continent of diverse peoples and cultures. Nevertheless, some general features and commonalities are discernible in the colonial rule in Africa and the response to this alien domination and control. It is those common features that are emphasized in this analysis.

Colonial rule basically meant the formal partition of Africa and its direct occupation by European powers, resulting in the exclusive use of African resources for Europe's development.¹⁹ This process which was formalized by the Berlin Conference saw Africa divided between Belgium, Britain, Germany, France, Italy, Portugal and Spain without any consideration whatsoever for the rights of the inhabitants of the territories so partitioned. Having carved out territories, the colonial powers set up administrative structures to guarantee effective occupation of those territories in tandem with extant rules of international law.²⁰ Moreover, in order to realize the economic objectives of colonization, development projects executed in the colonies were tailored to suit the economic interests of the colonial powers.²¹ The belief about white superiority over

¹⁶ F.D. Lugard, 1929, *The Dual Mandate in British Tropical Africa*, 4th ed., Edinburgh and London: Blackwood and Sons Ltd, pp.193-229. The policy entailed using existing traditional institutions such as Chiefs and Emirs to perform the basic functions of governance in their territories under the surveillance of colonial officials.

¹⁷ It was on this score that Leopold Sedar Senghor who later became the President of Senegal was elected as a Deputy to the French Parliament representing Dakar. Portugal also had a policy in several respects close to the French approach.

¹⁸ Thus in general, while the struggle for independence took a violent turn in former French colonies such as Algeria, Morocco, Portuguese colonies of Angola and Mozambique, it was largely peaceful and dialogic in British colonial territories such as Nigeria, Ghana.

¹⁹ M. Muiu, 2008, note 13, p.74.

²⁰ This rule of international law which emphasized effective occupation as validating title to territories is exemplified in the famous *Eastern Greenland Case*, (1933), PCIJ, Ser. A/B, No.53.

²¹ M.L. McNulty, 1995, 'The Contemporary Map of Africa', P.M. Martin and P. O'Meara, eds. *Africa*, Indiana: Indiana University Press, pp.10-45, at 43.

blacks as a pillar of the colonial project was reflected in the policies implemented in the colonial territories. According to Mahmood Mamdani, the colonial policies were based on a distinction between 'citizen' and 'subject'.²² While white settlers were accorded full rights of citizenship, the indigenous peoples were classified as 'subjects' with different rules applicable to them - rules that in large measure dehumanized and treated them as sub-humans.

Deriving from the superiority theory, it was thus necessary to take measures to 'civilize' Africans. This gave rise to what came to be known as the 'civilizing mission' based on the construction of Africans as the 'other' who, either by a mix of persuasive or coercive means, needed to receive the 'gift' of human rights.²³ This construction presented Africans as 'uncivilized' and irrational people ruled by emotion; a belief that shaped the imperial policies of the European countries.²⁴ In relation to human rights, this belief had two main components. First, it was used to justify some of the atrocities and human rights violations perpetrated against African peoples in the process of colonialism such as denial of basic rights, and all forms of discriminatory practices. Second, it served as the rationale for the desecration and demonization of African cultural practices in favour of those of Europe. Indeed, the civilizing mission was a complete package, as it entailed invalidating 'repugnant'²⁵ customs and traditional practices, introduction of new conception of rights based on individualism, and above all, new mechanisms of governance patterned along European models. Yet, as Mueni wa Muiu points out, the truth remains that this 'civilizing mission' was basically a mask for the exploitation of African resources.²⁶

²² M. Mamdani, 1996, *Citizen and Subject: Contemporary Africa and the legacy of late Colonialism*, Princeton, New Jersey: Princeton University Press, p.17.

²³ M. Muiu, 2008, note 13, pp.75-76, U. Baxi, 2006, *The Future of Human Rights*, 2nd ed. Oxford: Oxford University Press, p.39.

²⁴ M. Muiu, 2008, note 13, p.77.

²⁵ Thus provisions were inserted in enactments receiving English laws in British colonial territories that customary laws in those colonies could only be enforced by the courts if they were 'not repugnant to natural justice, equity and good conscience', as in S.19 of the Supreme Court Ordinance, No.4 of 1876 in the case of Nigeria, or 'not repugnant to justice and morality' the phrase used in the East African Order in Council, 1902, and S.20 of East Africa Native Courts Amendment Ordinance, No. 31 of 1902 applicable in Kenya and Uganda.

²⁶ M. Muiu, 2008, note 13, p.80.

The missionaries proved to be very useful agents of this project as they prepared the minds of Africans to accept colonial rule and their inferior status by urging them to discard their traditional ways, religions and cultural practices in favour of European norms and beliefs. While some of the traditional practices were no doubt reprehensible,²⁷ that should not have justified the kind of wholesale rejection of African traditional practices that colonialism entailed, as culture is a veritable index of a peoples' identity. Companies incorporated in the metropolitan countries also acted as agents of the civilizing mission. Thus the Royal Niger Company was instrumental to the British occupation of the area now known as Nigeria, while the British East Africa Company laid the groundwork for the annexation of Kenya and Uganda.²⁸

One of the most disturbing aspects of colonialism in Africa was that it led to the partition of the continent in a manner that did not take cognizance of the historical and cultural affinities of the people.²⁹ Taslim Elias encapsulates this point as follows:

In 1884-1885, the European imperial powers met in Berlin and without the consent or participation of the African people, demarcated the Continent of Africa into colonies or spheres of influence. In many cases, kingdoms or tribes were split with such reckless abandon that they came under two or three European imperial powers. This event was the genesis of many present-day conflicts and virtually insoluble problems in the African Continent.³⁰

The result is that today people of the same ethnic group are scattered in two or even three States. Thus the Tutsis and the Hutus are to be found in Rwanda, Democratic Republic of Congo and Uganda. Many Hausas are in Nigeria, a former British colony, while others are found in former French-controlled Niger. Similarly, the Yorubas are found in Nigeria as well as in Benin Republic, while the kingdom of Congo was divided between the Belgians, the French and the Portuguese.³¹

²⁷ For instance, the practice of killing twin children in some parts of Nigeria or that of burying kings with slaves or those captured in wartime. O.C. Eze, 1984, *Human Rights in Africa: Some Selected Problems*, Nigerian Institute of International Affairs and Macmillan Publishers Ltd, pp.12-13.

²⁸ J.T. Gathii, 2007, 'Imperialism, Colonialism, and International Law', 54 *Buffalo Law Review*, pp.1013-1066 at 1019.

²⁹ A comprehensive analysis of the various ethnic groups that suffered this partition in Africa is contained in A. I. Asiwaju, ed. 1984, *Partitioned Africans: Ethnic Relations Across Africa's International Boundaries 1884-1984*, Lagos: Lagos University Press.

³⁰ T.O. Elias, 1990, *Africa and the Development of International Law*, 2nd ed. Brill Academic Publishers, p.viii.

³¹ M. Muiu, 2008, note 13, pp.82-83.

One other bitter legacy of colonialism which has resonance for the present development crisis in the continent is that it brought with it the concept of the state with attendant governance structures that are in many respects alien to the African conception of governance.³² As the New Partnership for Africa's Development (NEPAD) framework document notes in Paragraph 21, 'colonialism subverted hitherto traditional structures, institutions and values or made them subservient to the economic and political needs of the imperial powers'. The result is that the Westernized elites who eventually took over the reins of power upon the attainment of political independence were unable to integrate such notions with the African conception of governance.

One must not, however, completely discountenance colonialism as it also engendered some important social and economic changes in African countries through the introduction of improved medical services, increase in the variety and yield of food crops, improved forms of sanitation, etc.³³ Nevertheless, on the whole, the balance is that colonialism impeded the development of the continent and made it difficult for the succeeding leaders to adequately grapple with the dynamics of integrating the imported Western ideas with traditional modes of governance as the post-colonial trajectory has shown.

2.2.3 Post-Colonial Africa

The implementation of the aforesaid colonial policies in Africa precipitated intense and sustained agitations by Africans which culminated in the grant or extraction of independence, with Gold Coast (now Ghana) leading the pack in 1957. Subsequently, several other African countries gained independence in the 1960s.³⁴ However, the attainment of this 'flag independence'³⁵ did not really translate to economic

³² B. Davidson, 1992, *The Black Man's Burden: Africa and the Curse of the Nation-State*, Ibadan: Spectrum Books Limited, p.12.

³³ L.H. Gann and P. Duignan, 1981, *Africa South of the Sahara*, Stanford, California: Hoover Institution Press, p.13.

³⁴ Indeed, over two-thirds of African states gained independence in the 1960s and eventually participated in the establishment of the Organization of African Unity (OAU) in 1963.

³⁵ Kieh, Jr. 2008, note 8, p.5; M.Tsele, 2003, 'Come, Let us Re-build: Challenges of Globalization for Africa; Economic Justice', Paper presented at the 8th General Assembly of the African Conference of Churches, Yaounde, Cameroon, November 22-27, 2003, p.7.

independence for African states as a number of endogenous and exogenous factors have conspired to emasculate them and rendered the notion of sovereignty as applicable to these states even more problematic than in general international law.³⁶

In this connection, it may be mentioned that African leaders have been unable to fashion and implement economic policies designed to utilize the abundant human and natural resources available in their countries to promote economic development. On the contrary, they have largely adopted policies that tied their countries to the apron-strings of the former colonial masters, while using their political positions as avenues for personal enrichment at the expense of their countries.³⁷ It was under such circumstances that soon after the wave of political independence, the continent witnessed a deluge of military coups that brought the military into governance in most African countries usually under the pretence of wanting to sanitize the polity from corrupt politicians. Regrettably, soon after such messianic posturing, the military on their part utilized the opportunity thus presented by amassing wealth especially as there were no constitutional or political checks on them, except perhaps, the fear of possible overthrow.³⁸ Although there is a new wave of democratic regeneration in the continent, as military rule is now treated with disfavour,³⁹ the crucial issue is how to internalize transparency and accountability in governance and reduce the high level of corruption militating against the economic development of the continent.⁴⁰

³⁶ An analysis of the problem of sovereignty is contained in E.N. V. Kleffens, 1953, 'Sovereignty in International Law' 82 *Hague Recueil Des Cours*, pp.5-130 at 117-126.

³⁷ For instance, Mobutu Sese Seko who took over power in 1965 and ruled Zaire, now Democratic Republic of Congo for 32 years had a private fortune of about \$8 billion in a country where the per capita income was the equivalent of \$135 a year. The fortune was obviously derived from revenue stolen from state treasury and humanitarian aid. H. McCullum, 2006, *Africa's Broken Heart: Congo- the Land the World Forgot*, Geneva: WCC Publications, p.9.

³⁸ The first coup in Africa where the military took over power fully from elected civilian government was in Togo in January, 1963 during which the then President Sylvanus Olympio was killed. This was soon followed by several other coups and counter-coups in the continent with the attendant instability and gross violations of human rights involved. An analysis of the dynamics that precipitate coups are examined in N. Ngoma, 2004, Coups and Coup Attempts in Africa: Is there any missing link? 13 *African Security Review*, pp. 85-94 at 89-92.

³⁹ Indeed, Article 4(p) of the African Union Act expressly provides that one of its principles is the 'condemnation and rejection of unconstitutional changes of government.' For an analysis of this provision and other efforts aimed at preventing coups in the continent, see F. Cowell, 2011, 'Preventing Coups in Africa: Attempts at the protection of human rights and constitutions', 15(5) *International Journal of Human Rights*, pp.749-764.

⁴⁰ The Commission for Africa underscored the magnitude of this problem in the following words: 'Corruption is systemic in much of Africa today. It is another of Africa's vicious circles: corruption has a

Apart from these internal failings, the involvement of independent African states in the globalization process has not produced the desired results in terms of economic development. To be sure, a substantial part of that engagement since independence has been through transactions with international financial institutions, especially the Bretton Woods duo of IMF and World Bank. Sadly, the prescriptions and conditionalities stipulated by these institutions for states that sought financial support from them have had negative effects on the economic conditions of such states, with the result that the institutions are now seen - rightly or wrongly - as Western stratagems for the underdevelopment of African countries.⁴¹ This view derives support from the fact that the implementation by African states of structural adjustment programmes ('SAP's) recommended by these institutions had in many cases worsened, rather than improved the conditions of the masses in these countries. Consequently, according to Nsongurua Udombana, 'SAPs have turned out to be bitter herbs of poverty, as the unholy wedlock between African States and the Bretton Woods institutions brought about some irreparable damages to African economies'.⁴²

The great expectations that attended political independence have thus given way to cynicism and alienated the state from the citizenry. The defunct Organization of African Unity (OAU) boldly acknowledged this grim reality when it admitted that 'we have noted, at the close of the 20th century, that of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned.'⁴³

corrosive effect on efforts to improve governance, yet improved governance is essential to reduce the scope of corruption in the first place'. The Commission for Africa, 2005, *Our Common Interest: An Argument*, London: Penguin Books, p.43. The current efforts to deal with the corruption scourge at the continental level are examined in N.J. Udombana, 2003, 'Fighting Corruption Seriously? Africa's Anti-Corruption Convention', 7 *Singapore Journal of International and Comparative Law*, pp. 447- 488 at 459-477. K. Olaniyan, 2004, 'The African Union Convention on Preventing and Combating Corruption: A Critical Appraisal', 4 *African Human Rights Law Journal*, pp.74-92 at pp.86-89.

⁴¹ J.M. Mbaku, 2008, 'The African Debt Crisis and the New Globalization', G.K. Kieh, Jr. ed. *Africa and the New Globalization*, Surrey: Ashgate Publishing Limited, pp.29-50 at 40; P. Okigbo, 1989, *The African Debt Trap*, Lagos: Lagos University Press, pp.16-18.

⁴² N. J. Udombana, 2002, note 3, p. 313.

⁴³ *Yaounde Declaration (Africa: Preparing for the 21st Century)*, adopted at the 32nd OAU Summit July, 1996 at Yaounde, Cameroon, AHG/Decl.3(XXX11) paragraph 2.

More telling is the fact that Africa has the lowest life expectancy, the highest infant mortality and illiteracy rates and lowest GDP, in short, the lowest human development indicator.⁴⁴ It has therefore been said that with such 'pothole and gully indexes, Africa is chewing the cud of underdevelopment in fact and in figure'.⁴⁵ In addition to the predatory activities of the African ruling elite, the re-configuration of the 'state' in compliance with the imperatives of neo-liberal globalization has also been a key factor in the underdevelopment of the continent. To be sure, one of the major pillars of economic globalization is veneration of the market economy whose benefits are usually unevenly distributed.⁴⁶ Accordingly, the emphasis on market forces as defining political and economic relations has enhanced the prebendalist tendencies of the ruling elite who use the instruments of the state to serve their own economic interests.

Moreover, the policies of international financial institutions largely controlled by advanced Western states manifest a considerable measure of inconsistency and double standards in relation to Third World countries. For example, while the institutions and Western countries advocate the opening up of the economies of African states to enable them to participate and reap the presumed fruits of globalization, Western countries on their part maintain protectionist economic policies⁴⁷ - policies that have, in conjunction with those of the international financial institutions, impacted negatively on the economies of African states which now constitute the majority of states in the Heavily Indebted Poor Countries (HIPC) group.⁴⁸

Accordingly, the reality in Africa today is that the confluence of these factors has conspired to prevent the state from meeting the basic needs of its citizens as the adoption of the prescriptions based on the 'Washington Consensus' has entailed questionable withdrawal of the state from the provision of some basic social services.⁴⁹ The result is that in the name of privatization, for instance, national enterprises and institutions are sold to multinational corporations in alliance with local compradors who are often

⁴⁴ Ibid, paragraph 6.

⁴⁵ N.J. Udombana, 2002, note 3, p.302.

⁴⁶ P. O'Connell, 2007, 'On Reconciling the Irreconcilables: Neo-liberal Globalisation and Human Rights', *7 Human Rights Law Review*, pp.483-509 at 491.

⁴⁷ J. Stiglitz, 2002, *Globalization and its Discontents*, London and New York: Penguin Books, pp.6-7.

⁴⁸ J.M. Mbaku, 2008, note 41, pp. 34-42.

⁴⁹ G.K. Kieh, Jr., 2008, 'The New Globalization: Scope, Nature and Dimensions', G.K. Kieh, Jr. ed. *Africa and the New Globalization*, Surrey: Ashgate Publishing Limited, pp.13-27 at 14-15.

government officials and their agents.⁵⁰ These developments have cumulatively led to the high level of poverty and inequality in Africa with far-reaching implications for the realization of human rights. This explains the increasing discontent with contemporary globalization and the demands by some human rights NGOs and social movements for the reshaping of the process to eliminate its negative aspects. Specifically, the various anti-SAP riots that took place in several African countries in the 1980s and 1990s were efforts to collectively oppose the deleterious effects of this hegemonic globalization.⁵¹

As will be shown later, through these movements and other similar developments, the human rights corpus has been impacting on the globalization process as the international financial institutions now accept the imperative of integrating human rights considerations not only in their policies and programmes, but as vital components of the development process.⁵² While there is much to be said in support of the view that these new strategies are necessarily cosmetic and superficial, even designed to secure neo-liberal globalization, a point further elaborated later, it is equally important to see it as representing recognition by the institutions and their prime movers of the transformative potential of human rights in catalyzing changes to the globalization process. This takes me to an examination of the human rights corpus in Africa as it affects the theme of this work.

2.3 Human Rights in Africa

The theory and practice of human rights have had a chequered history in Africa. This is because human rights norms have not only received varying levels of recognition and denunciation during the various periods of the continent's history, but have also been the

⁵⁰ J. Craig, 2002, 'Privatization and Indigenous Ownership: Evidence from Africa', 73(4) *Annals of Public and Cooperative Economics*, pp.559-576 at 571-572; R. Tangri, and A. Mwenda, 2001, 'Corruption and Cronyism in Uganda's Privatization in the 1990s', 100(398) *African Affairs*, pp.117-133 at 121-126 where mind boggling examples of these practices in Uganda are given.

⁵¹ The intensity of the protests in Zambia and Nigeria compelled the governments of these countries to withdraw from further implementation of IMF engendered economic policies in the late 1980s.

⁵² Through the use of such terms as 'mainstreaming' of human rights or the adoption of 'human rights - based approach' to development. A recent analysis of how the latter approach can be used to achieve the Millennium Development Goals is contained in G. Schmidt-Traub, 2009, 'The Millennium Development Goals and human rights-based approaches: Moving towards a shared approach', 13 *International Journal of Human Rights*, pp.72-85 at 78-83.

subject of intense controversy in recent years.⁵³ A useful starting point in exploring this historical trajectory is to examine the controversy as to whether human rights are exclusively Western concepts or values that are equally applicable in other societies. While some writers have argued that human rights are unknown in Africa, others reject this contention and argue that African societies have conceptions of human rights.

Putting the case forcefully for the first school of thought, Jack Donnelly contends that 'most non-Western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artifact of modern Western civilization'.⁵⁴ This position clearly mirrors the view that human rights evolved from the West, and is not applicable in other societies unless expressly exported by the West. According to Professor Upendra Baxi, this contention embodies three main claims. These are the evangelical claims, the historical claim and the impossibility thesis.⁵⁵ He argues that the evangelical claim is predicated on the notion that 'subordinated/colonized peoples lack qualities that make them recognizably human', a situation that imposes a burden on the West to transform the 'savages' into recognizable human beings. The historical claim simply rests on the view that human rights traditions 'originated' in the West, and reference is thus made to the emergence of the idea of natural rights. Finally, the impossibility thesis implies that 'human rights traditions remain *impossible* of origin outside the 'West'.⁵⁶

For the second school of thought, Dunstan Wai has argued, equally valiantly, that traditional African societies supported and practised human rights.⁵⁷ According to him, traditional African attitudes, beliefs, institutions, and experiences sustained the view that certain rights should be upheld for the orderly functioning of society. There was freedom of expression, the right to participate in democratic governance through the selection and deposition of rulers, while methods and mechanisms for resolving issues affecting their

⁵³ See P.T. Zeleza, 2004, 'Introduction: The Struggle for Human Rights in Africa', P.T. Zeleza, and P.J. McConaughay, eds. *Human Rights, the Rule of Law, and Development in Africa*, Philadelphia: University of Pennsylvania Press, pp.1-20 at 1-8.

⁵⁴ J. Donnelly, 1982, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights', 76 *The American Political Science Review*, pp.303-316 at 303.

⁵⁵ U. Baxi, 2006, note 23, pp.34-38.

⁵⁶ Ibid, p.37 (italics in original).

⁵⁷ D. M. Wai, 1979, 'Human Rights in Sub-Saharan Africa', A. Pollis and P. Schwab, *Human Rights: Cultural and Ideological Perspectives*, New York: Praeger Publishers, pp.115-144 at 116.

societies existed under the traditional system. He contends that it is, in fact, the authoritarian institutions and structures imposed on the continent through colonialism that has contributed to the pervasive violations of human rights in Africa.⁵⁸

Perhaps the gulf separating these positions is not really as wide as is often represented. It is my contention that a close examination of both positions show that they raise two fundamental issues relating to the naming of a thing or concept and the issue of essentialism. From a philosophical point of view, linguistic confusions can arise concerning the naming of a thing, and it has been demonstrated that some of the confusions or misunderstandings that pervade contemporary discourse have their roots in the different uses of language.⁵⁹ Applying this insight to the issue of human rights in Africa, the problem may really be that of identifying what is named as 'human rights' by both schools. This is because what is categorized as 'human rights' by the Africanists may not necessarily fit into what the other school of thought classifies as 'human rights'. Indeed, it can hardly be disputed by both groups that every society has its own conceptions of right and wrong conduct, and ways of treating individuals in society. These relate to questions of human dignity and the priority that a particular society accords to these notions in the organization of its affairs.

Be that as it may, it must be admitted that the current human rights system has strong marks of Western conceptions of rights which are significantly different from African notion of rights. To a large extent, this is traceable to the liberal origins of the Western conception.⁶⁰ On the other hand, African societies are organized on their own understanding and interpretation of human rights which have been a fundamental feature of the functioning of their societies. This draws attention to the philosophical underpinnings of these values and how they are reflected in the various notions of human rights. In *general*, the Western conception of human rights is predicated on individual autonomy, while the African conception gives prominence to the communitarian principle

⁵⁸ Ibid, p.127.

⁵⁹ M.D.A Freeman, 2001, *Lloyd's Introduction to Jurisprudence*, 7th ed. London: Sweet and Maxwell Ltd, p.x. referring to the philosophical analysis of such confusions by Ludwig Wittgenstein. A recent analysis of the problems often created by the misuse of language is contained in B.H. Bix, 2010, 'Law and Language: How words Mislead Us', 1(1) *Jurisprudence: An International Journal of Legal and Political Thought*, pp.25-38.

⁶⁰ J. Donnelly, 1990, 'Human Rights in Western Liberalism', A.A. An-Na'im, and F.M. Deng, eds., *Human Rights in Cross-Cultural Perspectives*, Washington, D.C. The Brookings Institution, pp.31-55 at 33-52.

which locates the individual as a member of the society with rights and duties bound up with those of the society.⁶¹

It can therefore be said that it is the attempt to conflate both conceptions of human rights without taking sufficient cognizance of the underlying cultural norms and values and the linguistic and philosophical confusions generated thereby, that has rendered the discussion problematic. In the first place, whatever the objective may be in attempting to universalize particular human rights norms, in practice, such human rights transplants can hardly take root in a new environment if they ignore the cultural norms of those societies.⁶² In other words, to be effective in a new environment and consistent with the mutual impact thesis here advanced, such foreign norms and values must equally be impacted upon in the process of transplantation. Consequently, there is always tension between foreign and local norms and values in the absence of the requisite mutual impact. This explains one of the major problems with the human rights corpus in Africa as the Western concepts of individual rights introduced into African societies through colonialism has not been sufficiently integrated into the peoples' largely communitarian mode of social organization through the failure of African political leadership.

The import of the present divergence may be illustrated by reference to the nature and structure of traditional African societies which give rise to particular notions of human rights. The concept of a nuclear family, for instance, is unknown in Africa because the family in the African context includes the immediate family in the Western sense, plus relations of both spouses, their uncles, cousins, nieces and nephews.⁶³ Within this web of relations, each member of the family has specific duties and responsibilities towards other members, and he or she can also lay claim to certain rights and privileges in

⁶¹ J. Silk, 1990, 'Traditional Culture and the Prospect for Human Rights in Africa', A.A. An-Na'im and F.M. Deng, eds. *Human Rights in Africa: Cross-Cultural Perspectives*, Washington, D.C: The Brookings Institution, pp.290-328 at 303-314. It has however, been demonstrated that even the Western conception is not entirely based on individualism, as the human rights struggles of the late 17th and 18th centuries in England, France and America were fought in the name of the people as a group. N. Stammers, 2009, *Human Rights and Social Movements*, London: Pluto Press, pp.62-63.

⁶² A.A.O. Okunniga, 1984, *Transplants and Mongrels and the Law: The Nigerian Experiment*, Inaugural Lecture Series 52, Ile-Ife: University of Ife Press, p.20.

⁶³ K. Gyekye, 2003, *African Cultural Values: An Introduction*, Accra: Sankofa Publishing Company, p.75.

return.⁶⁴ In this scheme, respect for senior members is regarded as a norm whose violation could attract social sanction or reproach.⁶⁵

The second aspect of this communitarian mode of social organization in Africa is that the care of the aged in the family is normally accepted as a joint responsibility, in the same way that child care is regarded as a communal affair. This communitarianism is even premised on the existence of a relationship between the dead ancestors and the living members of a family. Josiah Cobbah's description aptly captures this point:

The African worldview places the individual within the continuum of the dead, the living, and the yet unborn. It is a worldview of group solidarity and collective responsibility. In effect, in the same way that people in other cultures are brought up to assert their independence from their community, the average African's worldview is one that places the individual within his community.⁶⁶

It is thus clear that with these variations in modes of social organization, the concept of rights will differ between Western and African states. It must however, be admitted that, with the advent of colonialism and the attendant acculturation and socialization processes, a number of social, economic and institutional changes have been introduced in the continent, and these have greatly affected the traditional mode of social organization. As indicated earlier, it is the inability of African political leaders to sufficiently integrate the inherited institutions of the state with the existing African conceptions of rights and governance that has given rise to the present development crisis in the continent.⁶⁷ This gives importance to the point made by Kwasi Wiredu that 'how to devise a system of politics that, while being responsive to the developments of the modern world, will reflect the best traditional thinking about human rights (and other values) is one of the profoundest challenges facing modern Africans'.⁶⁸

⁶⁴ C.E. Welch, Jr. 1984, 'Human Rights as a Problem in Contemporary Africa', C.E. Welch, Jr. and R.I. Meltzer, eds. *Human Rights and Development in Africa*, Albany: State University of New York Press, pp.11-31 at 13-19.

⁶⁵ For example, in some African societies, when greeting an elder, it is a requirement that the younger person either bows to the elder, or prostrates on the ground as the Yorubas of Nigeria do, as a mark of respect and courtesy.

⁶⁶ J.A.M. Cobbah, 1987, 'African Values and the Human Rights Debate: An African Perspective', 9 *Human Rights Quarterly*, pp.309-331 at 323.

⁶⁷ M. Muiu, 2008, note 13, p.89.

⁶⁸ K. Wiredu, 1996, *Cultural Universals and Particulars: An African Perspective*, Bloomington and Indianapolis: Indiana University Press, p.171.

Does the solution lie in going back to the African traditional conception of rights as some writers have suggested, or redrawing the map of Africa along pre-colonial empires? According to Lakshman Marasinghe, ‘the best guarantees of human rights in Africa are to be found by preserving conceptions of human rights recognized by each society’s law and custom’, because ‘there is a greater possibility of success in enforcing human rights violations in traditional societies than in non-traditional societies’.⁶⁹ This formulation with its undue romanticization of the traditional mode of organization in African societies fails to take cognizance of the fact that even the traditional mode of social organization entailed grave violations of human rights under various guises.⁷⁰ For instance, slaves dedicated to some chieftaincy stools were common features in some African societies such as Asante of Ghana, while women were treated as sub-humans and objects of inheritance in some societies. Moreover, the contemporary African society has undergone such tremendous transformation – thanks to the pervasiveness of globalization in all its dimensions - that any attempt to recreate the pristine traditional society will prove to be hugely unrealistic.

In relation to Makau Mutua’s suggestion for re-drawing the map of Africa in line with the pre-colonial boundaries,⁷¹ it may be said that such a measure cannot be the panacea for the enormous challenges facing the continent, as it is even capable of generating unmanageable crisis in the continent in relation to issues such as who draws the map, and where the boundaries are to be fixed. It is my contention that the critical consideration should be how to construct a conception of rights that, while recognizing the identified philosophical and cultural differences, strives to use them to build a more inclusive notion of human rights. This highlights the importance of adopting the call for a cross-cultural dialogue that will facilitate the emergence of a new architecture of rights.

⁶⁹ L. Marasinghe, 1984, ‘Traditional Conceptions of Human Rights in Africa’, C.E. Welch, Jr. and R. I. Meltzer, eds. *Human Rights and Development in Africa*, Albany, New York: State University of New York Press, pp.32-45 at 32.

⁷⁰ O.C. Eze, 1984, note 27, *ibid*; M. Mutua, 2002, *Human Rights: A Political and Cultural Critique*, Philadelphia, Pennsylvania: University of Pennsylvania Press, p.78.

⁷¹ M. Mutua, 1995, ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’, 16 *Michigan Journal of International Law*, pp.1113-1176 at 1118.

2.3.1 Post-Colonial Conception of Human Rights

One of the major challenges facing post-colonial Africa is how to ensure that human rights assume their deserved central position in the efforts to promote the social and economic development of the continent. The centrality of this issue is all the more important because in Africa, governments which are supposed to be the prime protectors and enforcers of human rights, are often manipulated by those in control of the machinery of governance and become the most flagrant violators of the basic rights of citizens.⁷²

In attempting to deal with this apparent dilemma, African leaders latched onto the dichotomy between civil and political rights and social and economic rights, and precipitated a controversy on the issue of prioritization of the rights to be enforced at any given point in time. Prior to the adoption of the African Charter on Human and Peoples' Rights in 1981, the debate centred around the choice between social and economic rights on the one hand, and civil and political rights - the assumed paragon of Western human rights corpus - on the other hand. Some African leaders argued that it is only when a person has economic and social rights that civil and political rights can be meaningful to him or her. Proceeding from such an admirably high moral plateau and concern for human welfare, this argument, characterized as the '*full-belly thesis*'⁷³ by Rhoda Howard, suggested a preference for economic and social rights over civil and political rights. Julius Nyerere's classic formulation captures this position:

What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political

⁷² B. Rajagopal, 2003, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press, pp.186-194 where the inherent dilemmas in this conception of the human rights discourse is examined.

⁷³ R. Howard, 1983, 'The Full-Belly Thesis: Should economic rights take priority over civil and political rights? Evidence from Sub-Saharan Africa', 5 *Human Rights Quarterly*, pp.467-490 at 469. This characterization is however, susceptible to the criticism that it overstates the position of the advocates who do not necessarily insist that the stomach must be 'full' before talking about civil and political rights, but that it should not be empty.

freedom become properly meaningful and his right to human dignity become a fact of human dignity.⁷⁴

Apparently supporting this thesis, the then military ruler of Ghana, Colonel Acheampong, contended that ‘one man, one vote is meaningless unless accompanied by the principle of ‘one man, one bread.’⁷⁵ Another variant of this prioritization of human rights relates to arguments of trade-offs, where it is argued that in order to accelerate the rate of economic development, certain human rights violations, particularly those of a civil and political character, are inevitable and have to be endured. This approach which has been described as the ‘ideology of developmentalism,’⁷⁶ argues that in view of the material conditions of underdevelopment in the continent, African states can ill-afford the ‘luxury’ of giving prominence to civil and political rights and that development had to take priority over everything else.

Placing these arguments in their historical context, it is evident that they were essentially regime-protective stratagems in a fashion symptomatic of post-colonial African governance. The strategy was to de-emphasize the citizen’s involvement and interrogation of the political process that had become so effectively manipulated by African leaders and rendered the citizen’s basic voting rights irrelevant. It is a sad commentary that in this 21st century, the views of the electorate hardly matter in the electoral process in many African countries. The aftermath of the 2007 Kenyan elections and that of Zimbabwe in 2008 speak volumes about this, in the same way that independent reports on the April 2007 Nigerian elections showed that it was characterized by massive rigging and other forms of irregularities.⁷⁷

⁷⁴ J. Nyerere, 1969, ‘Stability and Change in Africa’, (An Address to the University of Toronto) printed in *Africa Contemporary Record* 2(1969-70) C.30-31, quoted in R. Howard, 1983, note 73, p.467. It has recently been argued that prioritization of human rights in Africa should be predicated on the understanding that human rights violations are the rule and not the exception with a focus on ‘addressing the vectors and causes that predispose the peoples of the continent to violations instead of concentrating on the symptoms’. C.A. Odinkalu, 2003, ‘Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa’, 47 *Journal of African Law*, pp.1-37 at 4.

⁷⁵ Quoted in R. Howard, 1983, note 73, *ibid*.

⁷⁶ I.G. Shivji, 1989, *The Concept of Human Rights in Africa*, London: CODESRIA Book Series, p.83. This argument is similar to the one now being raised by some writers in relation to the impact of globalization on human rights, for example, R. E. Howard-Hassmann, 2005, ‘The Second Great Transformation: Human Rights Leapfrogging in an Era of Globalization’, 27 *Human Rights Quarterly*, pp.1-40 at 5.

⁷⁷ Such problems have far-reaching implications for the consolidation of democracy in the continent as highlighted by J.S. Omotola, 2009, ‘Garrison Democracy in Nigeria: The 2007 General Elections and the

A further indication of the rhetorical nature of the preference for social and economic rights over civil and political rights by the political leaders is found in the fact that even the former set of rights did not fare any better in those countries whose leaders were strong advocates of such rights. In reality, such leaders either took cover under the progressive nature of the rights as they were then formulated, insisting that their goal was the enforcement of such rights as the resources became available, or were clearly not committed to their enforcement. This gives further importance to Professor Upendra Baxi's analysis of the politics *of*, and *for* human rights prevalent in contemporary human rights praxis.⁷⁸ Under those circumstances, advocacy for economic and social rights by such leaders was therefore mere political posturing especially in the context of the then ideological struggle between capitalism and socialism each favouring a particular set of rights.

Against this background, it is thus a welcome development (as would be shown later) that the African Charter on Human and Peoples' Rights has taken the bold step of formalizing the issue of indivisibility of rights in the continent and this approach is reflected in a number of development initiatives adopted in Africa.

2.4 Globalization, Human Rights and Development Initiatives in Africa

The intersection between globalization and human rights and, in particular, the impact of human rights norms on economic development efforts in Africa has been manifested in a number of initiatives in the continent. Although the results of the deployment of human rights norms in such mechanisms have not necessarily been impressive, partly because of the underpinning political and economic philosophies, they represent significant steps that nevertheless demonstrate the mutuality of the relations between human rights and globalization. In this connection, it is intended to examine how the New Partnership for Africa's Development has sought to integrate human rights norms in development initiatives in the continent.

Prospects of Democratic Consolidation', 47 *Commonwealth and Comparative Politics*, pp.194-220 at 212-216.

⁷⁸ U. Baxi, 2002, note 23, pp.57-58.

2.4.1 New Partnership for Africa's Development (NEPAD)

Since the central focus of this work is on the relationship between globalization and human rights, my analysis of NEPAD will be limited to those aspects of the document that have sufficient bearing to this overarching objective. The New Partnership for Africa's Development (NEPAD) is one of the most important initiatives adopted in recent times by African countries to deal with the continent's developmental challenges in this era of globalization. Although the idea of having an institutional framework for the co-ordination of economic policies across the continent is not necessarily new,⁷⁹ the adoption of the NEPAD mechanism in October 2001 represents a fundamental departure from previous efforts in this direction.

It was pioneered by Thabo Mbeki, Olusegun Obasanjo, Hosni Mubarak, the then Presidents of South Africa, Nigeria, and Egypt respectively, Abdoulaye Wade, and Abdelaziz Bouteflika current Presidents of Senegal and Algeria; leaders who in their national policies pay great homage to the neo-liberal philosophy as the organizing principle for social and economic relations.⁸⁰ NEPAD was established as an attempt by African leaders to show that there is a dramatic break with the past through the emergence of a new approach to dealing with the problems of the continent. It was equally meant to send a signal to the world that African leaders had learnt the lessons of misrule, realized the need for governments to be accountable to the people, and accepted the dominant creed that development can best be achieved using market-based economic policies.⁸¹ NEPAD was endorsed in October 2001 at the inaugural meeting of the African Union which replaced the Organization of African Unity (OAU).

⁷⁹ There had been previous efforts such as the Lagos Plan of Action, the African Economic Community Treaty, among others. See, K. Appiagyei-Atua, 2006, 'Bumps on the road: A critique of how Africa got to NEPAD', 6 *African Human Rights Law Journal*, pp.524-548 at 535-544. Indeed, NEPAD acknowledges this fact in paragraph 42 and admits that these measures failed due to internal and external reasons.

⁸⁰ For example, the investment promotion laws of South Africa and Nigeria evidence deference to such principles and offer generous incentives to foreign investors.

⁸¹ M.O. Chibundu, 2008, 'NEPAD and the Rebirth of Development Theory and Praxis', J. I. Levitt, ed. *Africa: Mapping New Boundaries in International Law*, Oxford and Portland, Oregon: Hart Publishing, pp.257-295 at 260.

2.4.1.1 Normative Framework

One significant feature of NEPAD which marks it out as different from previous efforts in the continent is that it is neither framed as a treaty nor a charter, but is simply referred to as a ‘framework’ document.⁸² It basically x-rays the problems of the continent, identifies their causes and prescribes curative measures in a programmatic fashion. The normative content, focus and direction of NEPAD are underscored by Paragraph 1 of the document which states that:

This New Partnership for Africa’s Development is a pledge by African leaders, based on a common vision and a firm and shared conviction, that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic. The Programme is anchored on the determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalizing world.

In order to justify its emphasis on the development of the continent and the urgent need for concerted efforts in this direction, it makes an assessment of the African condition in comparison with the rest of the world, by declaring pointedly that ‘the poverty and backwardness of Africa stand in stark contrast to the prosperity of the developed world. The continued marginalization of Africa from the globalization process and the social exclusion of the vast majority of its peoples constitute a serious threat to global security’.⁸³ This statement by NEPAD is perhaps informed by the understanding that extreme poverty and underdevelopment in Africa also poses enormous global security challenges as buttressed by the current international concern over the frequent hijacking of vessels by pirates in troubled Somalia. The lingering crisis in the Niger Delta region of Nigeria resulting in frequent kidnapping of Nigerians and foreigners also belongs to the same category. NEPAD acknowledges the problems created by the legacy of colonialism, pervasive corruption and mismanagement of resources in the continent but contends that, such challenges notwithstanding, ‘if the continent’s enormous natural and human resources are properly harnessed and utilized, it could lead to equitable and

⁸² Ibid.

⁸³ Paragraph 2 of the NEPAD Document.

sustainable growth, and enhance Africa's rapid integration into the world economy'.⁸⁴ It is on this score that African leaders make an appeal to the people 'to recognize the seriousness of the situation and the need to mobilize themselves in order to put an end to further marginalization of the continent and to ensure its development by bridging the gap between Africa and the developed countries'.⁸⁵

This formal commitment of African leaders to a new mode of association with their citizens is one of the more significant features of NEPAD. However, it raises the fundamental question of the extent to which ordinary Africans are involved in the formulation, monitoring and implementation of development programmes, and allowed to effectively participate in the democratic process. Have African leaders begun to demonstrate accountability in the democratic processes? While the examples of democracy setbacks and relapses in sub-Saharan African countries such as Equatorial Guinea, Kenya, Niger, and Zimbabwe are worrisome, the recent Arab uprisings in North Africa can be said to be hugely momentous and give cause for optimism on the prospects of deploying human rights discourse to effect democratic changes in the continent. The mass protests in that region, which started in Tunisia on 18 December 2010, led to the overthrow of the country's President, Zine El Abidine Ben Ali, resignation of the Egyptian President Hosni Mubarak, and the overthrow, and subsequent killing, of Muamar Gadaffi of Libya.⁸⁶ Although it is too early to assess these developments, it can be said that they represent the successful deployment of counter-hegemonic pressures against authoritarian and undemocratic leaders.

With specific reference to the relevance of human rights in the development process, NEPAD states that 'the new phase of globalization coincided with the reshaping of international relations in the aftermath of the Cold War', and that 'democracy and state legitimacy have been redefined to include accountable government, *a culture of human*

⁸⁴ Ibid., paragraph 52.

⁸⁵ Ibid., paragraph 55.

⁸⁶ The Tunisian President was overthrown on 14 January 2011, while Hosni Mubarak resigned on 11 February 2011, and the Libyan Leader Muamar Gadaffi was killed on 20 October 2011. It is ironic that Hosni Mubarak, who was one of the five African leaders that initiated the NEPAD framework, did not embrace democracy in his country. An analysis of the political, economic and security implications of these uprisings is contained in, B. Smith, 2011, *The Arab Uprisings*, London: House of Commons Library, Research Paper 11/73, 15 November 2011, pp.11-15.

rights and popular participation as central elements'.⁸⁷ This recognition of the salience of human rights in the development process is the propelling force for the agreement of African leaders to take joint responsibility, among others, for 'promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at the national and sub-national levels'.⁸⁸ Moreover, 'African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and sub-regions and on the continent'.⁸⁹ These principles are to be realized within the parameters of a Peace and Security Initiative, Democracy and Political Governance Initiative, and the Economic and Corporate Governance Initiative.

Under the Democracy and Political Governance Initiative, for instance, it states in Paragraph 79 that:

It is generally acknowledged that development is impossible in the absence of true democracy, respect for human rights, peace and good governance. With the *New Partnership for Africa's Development*, Africa undertakes to respect the global standards of democracy, the core components of which include political pluralism, allowing for the existence of several political parties and workers' unions, and fair, open and democratic elections periodically organized to enable people to choose their leaders freely.

The purpose of the Initiative is to strengthen the political and administrative framework of African countries, in accordance with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law, which would, in conjunction with the Economic Governance Initiative, enhance development in the continent.

A further demonstration of the importance attached to democracy and human rights in the development process by NEPAD is the declaration that 'one of its foundations is the expansion of democratic frontiers and the deepening of the culture of human rights' and

⁸⁷ NEPAD Document, paragraph 43. (Emphasis added).

⁸⁸ Ibid., paragraph 49.

⁸⁹ Ibid., paragraph 71.

the assurance that ‘a democratic Africa will become one of the pillars of world democracy, human rights and tolerance.’⁹⁰

Deriving from its central objective of promoting African development, NEPAD argues that the appropriate focus now should be on the complete integration of contemporary African economies into the global system, notably through the drumbeat of neo-liberalism. One way of actualizing this is to ensure the diversification of African economies from raw materials to industrialization.⁹¹ This will deal with the problem of the overwhelming dependence of African states on one or two primary products whose prices are determined by foreign demand with the attendant vulnerability. While this is no doubt a laudable objective, it is the suggested path to achieving it that is hugely problematic as will be shown shortly.

Furthermore, it outlines the sectoral priorities and the identified measures necessary to actualize such goals through a programme of action between its adoption in 2001 and 2015. Its areas of coverage include infrastructural development, ICT, energy transport, water and sanitation, human resources, including measures to reverse the brain drain, education, health, agriculture, environment, culture, science and technology and how to mobilize and utilize the resources for the development of the continent. This holistic approach to development is in tandem with the prevailing view that development should not be limited to economic growth alone.⁹²

One crucial feature of the NEPAD document is that it venerates the neo-liberal development paradigm as the key solution to the myriad problems confronting Africa. It gives prominence to the neo-liberal consensus on the obligation of governments to create and nurture a hospitable environment for foreign investment. It also stresses the imperative of ‘good governance’ as a requirement for capital flows, and the need to ‘address investors’ perception of Africa as a ‘high-risk’ continent, especially with regard to security of property rights, regulatory frameworks and markets’.⁹³ Accordingly, it places emphasis on ensuring transparency in regulation, functioning and reasonably efficient administrative and judicial systems, an attentive bureaucracy and, ultimately, an

⁹⁰ Ibid., paragraph 180.

⁹¹ Ibid., paragraph 153.

⁹² A. Sen, 1999, *Development as Freedom*, Oxford: Oxford University Press, p.14.

⁹³ Paragraph 151 of NEPAD Document.

accountable government.⁹⁴ As will be shown later in this work (Chapter 4), these are familiar principles emphasized by international financial institutions as embodying the ‘good governance’ concept.

On international economic co-operation, NEPAD advocates the establishment of a new relationship between African states and the industrialized countries, as well as multilateral organizations to promote the economic development of the continent. Thus, it declares in paragraph 184 that ‘the various partnerships between Africa and the industrialized countries on the one hand, and multilateral institutions on the other, will be maintained. The partnerships in question include, among others, the UN’s New Agenda for the Development of Africa in the 1990s; the Africa-Europe Summit’s Cairo Plan of Action; the World Bank-led Partnership with Africa; the IMF-led PRSPs; the Japan-led Tokyo Agenda for Action; the AGOA of the United States; and the ECA-led Global Compact with Africa’. This indicates continued participation in the conditionality-driven programmes of the international institutions and other donors.

In return, NEPAD requests developed country governments and international financial institutions to support peace-keeping initiatives, accelerate debt reduction, increase official development assistance to at least 0.7 per cent of the gross domestic product of developed countries, make available on less stringent terms access to pharmaceuticals, negotiate ‘more equitable’ terms of trade within the World Trade Organization framework and encourage greater private investment in Africa’.⁹⁵ They are also urged ‘to ensure that the World Bank and other multilateral development finance institutions participate as investors in the key economic infrastructure projects, in order to facilitate and secure private sector participation’, ‘support governance reforms of multilateral financial institutions to better cater for the needs and concerns of countries in Africa’.⁹⁶ In view of this neo-liberal posture, it does not come as a surprise that the United Nations General Assembly commended NEPAD as an innovative and important development.⁹⁷

⁹⁴ Ibid., paragraph 83.

⁹⁵ Ibid., paragraph 185.

⁹⁶ Ibid.

⁹⁷ UN General Assembly Declaration A/RES/57/2, A/RES/57/7, A/RES/57/300.

In order to underscore the contractual nature of the ‘partnership’, NEPAD declares that ‘through the Programme, African leaders are making a commitment to the African people and the world to work together in rebuilding the continent. It is a pledge to promote peace and stability, democracy, sound economic management and people-centred development, and to hold each other accountable in terms of the agreements outlined in the Programme’.⁹⁸

It is noteworthy that institutionally, NEPAD is not an embodiment of the kind of elaborate organizational framework common with international economic institutions. Beyond the Heads of State Implementation Committee composed of the five heads of state, who are promoters of NEPAD and ten others, two from each region of the continent, established in Paragraph 200 of the NEPAD document, it has no institutional structure. While this provision may have been informed by the need to keep alive the vision of the founding members, it raises serious questions on the democratic content of the mechanism. This is more obvious in situations where the countries of the five permanent committee members are to be assessed, creating the possibility of a soft treatment for such countries.

In relation to the lack of institutional framework, it would seem that in attempting to move away from previous institutional arrangements that largely failed to deliver in terms of economic development of the continent, NEPAD falls into the error of assuming that a regional mechanism can function and achieve results without any organized structural framework. This is buttressed by the fact that in its operations, NEPAD has been forced to rely heavily on the structures and even personnel provided by member states, a measure that invariably impedes its effectiveness and independence in important respects.

2.4.1.2 Appraising the NEPAD framework from a human rights and development perspective

One positive feature of NEPAD within the context of this work is that it embodies the unequivocal commitment of African states to the imperative of a rule-based

⁹⁸ Paragraph 202. In this regard, it recognizes that Africa ‘holds the key to its own development’, even as the framework ‘offers an historic opportunity for the developed countries of the world to enter into a genuine partnership with Africa, based on mutual interest, shared commitments and binding agreements’.(Paragraph 203).

accountability for the promotion of democracy, human rights and good governance as elements of the development process.⁹⁹ This is evident in its frequent references to principles of ‘good governance’, ‘democratic accountability’, ‘rule of law’, and the promotion of ‘human rights’ as key factors for African development.

However, considering the underpinning neo-liberal philosophy of the document, the invocation of such terms would seem to be no more than ritualized incantations designed to legitimize the programme. It also epitomizes the rule of law consensus and the low-intensity democracy being promoted under the neo-liberal paradigm.¹⁰⁰ This has greatly diluted the effectiveness of the deployment of such terms as important elements necessary for African development. Nevertheless, the fact that African governments are willing to commit to these principles in a formal development programme is a clear departure from orthodox behaviour and one that can be a basis for a more progressive drive to promote genuine development in the continent.¹⁰¹

Although NEPAD proclaims that it is ‘an African-owned and African-led development programme’,¹⁰² it is evident that it is steeped in the neo-liberal economic ideology as it not only borrows extensively from the dominant language of the latter, but explicitly advocates the adoption of some of the fundamental prescriptions of international financial institutions based on the ‘Washington Consensus’.¹⁰³ For instance, rather than focus on measures to enhance indigenous capability and entrepreneurship, NEPAD’s emphasis is on the accumulation of wealth through foreign participation in African economies which is one of the neo-liberal dogmas underpinning foreign direct investment as a catalyst for economic development.¹⁰⁴

⁹⁹ M.O. Chibundu, 2008, note 81, p.295.

¹⁰⁰ B. de Sousa Santos, 2002, *Toward a New Legal Common sense: Law, Globalization and Emancipation*, 2nd ed. London: Butterworths LexisNexis, pp.335-352.

¹⁰¹ Ibid., p.281.

¹⁰² Paragraph 60 of NEPAD Document.

¹⁰³ K. Appiagyei-Atua, 2006, note 79, p.545. The ten prescriptions of the ‘Washington Consensus’ are summarized in J. Williamson, 2008, ‘A Short History of the Washington Consensus’, N. Serra, and J.E. Stiglitz eds. *The Washington Consensus Reconsidered: Towards a New Global Governance*, Oxford: Oxford University Press, pp.14-30 at 16-17.

¹⁰⁴ M. Sornarajah, 2004, *The International Law on Foreign Investment*, 2nd ed. Cambridge: Cambridge University Press, pp.51-57. This proposition representing the classical theory on foreign investment is however stoutly countered by the dependency theory; supra, pp.57-59. It has also been argued that NEPAD’s adoption of a market-centred approach to development primarily financed by flows of Western aid and capital prevents it from challenging and advocating the dismantling of the structures sustaining inequality, poverty, and hierarchy both within and without Africa that stand in the way of the continent’s

Moreover, a close examination of the NEPAD document reveals that it heavily adopts pre-packaged answers contained in the declarations of Washington-based international economic institutions such as IMF and the World Bank and their academic apologists. These include its veneration of free markets as efficient; frequent references to 'democracy', 'good governance' and the 'rule of law' in ways that evidence acceptance of only the minimalist conceptions of these terms.¹⁰⁵ In significant ways therefore, NEPAD's prescriptions seem to be a re-threading of the discredited structural adjustment programme under the guise of an African-led initiative. Symptomatic of their ready acceptance of prevailing economic views and principles, African leaders seem to have been co-opted, through NEPAD, into the alluring dominant ideology of neo-liberal globalization.

Additionally, by putting much faith in the supposed miracle of the neo-liberal creed, NEPAD invariably ignores the devastating effects of such economic policies on the living conditions of the masses and the attendant human rights violations witnessed in Africa through the implementation of the prescriptions of international financial institutions.¹⁰⁶ In this connection reference may be made to the empirical study on the impact of structural adjustment programmes on human rights in Africa. Using the Physical Quality of Life Index (PQLI), Rodwan Abouharb and David Cingranelli have shown the adverse consequences of these programmes on human rights.¹⁰⁷

Beyond hortatively stating the need for recognition of human rights as important elements of the development process, there is no specific articulation in the NEPAD document of the form of human rights necessary to activate the required development of

sustainable development. J. Gathii, 2003, 'A Critical Appraisal of the NEPAD Agenda in Light of Africa's Place in the World Trade Regime in an Era of Market Centered Development', 13 *Transnational Law and Contemporary Problems*, pp.179-210 at 180-181.

¹⁰⁵ The components of the minimalist and maximalist conceptions of these terms are examined in A.M.B. Mangu, 2007, 'Assessing the effectiveness of the African Peer Review Mechanism and its impact on the promotion of democracy and good political governance', 7 *African Human Rights Law Journal*, pp.354-388 at 358.

¹⁰⁶ A. Anghie, 2004, note 15, p.260.

¹⁰⁷ M.R. Abouharb, and D. Cingranelli, 2007, *Human Rights and Structural Adjustment*, Cambridge: Cambridge University Press, p.149. The authors' detailed conclusions on this point are discussed fully in Chapter 4 of this work.

the continent.¹⁰⁸ Indeed, its veneration and adoption of neo-liberal economic policies strongly suggest preference for the hegemonic version of human rights. This inference stems from its constant references to good governance, democracy and human rights which are over-worn but embraced phrases of international economic institutions. At a minimum, the NEPAD document ought to have made reference and predicated its prescriptions on the human rights-based approach to development which is now being increasingly adopted by international development agencies. Such an approach would have guaranteed a more inclusive development framework with a high degree of participation by representatives of affected communities, civil society, minorities, indigenous peoples, and women and tie in properly with NEPAD's recognition of the importance of the ordinary African in the development process.¹⁰⁹

However, notwithstanding NEPAD's evidently neo-liberal slant, a number of considerations give hope that the implementation of its prescribed development policies may lead to *some* improvements in the economic conditions of African countries. In the first place, the fact that NEPAD recognizes the role of the ordinary people in the development process and seeks to mobilize them to achieve this goal is significant. It is recognition of the relevance of the 'bottom-up approach' to development rather than the previous 'top-down approach' which ignores the involvement of the ordinary people in the formulation and implementation of development programmes. Secondly, its holistic approach to development which recognizes the interplay of various elements in the process is also noteworthy. This ensures the incorporation of socio-political, economic, and environmental needs and concerns in the development process in line with the current conception of development.¹¹⁰ Perhaps more than any other principle embodied in the NEPAD framework, the creation of the peer review mechanism is one innovation which marks it out beyond the traditional approaches by previous institutions. Although still in its infancy, since only three African countries have so far undertaken the peer review exercise, the African Peer Review Mechanism, if properly utilized, can lead to the

¹⁰⁸ This omission is inexcusable since some paragraphs of the NEPAD Document, namely; paragraphs 7, 49, 71, 79, 80, and 180 expressly mention human rights. An analysis of these clauses is examined in S. Gumedze, 2006, 'The NEPAD and Human Rights', 22(1) *South African Journal on Human Rights*, pp.144-171 at 157-164.

¹⁰⁹ B. Manby, 2004, 'The African Union, NEPAD, and Human Rights: The Missing Agenda', 26 *Human Rights Quarterly*, pp.983-1027 at 1003.

¹¹⁰ See A. Sen, 1999, note 92, *ibid*.

adoption of best practices by states in relation to issues of accountability, democratic governance and the promotion of human rights.¹¹¹

2.5 Conclusion

This chapter has highlighted the involvement of Africa with the globalization process and the interaction of the latter with the human rights corpus. This has entailed discussion of the three historical phases of African development, pre-colonial, colonial and post-colonial periods. One common, but disturbing trend from the analysis is that Africa has not fared better in any of these periods in terms of the interaction between globalization and human rights. Endogenous and exogenous factors have conspired to entrench an unacceptable level of suffering and poverty in Africa and the poor human rights record.

Although there has been no lack of measures designed to redress these unfortunate developments, the reality is that the implementation and enforcement strategies have not matched the declaratory statements contained in the relevant instruments and mechanisms. Africa's involvement with the globalization process has therefore been a bitter experience. If the situation during the pre-colonial and colonial periods can be explained - although arguably - by the lack of organized modern political structures and sovereignty to carry out independent development programmes, the same cannot be said of the situation since the attainment of political independence by African states. For one thing, upon the attainment of independence, African states had the opportunity to adopt and implement development programmes that could have moved the continent away from the current level of underdevelopment. Unfortunately, most African leaders opted to toe the path charted for them by the departing colonial rulers, and, facing economic difficulties, were compelled to seek the assistance of international financial institutions such as IMF and World Bank controlled by Western countries. The implementation of the economic policies of these institutions has had adverse effects on the living conditions of people in these countries and their human rights. The result has certainly not been palatable as the economic conditions of African states largely deteriorated over the years.

¹¹¹ For an assessment of the mechanism, see A.M.B. Mangu, 2007, note 105, pp.363-385.

The above analysis has also underscored the dynamic relationship between globalization and human rights, as shown in the fact that African states have subsequently recognized the salience, and expressed their commitment to the deployment of human rights norms in developmental strategies. They have accordingly adopted a number of developmental models and initiatives embodying recognition of this dynamic connection.¹¹² In particular, the New Partnership for Africa's Development (NEPAD) highlights the inevitability of this connection in order to promote the economic development of the continent. Although the extent of implementation of these laudable initiatives is still far from the target, it is important to recognize this acceptance as a commitment to paradigmatic change.

The central issue then is how this latter-day realization by African states of the emancipatory potential of human rights can be sustained and maximized as the underpinning factor guiding the globalization process in order to facilitate the development of the continent. I have argued that the seeds for this development have already been sown with the adoption of the New Partnership for Africa's Development, notwithstanding its evidently neo-liberal slant, as it represents a marked departure from the previous approaches by African leaders. It equally signals a radical break from the paralysis inherent in the undue emphasis on colonialism as the reason for the present development crisis. How this new approach plays out within the framework of the African Charter on Human and Peoples' Rights will be examined in the next chapter.

¹¹² In this respect, the pessimism by Nsongurua Udombana concerning the role of the African Union in the protection of human rights in the continent can be said to be somewhat presumptive. N.J. Udombana, 2002, 'Can the leopard change its spots? The African Union Treaty and human rights', 17 *American University International Law Review*, pp.1177- 1261 at 1183.

Part Two

Institutional dimensions of the relationship between Globalization and Human Rights

This part of the Thesis examines the interaction between human rights norms and international economic institutions, which are the main agents of the globalization process. It does so, first by looking at the African Charter on Human and Peoples' Rights and how some of its provisions have been used in this era of globalization. It is shown that these provisions have not only been impacted upon by the processes of globalization, but have also, in particular ways, also influenced key components of the globalization process. Second, in relation to the international economic institutions studied, namely, the World Bank, IMF and WTO, it is shown that initially the institutions were reluctant to accept human rights norms in their policies and programmes. There are however remarkable changes in this direction as the institutions now adopt and promote these norms in their policies and programmes. Nevertheless, it is contended that they have only adopted the hegemonic version of human rights and the thesis advocates the adoption of the counter-hegemonic version through struggles by the oppressed people.

Chapter 3: Globalization and the African Charter on Human and Peoples' Rights

3.1 Introduction

This Chapter builds on the connection established previously between globalization and human rights in Africa by focusing on how that mutual relationship influenced the adoption of, and specific provisions within the African Charter on Human and Peoples' Rights. It will also examine some particular aspects of the Charter implicated in this interaction between global and regional norms or, to use Santos' terms, between 'localized globalism' and 'globalized localism' indicative of the contradictory nature of globalization itself.¹ In the same vein, the centrality of two forms of globalization, namely, economic globalization and legal globalization which have been instrumental in defining the relationship between the provisions of the Charter and the overall globalization process will also be explored. While the adoption of the Charter in 1981 can be said to be a significant landmark in the effort to institutionalize human rights in Africa, it is important to underline and contextualize the impact this has had on contemporary developments in the continent.

Upon the attainment of independence by a majority of African states in the early 1960s, African leaders seemed more concerned with the protection of the territorial integrity of their states and promotion of the economic development of their countries, and showed little interest in the protection of human rights. To some extent, this was understandable, though not excusable, since African leaders were confronted with the stark realities of gross underdevelopment in their countries and the attendant challenges of responding to these concerns. This meant that human rights issues and the dynamic connection between them and economic development were given secondary position in the scheme of things.²

¹ B. de Sousa Santos, 2002, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, London: Butterworths LexisNexis, p.179.

² F. Viljoen, 2007, *International Human Rights Law in Africa*, Oxford: Oxford University Press, p.163. It is ironical that most of the nationalist leaders who had employed human rights norms such as right to self-determination in their independence struggles jettisoned such norms upon ascension to political power.

The assumed pre-occupation with the promotion of economic development informed the zeal with which African leaders clamoured for the integration of their national economies into the international system and the establishment of robust relations with international economic institutions. This in turn entailed acceptance of the rules and policy measures formulated by these institutions - policies that have largely impacted on the level of human rights protection in the continent. Moreover, incorporation into the global web of social, economic, and political relations which was increasingly paying homage to the human rights corpus – albeit rhetorically – impelled African leaders to see the institutionalization of human rights as a way of measuring up to that standard.

It is against this background that this chapter seeks to establish, first, that African leaders were compelled by internal and external developments to formulate and adopt the African Charter on Human and Peoples' Rights, and that they have used the framework of the Charter to articulate African historical experiences and infused the same into some of the human rights norms in the Charter. Second, it will also be shown that although African states used the human rights norms and principles embedded in the Charter as a springboard for advancing their economic and political goals within the context of the globalization process, the development has not been entirely linear, as there had been reverses in several areas, indicating the mutual relationship between globalization and human rights. In this connection, reference will be made to some specific human rights norms embodied in the Charter and how these have been deployed to define the position of the continent in the globalization process.

3.2 The African Charter on Human and Peoples' Rights: A Historical Overview

The attainment of political independence by majority of African states in the early 1960s did not *ipso facto* translate to any considerable recognition of the salience of human rights. As indicated earlier, leaders of the newly independent African States gave more

Moreover, the precedent of poor human rights record of the departing colonial masters did not propel African leaders to accord prominence to human rights issues.

prominence to maintaining the territorial integrity of their states and the claimed adherence to the principle of non-interference in the internal affairs of other states.³

It therefore took well over twenty years for African states to take the issue of human rights seriously at the highest level of governance and agree on a concerted platform for dealing with such matters. This delay occurred, notwithstanding the early recognition of the need for a continental mechanism for handling human rights issues by scholars and activists.⁴ It may be mentioned that one of the key proposals of the 'Law of Lagos' adopted at the end of the African Conference on the Rule of Law in 1961 was the imperative of an African Convention on Human Rights and a Court. As the Conference put it:

In order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusion of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.⁵

Although as it turned out, African states did not respond immediately to this call, the relevance and resilience of the human rights corpus could not be ignored for too long. Consequently, between 1967 and 1981 several efforts were made and conferences held to place human rights in their deserved position in the continent. These included conferences in Dakar, Cairo, Addis Ababa, Monrovia, and Banjul, culminating in the decision by the Assembly of Heads of State and Government of the Organization of African Unity (OAU) at its Ordinary Session in 1979 calling on the OAU Secretary General to convene a meeting of African experts to elaborate a draft of an African Charter

³ As contained in Article 2(7) of the United Nations Charter and Article 3 of the Charter of the now defunct Organization of African Unity (OAU). It is however, comforting that this principle of non-interference has been significantly mellowed down by the provision in Article 4(h) of the African Union Act which authorizes the Organization to intervene in the affairs of a member state in grave circumstances such as war crimes, genocide, and crimes against humanity. The implications of this new provision are examined in B. Kioko, 2003, 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention', *International Review of the Red Cross*, Vol. 85 no. 852, pp.807-825.

⁴ M. Evans and R. Murray, 2008, 'The State Reporting Mechanism of the African Charter', M. Evans and R. Murray, eds. *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, 2nd ed. Cambridge: Cambridge University Press, pp.49-75 at 49.

⁵ Law of Lagos, 7 January 1961, Para. 4, reprinted in 3 *Journal of Commission of Jurists* 9 (1961).

on Human and Peoples' Rights.⁶ The result of the work of this Expert Committee was the eventual emergence of the African Charter.

These efforts were driven by recognition of the need for a continent-wide framework for the protection of human rights. This change of focus by African leaders and their acceptance of human rights can be attributed to two main factors. First, the emphasis placed on the human rights record of states by the American government during the tenure of President Jimmy Carter, and the decision to link aid to African countries to their human rights record, compelled African leaders to reconsider their level of support for human rights.⁷ Although this American advocacy of human rights was more rhetorical than real, considering its selective application, it was nevertheless sufficient to make aid-dependent African states fall in line and also proclaim adherence to human rights norms.⁸ Second, the emergence of a crop of tyrants in the continent and the negative image this was creating for the continent internationally also made African leaders give serious thoughts to human rights issues. The atrocities committed by Idi Amin of Uganda, Jean Bedel Bokassa of Central African Empire, and Marcias Nguema of Equatorial Guinea, in their countries constituted huge embarrassments for the continent.⁹ These factors served as the impetus that compelled African states to eventually adopt the African Charter on Human and Peoples' Rights in 1981.¹⁰ The adoption of the Charter can therefore be said to be a progressive development for a continent that had become notorious for human rights abuses.

⁶ Decision AHG/Dec.115 (XVI), Rev.1. The historical trajectory of the Charter is examined in G. Baricako, 2008, 'Introductory Preface', M. Evans and R. Murray, eds. *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, 2nd ed., Cambridge: Cambridge University Press, pp.1-19 at 1-8; R.Gittleman, 1982, 'The African Charter on Human and Peoples' Rights: A Legal Analysis, 22 *Virginia Journal of International Law*, pp.667-714 at 670-673.

⁷ O. Ojo and A. Sesay, 1986, 'The OAU and Human Rights: Prospects for the 1980s and Beyond', 8 *Human Rights Quarterly*, pp.89-103 at 92.

⁸ I.G. Shivji, 1989, *The Concept of Human Rights in Africa*, London: CODESRIA Book Series, p.94.

⁹ While Idi Amin was known to have consistently ordered the execution of opponents of his bizarre style of governance, Jean Bedel Bokassa ordered the shooting of school children demonstrating on a date that coincided with his birthday celebration killing over 100 children in the process. Happily, these tyrants were swept away in their various countries by the 'people's power' in 1979 and they later died unsung in exile.

¹⁰ Equally worthy of mention is the role played by the United Nations Commission on Human Rights through organizing seminars on human rights in Africa during which sessions the need for a continental Charter on human rights were canvassed. The African Charter on Human and Peoples' Rights itself was adopted on 28 June 1981 in Nairobi, Kenya. It entered into force on 21 October 1986 upon ratification by the majority of African states; OAU Doc. CAB/LEG/67/3 Rev.5; reprinted in 21 ILM (1982) 59.

3.3 Specific Charter provisions and their intersection with Globalization

Although the African Charter contains provisions for the protection of the whole panoply of rights, for present purposes,¹¹ the central focus is on those provisions that are evidently reflective of the dynamic relationship between globalization and human rights. This approach will enable sufficient consideration to be given to the interaction between the identified provisions and the globalization process in furtherance of the main argument of the thesis. It may be mentioned that one of the distinctive features of the African Charter on Human and Peoples' Rights is its recognition of the interdependence and indivisibility of human and peoples' rights. It boldly declares in its preamble that 'the satisfaction of economic, social, and cultural rights is a guarantee for the enjoyment of civil and political rights'.

Coming at a time when the international community was embroiled in the contest between the West and East, with each bloc favouring either civil and political rights, or economic, social and cultural rights, and the values derived therefrom over the other, this recognition by the Charter of the interdependence of both sets of rights can be said to be hugely momentous on at least two important grounds.

First, on this subject, it can be said to be far ahead of other regional human rights instruments such as the European Convention on Human Rights¹² and the Inter-American Convention on Human Rights which were already in force at the time.¹³ Second, it also had a remarkable impact on the international development of human rights jurisprudence as it acted as a precursor to the United Nations Declaration in 1993 that human rights are interdependent and indivisible.¹⁴ Although little attention is often given to this impact in the conventional narration of the historical trajectory of human rights, it is important to highlight this development as it meant that a regional conception of human rights was

¹¹ Other aspects of the Charter especially those on social and economic rights will be considered in the latter part of this work (chapters 5, 6, and 7) in relation to the impact and response of African state systems to globalization.

¹² The Convention was adopted on 4 November 1950. However, the European Social Charter has now been used to reflect this in the European system.

¹³ The American Convention on Human Rights was adopted on 22 November 1969.

¹⁴ See the United Nations Conference on Human Rights, 1993.

projected into, and eventually accepted in the global arena, in the same way that global human rights norms have been embedded in regional systems. Such developments invariably validate Professor Boaventura de Sousa Santos' analysis of the interaction between globalized localism and localized globalism, as elements of the globalization process.

However, notwithstanding this recognition under the African Charter, there has been consistent marginalization of economic, social, and cultural rights and solidarity rights in the continent.¹⁵ It is therefore intended in this section to focus on some of these rights which have a significant impact on contemporary developments in Africa. Moreover, the development crisis confronting African states today calls for closer examination of the relationship between the globalization process and economic, social and cultural rights as well as solidarity rights. This inquiry is all the more important because economic globalization is frequently implicated in the current level of marginalization or non-realization of these rights in the continent. Conversely, and in tandem with the mutual impact thesis advanced in this work, it will be examined whether these rights in any way have a corresponding impact on the globalization process. It is my contention that the establishment of a mutual relationship between globalization and these rights and the potential benefits derivable from such a conceptualization could galvanize African states to pay greater attention to the enforcement of these rights, alongside civil and political rights, and improve the conditions of millions of oppressed and deprived Africans.

Furthermore, deriving from the increasing holistic interpretation of development discussed earlier, it seems appropriate to focus greater attention on those rights that have some direct connection with the development process. Africa, more than any region of the world, needs to play a greater role in recognizing the relevance and salience of these second and third generation rights, because of its current economic conditions, particularly as the enjoyment of these rights have been shown to be intricately connected with the processes of economic globalization. Accordingly, for the purpose of this

¹⁵ J. Oloka-Onyango, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', 18 *American University International Law Review*, pp.851-913 at 852-853; S.C. Agbakwa, 2000, 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights', 5 *Yale Human Rights and Development Law Journal*, pp.177-216.

analysis, attention will be focused on the right to self-determination, the right to disposal of natural wealth and resources, and the right to development, to be taken in that order.

3.3.1 Self-Determination under the African Charter

Self-determination is one of the fundamental, but contested principles of international law. It basically refers to the right of a people to freely determine their political, social and economic status in order to attain their developmental goals.¹⁶ Although its origin can be traced back to the American Declaration of Independence, 1776 and the French Declaration, 1789¹⁷ and through the postulations of Lenin and Woodrow Wilson in the early 20th century, it gained prominence after the Second World War and became a very useful weapon in the decolonization process.¹⁸ In no region has its impact been more pronounced than in Africa where it was, and remains, an important reference point in human rights activism. It was recognition of this salience that led to the inclusion of a number of provisions in the African Charter on Human and Peoples' Rights relating to self-determination. Thus Article 19 of the Charter proclaims that: 'All peoples shall be equal, they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another'.¹⁹ To fortify this, Article 20 states that 'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen'.²⁰

¹⁶ See Common Article 2 of the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁷ A. Cassese, 1995, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge: Cambridge University Press, p.11; It has also been argued that the revolt of black slaves in the French colony of Saint Dominique and eventual establishment of the Republic of Haiti in 1804 was equally indicative of the exercise of the right to self-determination, even though this significant struggle is often omitted in the standard histories of human rights. N. Stammers, 2009, *Human Rights and Social Movements*, London: Pluto Press, p.67.

¹⁸ This was accomplished principally through the adoption of Resolution 1514 entitled: Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, a year that witnessed the highest number of African states gaining political independence.

¹⁹ This is to ensure the protection of minority groups in states. Unfortunately, the marginalization of minority groups remains a common phenomenon in several African States.

²⁰ Article 20(1).

These are, no doubt, important provisions relating to the exercise of the right of self-determination. It may be noticed that Article 20 uses the adjectives ‘unquestionable’ and ‘inalienable’ preceding the right to self-determination. Normatively, these words do not necessarily add to the nature and content of the right in question beyond expression of the perceived importance of the right and the strong desire to actualize it.

One problematic issue that has had, and continues to have, tremendous effect on the exercise of the right to self-determination, and, concomitantly on the globalization process in Africa, is the meaning of the word ‘peoples’ under the Charter. Although the Charter uses it in contrast to ‘State’, no definition of the word is provided therein, the prominence given to the term in the Charter notwithstanding.²¹ It can therefore be said that the drafters of the Charter imported the inherent indeterminacy of the term in general international law into the African Charter when they could have used the opportunity presented to define and clarify the use of the term within the context of the Charter. Consequently, we have to resort to the jurisprudence of the African Commission on Human and Peoples’ Rights to ascertain its interpretation of the word ‘people’.

The reliance on the Commission is informed by the fact that the African Court of Justice and Human Rights, which is now the main judicial organ under the African Union, only came into being in July 2008 as a merger between the African Court of Human and Peoples’ Rights, and the African Court of Justice established under the Constitutive Act of African Union.²² However, even this does not give us any direct guidance as the Commission has given three different interpretations of the term, giving rise to the

²¹ It would seem from the drafting history that the concept was deliberately left undefined in order to avoid controversy. F. Viljoen, 2007, note 2, p.243. This feature is, unfortunately, also noticeable in the United Nations Charter. K. Henrard, 2000, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination*, The Hague: Martinus Nijhoff Publishers, p.291; T.D. Musgrave, 2002, *Self Determination and National Minorities*, Oxford: Oxford University Press, pp.148-179.

²² See the Protocol on the Statute of the African Court of Justice and Human Rights. It was only on 15 December, 2009 that it concluded its first case since its inauguration; in the matter of *Michelot Yagombaye vs. Republic of Senegal*, Application No. 001/2008. The structural problems of the Court and attendant challenges have recently been explored by a former Judge of the Court; G.W. Kanyeihamba, 2009, ‘Assessing Regional Approaches to the Protection of Human Rights: The Case of the Stillborn African Court on Human and Peoples’ Rights’, 15(2) *East African Journal of Peace and Human Rights*, pp.278-295.

description of the word as a ‘chameleon-like term that varies in nature according to the right which is to be implemented’.²³

In *Sir Dawda K. Jawara v The Gambia*,²⁴ the Commission interpreted the word ‘peoples’ to mean the entire people of a country as a collective when it found a violation of Article 20(1) on the right to freely determine their political status, as a result of a military coup in The Gambia. It held that the military coup was a grave violation of the right of Gambian people to freely choose their government as entrenched in Article 20(1) of the Charter. Similarly, in *Democratic Republic of Congo (DRC) v. Burundi, Rwanda and Uganda*²⁵ the Commission made generous references to the right of the ‘people’ of Congo to self-determination, and to the disposal of their natural wealth and resources.

However, this interpretation which regards ‘peoples’ as corresponding to the whole collectivity in a state blurs the distinction between ‘the people’ and ‘the State’ as clearly indicated in the African Charter and other international conventions. Although it is arguable whether the distinction ought to be maintained, the point remains that in contemporary Africa the dichotomy provides a useful avenue for making governments accountable to the people. This is because equating the people with the state emboldens African political leaders who often project their decisions and actions as those of the people, even when these are patently against the interests of the people. Additionally, it has also been contended that the Commission’s interpretation of the term in this mode seems to re-emphasize the statist orientation that was the hallmark of thinking at the inception of the now defunct Organization of African Unity (OAU).²⁶ This is because it links the concept of ‘people’ to the inherited territorial demarcations in Africa without

²³ F. Ouguerouz, 2003, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague: Martinus Nijhoff, p.211; C. Baldwin and C. Morel, 2008, ‘Group Rights’, M. Evans and R. Murray, eds. *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2006*, 2nd ed., Cambridge: Cambridge University Press, pp.244-288 at 247-248; F. Viljoen, 2007, note 2, pp.243-244. Contrast, however, Solomon Dersso’s categorization of five possible interpretive modes for the word ‘peoples’ under the Charter. S.A. Dersso, 2006, ‘The Jurisprudence of the African Commission on Human and Peoples’ Rights with respect to peoples’ rights’, 6 *African Human Rights Law Journal*, pp.358-381 at 360-363.

²⁴ (2000) AHRLR 107 (ACHPR) (13th Annual Activity Report) (Gambia Coup Case);

²⁵ Communication 227/1999, (2003) 20th Annual Activity Report; contrast this general interpretation with the radical notion of ‘people’ in the Universal Declaration of the Rights of Peoples otherwise known as the ‘Algiers Declaration’ of 4 July 1976.

²⁶ Indeed, Frans Viljoen has described it as a ‘status quo-serving interpretation of the term’, note 2, p.243.

being attentive to the cultural identities and affinities that define people who now find themselves in two or more countries.

The second interpretation of the term by the African Commission sees the word as a reference to indigenous peoples, ‘oppressed people’, or the inhabitants of an African territory under colonial rule or alien domination. This draws from the express provision of Article 20(2) of the Charter which provides that ‘colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community’. Such people also have the right to the assistance of state parties to the Charter in their liberation struggle against foreign domination, be it political, economic or cultural.²⁷

According to Richard Kiwanuka, this is the ‘least problematic of the uses of the term ‘people’, under current international law, because ‘political self-determination is generally equated with freedom from colonial-type rule.’²⁸ This interpretation certainly had relevance and topicality when some African territories were still under one form of colonial rule or the other, but with the attainment or grant of independence to virtually all of African territories, it will decline in significance, except in cases of ‘internal colonialism’ such as the unending case of Western Sahara still struggling under the ‘colonial’ claws of Morocco, and Southern Sudan which recently gained independence from the long-standing domination of the North.²⁹ It is on this score that there are strong beliefs in some African countries that though external colonialism has ended, it has been replaced by internal colonialism as some ethnic groups have perpetually dominated the political, and, consequently, the economic life of some countries to the detriment of other groups.³⁰

Thirdly, the Commission has also interpreted ‘people’ to mean distinct ethnic groups or a group of people within a state who see themselves as distinct such as the Katangese

²⁷ Article 20(3).

²⁸ R.N. Kiwanuka, 1988, ‘The Meaning of “People” in the African Charter on Human and Peoples’ Rights’, 82 *American Journal of International Law*, pp.80-101 at 88-89.

²⁹ An analysis of this domination is contained in F.M. Deng, 1995, *War of Visions: Conflicts of Identities in the Sudan*, Washington, D.C.: The Brookings Institution, pp.135-177. Significantly, South Sudan became an independent state on 9 July 2011 following a referendum on secession from the Republic of Sudan held in January of the same year.

³⁰ This was partly responsible for the Kenyan pogrom after the December 2007 elections. It was also the moving force of the Eritrean struggle which culminated in their secession from Ethiopia in 1993.

of Zaire, Ogoni of Nigeria, or Endorois of Kenya. Thus in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya*³¹ the complainants who filed the case before the Commission on behalf of the Endorois community alleged a number of violations resulting from the eviction of the Endorois people from their ancestral lands by the Kenyan Government in order to establish a Game Reserve. One of the key issues that arose for determination was the question of who constitutes a 'people' for purposes of the Charter and whether the Endorois could be classified as such. The Commission set out the criteria that a group of individuals would have to satisfy in order to be considered as peoples. These are:

a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy especially rights enumerated under Articles 19-24 of the African Charter – or suffer collectively from the deprivation of such rights'.³²

Based on these criteria, the Commission held that the Endorois qualified as a people for the purposes of the Charter.³³ This interpretation, which is normatively inclusive and progressive, is however manifestly at variance with the international conception of the term which does not regard ethnic groups and minorities as peoples.³⁴ Nevertheless, the interpretation is recognition of the realities of marginalization and exclusion that many ethnic groups and minorities face in Africa and seeks to afford them legal protection. Enforcing the exercise of this right, especially in its external dimension, however raises enormous challenges. The major problem concerns the extent to which the rights can be exercised under the African Charter without jeopardizing the venerated sovereignty of a state. In particular, it may be asked, to what extent can the Ogoni people in Nigeria or the Bakassi, now in Cameroon³⁵ exercise their right to political and economic self-determination?

³¹ Communication 276/2003.

³² Paragraph 151.

³³ Paragraph 162.

³⁴ H. Quane, 1998, 'The United Nations and the evolving right to Self-Determination', 47 *International and Comparative Quarterly*, pp.537-572 at 571.

³⁵ Bakassi was part of Nigeria but ceded to Cameroon by virtue of the ICJ's judgment in the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ Reports 2002, p.303. An analysis of this decision is contained in N.J. Udombana,

The Commission seemed to have dealt with this issue in the earlier case of *Katangese Peoples' Congress v Zaire*.³⁶ The complainant, the President of the Katangese Peoples' Congress, requested the African Commission to recognize, among other things, the independence of Katanga by virtue of Article 20(1) of the African Charter. The Commission however found that the claimants had not shown that they had made efforts to exercise their right to self-determination in accordance with the constitutional options open to them such as confederation, regionalism, local government, or self-government. Moreover, since the Commission is obliged to uphold the territorial integrity and sovereignty of Zaire, now (Democratic Republic of Congo), it found that the exercise of the right to self-determination must be done within the boundaries of the state.

It is my contention that the Commission's central focus in this Communication was on the internal dimension of self-determination even when the demand of the Katangese people was evidently premised on the external dimension. According to Kristin Henrard, 'the right to self-determination in its external dimension refers to the international status of a people concentrated on a specific territory and the relations of that entity with the surrounding states', while the internal dimension of the right is 'concerned with the state structure and other national legal regulations designed to accommodate in a (more) optimal way the separate identities of the various population groups present in a state'.³⁷ In general, the exercise of the right to self-determination in its internal dimension does not have a disruptive potential since it does not affect the territorial integrity of the existing state. This is because the right to internal self-determination can be exercised by ethnic groups and minorities in a state within the framework of such mechanisms as decentralization, regionalization or federalism.³⁸ The basic explanation for this approach by the Commission is the general reluctance to articulate and legitimize the exercise of the right to self-determination in its external dimension for fear of the attendant disintegrative consequences. This is not entirely surprising because self-determination

2004, 'The Ghost of Berlin still haunts Africa: The ICJ Judgment on the Land and Maritime Boundary Dispute between Cameroon and Nigeria', 10 *African Yearbook of International Law*, pp.13-61.

³⁶ (2000) AHRLR 72, (ACHPR 1995) (8th Annual Activity Report) (Katangese Secession Case).

³⁷ K. Henrard, 2000, *Devising an adequate system of minority protection: Individual human rights, minority rights and the right to self-determination*, The Hague/Boston/London: Martinus Nijhoff Publishers, p.281.

³⁸ *Ibid.*, p.307.

had long been described as a phrase ‘loaded with dynamite’ and one that could be a source of political instability, domestic disorder, and a cause of rebellion.³⁹ Such fears are however often over-blown since the exercise of the right in its external dimension is also subject to a number of conditions and realities. It must be realized that the genuine desire and aspirations of a people can hardly be suppressed for too long, as the struggles by the Eritrean and Southern Sudanese peoples have clearly shown. Moreover, the decision puts the exercise of the right, even in its internal dimension, in a precarious situation where the state has a constitutional structure that makes it difficult, if not impossible, for particular ethnic groups in the country to articulate and have their own models of governance accepted by the national governments. Worst still, where there is a deliberate policy skewed against identifiable ethnic groups, especially where the group is perceived to be opposed to the present national government.

Another major problem with the third interpretation of the term is the tension evident in the exercise of the right to disposal of natural wealth and resources contained in Article 21 between the various categories covered in the word ‘people’. For instance, the exercise of this right by an ethnic group in a country may conflict with the claim to the exercise of the same right by the ‘people’ of a state as a collectivity, and even with the state itself. This is more critical in the context of a resource-rich ethnic group within a state, as in the case of the Bakassi in Cameroon, or the Ogoni people in Nigeria. Will the ethnic group’s exercise of this right be overridden by the general right of the collectivity in the state to exercise such right? The African Commission was confronted with the challenge of making a decision on this point in the *Endorois Case*.⁴⁰ It held that the right to natural resources on traditional lands vests in the indigenous peoples and as such the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the respondent State. The Commission even went further to hold that the fact that the government dispossessed the Endorois of their land and failed to provide adequate compensation or restitution, meant that the Kenyan government had violated

³⁹ R. Lansing, 1921, *The Peace Negotiations: A Personal Narrative*, London: Constable and Co. Ltd, p.87. This notion continues to affect the attitude of the international community to issues concerning self-determination today. A. Cassese, 1995, note 17, p.5.

⁴⁰ Note 31.

Article 21(2) which provides that in cases of spoliation, the dispossessed are entitled to lawful recovery of property as well as adequate compensation.⁴¹

The challenges of enforcement arising from this interpretation are better appreciated when placed alongside the Commission's decision in the *Katangese Case*.⁴² It would be recalled that in the latter case, the Commission ruled that the right to self-determination must be exercised within the context of the territorial sovereignty of the Zairean State. A corollary of this line of reasoning is that the assertion of the right to disposal of natural wealth and resources must be exercised within the framework of the right by the state collectivity to exercise the same right. This interpretation not only hollows out the right of 'peoples' under the label of an ethnic group, but renders it completely irrelevant in a situation where national legislation exists that vests ownership, control and disposal of particular natural resources in a country on the state. The Nigerian scenario provides a classic illustration of the problem with such interpretation as both the Petroleum Act,⁴³ and the Land Use Act⁴⁴ vest ownership of oil and land resources in the country in the Nigerian State, thus denying the ethnic groups where these resources are found any right to the disposal of same. Similarly, Article 4(2) of the 1977 Constitution of the Democratic Republic of Sao Tome and Principe provides that, 'the land and the natural resources of the soil and subsoil, in territorial waters and on the continental shelf of the islands, shall be the property of the State, which shall determine the conditions of their improvement and their use'.

Ordinarily, such provisions should not pose serious problems where the government utilizes the natural resources for the benefit of the whole people in the state, but they become worrisome in a country where political leaders plunder the resources of the country without regard for the interests of the people, least of all, the area where the resources are produced. It would seem that under these circumstances, an interpretation conducive to the exercise of this right without upsetting the applecart of state sovereignty will be one that subjects the national legislation to recognition of the interests and

⁴¹ Note 31, paragraph 268.

⁴² Note 36.

⁴³ Chapter P10, Laws of the Federation of Nigeria, 2004, S.1.

⁴⁴ Chapter L5, Laws of the Federation of Nigeria, 2004, S.2 (1). The injustice inherent in the foregoing enactments for the oil bearing communities in Nigeria are examined in K.S.A. Ebeku, 2002, 'Oil and the Niger Delta People: The Injustice of the Land Use Act', 35 *Law and Politics in Africa, Asia and Latin America*, pp.201-231 at 217-229.

developmental aspirations of the natural resource-bearing groups in the country. This leads me to an examination of the role of states in the exercise of this right and how this has been impacted upon by the processes of globalization.

3.3.2 African States and the right to disposal of natural wealth and resources

The tension inherent in the exercise of the right to disposal of natural wealth and resources by peoples and States is traceable to the provisions of the Charter on the exercise of the right. To begin with, Article 21(1) of the Charter proclaims that:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.⁴⁵

However, perhaps as a counterpoise and looking to the external dimension, Article 21(4) of the Charter provides that ‘State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity’. Putting aside the consequential tension already discussed, it can be said that these provisions theoretically underscore the commitment of African leaders to promote economic development of the continent because of their realization that political independence is insufficient to guarantee economic development of their countries. To be sure, the state of underdevelopment of the continent in spite of the abundant natural resources has been a subject of considerable concern, and, emboldened by a number of United Nations Resolutions,⁴⁶ African states sought to use the framework of the Charter to articulate their desire for fundamental change and greater control over their natural resources. To complement these provisions, State parties undertake to ‘eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to

⁴⁵ Article 21(1).

⁴⁶ These include Res 1803(XVII) adopted by the General Assembly at its 1194th Plenary Meeting on December 14, 1962, Res.1803(XVII) UN General Assembly, 17th Sess. Official Records, Supp. No.17(A/5217), p.15-Article 21(1) and Res 3281 Charter of Economic Rights and Duties of States It was adopted at the 2315th Plenary Meeting, December 12, 1974, by a vote of 120 to 6 with 10 abstentions. An analysis of this Resolution and its implications for international law is contained in T.O. Elias, 1992, *New Horizons in International Law*, 2nd rev. ed. Dordrecht: Martinus Nijhoff Publishers, pp.201-249.

fully benefit from the advantages derived from their natural resources'.⁴⁷ It is in this context that reference may be made to the *Social and Economic Rights Case*⁴⁸ where the African Commission referred to the rationale for the entrenchment of the provision. As the Commission put it:

The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative development to its traditional place at the heart of African society.⁴⁹

However, the inclusion of Article 21(1) and similar provisions in the Charter has proven to be more of political posturing than genuine commitment to development as African states, have, in response to the imperatives of globalization, adopted policy measures and engagements diametrically at variance with such provisions. In this regard, they are ever willing to subjugate the human rights of their people in order to allow transnational corporations exploit the natural resources in their territories. This is a manifestation of the negative impact of the globalization process on human rights in Africa. The dynamics of rights marginalization by African states in response to the processes of globalization were brought to centre-stage in the *Social and Economic Rights Case*⁵⁰ which presented enormous challenges as it pertained to the exercise of

⁴⁷ Article 21(5).

⁴⁸ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR2001) (15th Annual Activity Report) hereafter 'Ogoni Case'.

⁴⁹ Ibid, paragraph 56.

⁵⁰ Note 48. The various ramifications of this case are examined in J.C. Nwobike, 2005, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria', 1 *African Journal of Legal Studies*, pp.129-146; H.O. Yusuf, 2008, 'Oil in troubled waters: Multinational corporations and realising human rights in the developing world, with special reference to Nigeria', 8 *African Human Rights Law Journal*, pp.79-107; J. Oloka-Onyango, 2003, 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', 18 *American University International Law Review*, pp.851-913.

various rights under the African Charter. It is therefore necessary to set out the facts of this Communication in some detail here.

The Communication alleged that the military government of Nigeria was directly involved in oil production through the State oil company, the Nigerian National Petroleum Company (NNPC), the majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People.

It was further alleged that the oil consortium exploited oil reserves in Ogoniland with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages resulting in the contamination of water, soil and air and attendant diseases and other health problems for the Ogoni people. It alleged that the Nigerian Government condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies.

It further alleged that the Government withheld from Ogoni Communities information on the dangers created by oil activities and did not involve them in decisions affecting the development of their area. The Government did not require oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland. The Government even refused to permit scientists and environmental organizations from entering Ogoniland to undertake such studies. The Government also ignored the concerns of Ogoni Communities regarding oil development, and responded to protests with massive violence and executions of Ogoni leaders. The Communication alleged that the Nigerian government does not require oil companies to consult communities before beginning operations, even if the operations pose direct threats to community or individual lands.

The Communication further stated that the Nigerian Government participated in this irresponsible oil development that has devastated much of the soil and water upon which

Ogoni farming and fishing depended and that the destruction of farmlands, rivers, crops and animals has created malnutrition and starvation among certain Ogoni Communities. The Communication thus alleged violations of several Articles of the African Charter; namely, Articles 2 (non-discrimination), 4 (right to life), 14 (right to property), 16 (right to health), 18 (right to family life), 21 (right to disposal of wealth and natural resources), and 24 (right to satisfactory environment favourable to development).

It is noteworthy that the Nigerian Government in response to these grave allegations submitted a *Note Verbale* admitting the gravamen of the complaints mentioned and only outlined the remedial measures being taken by the new civilian administration.⁵¹

In considering the admissibility of this complaint under the Charter, the Commission rightly took notice of the fact that the Nigerian military government had enacted various decrees ousting the jurisdiction of the courts for acts of government that violate the fundamental human rights of Nigerians.⁵² It was of the view that under such circumstances no adequate domestic remedies were available to be exhausted, and it therefore declared the Communication admissible.⁵³ On the merits of the case, the Commission had no difficulty in holding that the Nigerian Government did not live up to the minimum expectations of the African Charter, and had violated the aforementioned articles of the Charter. In particular, in holding that Nigeria had violated its obligations under Article 21 of the Charter, the African Commission declared:

In the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly

⁵¹ Paragraph 30.

⁵² Paragraph 41. One of the first acts of the numerous military regimes that Nigeria had was to suspend those sections of the Constitution dealing with fundamental rights and ousting the jurisdiction of the courts from inquiring into any alleged violation of such rights. For instance, the Constitution (Suspension and Modification) Decree No. 107 of 17 November 1993 provided that 'no question as to the validity of this Decree... shall be entertained by a court of law in Nigeria'.

⁵³ The Commission had taken a similar position in *Constitutional Rights Project (in respect of Zamani Lekwot and six others) vs. Nigeria*, Communication 87/93, Eighth Activity Report 1994-1995, Annex VI; and *Civil Liberties Organisation vs. Nigeria*, Communication 129/94, Ninth Activity Report 1995-1996, Annex VIII. It may be mentioned that a crucial condition for admissibility of complaints under Article 56(5) of the Charter is that the complainants must have exhausted local remedies, where available, unless it is obvious that such procedure is unduly prolonged.

affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter'.⁵⁴

It must be stressed that this is not an isolated instance where an African state has ignored the human rights of her citizens to conform with the pressures of economic globalization. As already noted, the Kenyan Government's action in relation to the Endorois people is equally demonstrative of this approach, while the Chad/Cameroon pipeline project is another example where the human rights of Africans was sacrificed on the altar of economic globalization. It may be mentioned that the execution of the pipeline project partly funded by the World Bank entailed massive human rights abuses involving Chadian and Cameroonian nationals near the pipeline project.⁵⁵ Thus in general, while such projects may, arguably, have been designed to promote the social and economic development of the affected states, their execution was done without consideration for the human rights of the affected peoples and communities.

Moreover, notwithstanding the existence of these provisions under the African Charter, but in conformity with the requirements of neo-liberal globalization, African states have concluded several bilateral investment treaties⁵⁶ with developed Western states containing stipulations that severely curtail their power to regulate economic activities in their territories and exercise sovereignty over their natural wealth and resources. Although the concept of economic sovereignty is necessarily relative, since no state is completely sovereign in the present interdependent world, international law recognizes the exercise of sovereign rights as one of the fundamental incidents of statehood.⁵⁷ In other words, sovereignty is compromised in an atmosphere of domination, dependence and inequality, or where a state is not master of its resources.⁵⁸

⁵⁴ Note 48, paragraph 58.

⁵⁵ K. Horta, 2002, 'Rhetoric and Reality: Human Rights and the World Bank', 15 *Harvard Human Rights Journal*, pp.227-243 at 233-237.

⁵⁶ Hereinafter referred to simply as 'BITs', where appropriate.

⁵⁷ I.A. Shearer, ed., 1995, *Starke's International Law*, 11th ed. London: Butterworth and Co., pp.144-145; see also Article 1 of the Charter of Economic Rights and Duties of States which provides that 'every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people without any outside interference, coercion or threat of any form'.

⁵⁸ M. Bedjaoui, 1991, 'The Right to Development', M. Bedjaoui, ed. *International Law: Achievements and Prospects*, Paris and Dordrecht: UNESCO/ Martinus Nijhoff Publishers, pp.1177-1203 at 1189. An analysis of the components of this sovereign right of states is contained in G. Abi-Saab, 1991, Permanent

Applying these principles to the recent embrace of bilateral investment treaties in their present forms by African states, it becomes obvious that their approach is a manifestation of performative contradiction. On the one hand, they had advocated, and succeeded in securing the adoption of international norms that authorize states to exercise sovereign rights over economic activities in their territories and even included this right in the African Charter, yet, on the other hand, they have ‘willingly’ signed bilateral investment treaties that seriously undermine the exercise of such powers.⁵⁹

In general, it may be said that a bilateral investment treaty is an international agreement between a developed and a developing state with the objective of promoting and protecting the investments of nationals of the contracting parties in their respective states. In important respects, bilateral investment treaties can be said to be a form of constitutionalization of economic globalization, since they institutionalize legal incapacity of states to act in a variety of economic matters.⁶⁰ This is because they represent, in the words of David Schneiderman, ‘a form of constitutional pre-commitment binding across generations that unreasonably constrains the capacity [of states] for self-government’.⁶¹ Although the signing of these treaties is traceable to what has been described as the ‘race to the bottom’, where developing states are eager to enter into such agreements in order to attract foreign investment which might otherwise be channelled to other developing states, African states ought to have rejected treaties that fundamentally negate their sovereign rights and human rights commitments under the African Charter. This is more so since there is no credible and irrefutable evidence of a correlation between investment treaties and foreign investment flows; a neo-liberal dogma that African states have been beguiled to accept. As Sornarajah points out, ‘the

Sovereignty over Natural Resources and Economic Activities’, M. Bedjaoui, ed. *International Law: Achievements and Prospects*, Paris and Dordrecht: UNESCO/ Martinus Nijhoff Publishers, pp.597-617 at 601-604.

⁵⁹ As Andrew Guzman points out, ‘these bilateral treaties undermine precisely the independence and control that the countries have fought so hard to protect’. A.T. Guzman, 1998, ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’, 38 *Virginia Journal of International Law*, pp.639-688 at 666; D. Schneiderman, 2008, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise*, Cambridge: Cambridge University Press, pp.27-28.

⁶⁰ D. Schneiderman, 2008, note 59, p.37.

⁶¹ Ibid.

loss of regulatory control that the treaties entail is not justified by the unprovable hypothesis that such treaties lead to foreign investment flows'.⁶²

Furthermore, adherence to the bilateral investment treaties has led to the 'resurrection' of the 'Hull Rule' on the treatment of foreign property in cases of expropriation or nationalization, a rule that also impinges on the exercise of state sovereignty, especially in its internal dimension.⁶³ It may be mentioned that Cordell Hull, the then American Secretary of State had, in articulating the American response to the Mexican agrarian expropriations of the early twentieth century stated:

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that *under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor*'.⁶⁴

This rule which received trenchant opposition from developing countries was subsequently abandoned in favour of the 'appropriate compensation' standard embodied in subsequent United Nations Resolutions.⁶⁵ Ironically, through the process of legal globalization, most bilateral investment treaties contain clauses embodying this Hull rule. An example is the treaty between the United States and the Republic of Congo.⁶⁶ It provides in Article 3(1) as follows:

⁶² M. Sornarajah, 2006, 'Power and Justice: Third World Resistance in International Law', 10 *Singapore Year Book of International Law*, pp.19-57 at 32. Contrast however, E. Neumayer, and L. Spess, 2005, 'Do Bilateral Investment Treaties increase foreign direct investment to Developing Countries?', 33(10) *World Development*, pp.1567-1585 who argue that from quantitative evidence a higher number of BITs raises foreign direct investment flows to developing countries, admitting however, that in some cases this could be dependent on specifications of institutional quality.

⁶³ This is not to ignore the normative problems with the concept of sovereignty, so aptly analyzed in M. Koskenniemi, 2005, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge: Cambridge University Press, pp.224-302.

⁶⁴ The exchange of notes between the American and Mexican governments on the Mexican expropriations are contained in G.H. Hackworth, 1942, *Digest of International Law, Vol.3*, Washington D.C: United States Government Printing Office, Section 228, at 655-65 (Italics added for emphasis). This formula has become the magic phrase of Western capitalist states and is now inserted, as a matter of course, in bilateral investment treaties.

⁶⁵ These include Resolutions 1803, and 3281. It must be acknowledged that even the interpretation of the 'adequate compensation' standard has also generated some dispute with developed Western states contending, even against the clear wordings of the Resolutions, that it requires adoption of the Hull rule.

⁶⁶ It is entitled Treaty between the Government of the United States of America and the Government of the Republic of Congo Concerning the Reciprocal Encouragement and Protection of Investment, signed at Washington February 12, 1990 and it entered into force 3 August, 1994. (Emphasis added). The bilateral

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; *upon payment of prompt, adequate and effective compensation*; and in accordance with due process of law and the general principles of treatment provided for in Article 11(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

In significant ways, this provision seriously hinders the exercise of sovereignty, in particular, the right to nationalize or expropriate foreign investment because of the inherent difficulty, if not impossibility, in complying with the specified conditions for nationalization or expropriation.⁶⁷ Very often, a consideration of the magnitude of these conditions prevents African states from taking progressive actions and measures that could promote the indigenization of their national wealth and resources. Moreover, although cast in the façade of mutual commitment, the obligations in the above treaty, like others, are, in practice, evidently one-sided in favour of American investments in the Republic of Congo, the latter having no tangible investors in the United States to benefit from such provisions.

In order to further situate the extent of contradiction between the adoption of bilateral investment treaties in their present forms by African states and their obligations under the African Charter in response to the processes of globalization, it is expedient to set out the relevant provisions of the Charter of Economic Rights and Duties of States which African states strove so hard to ensure its adoption by the international community and which was the inspiration for the provisions on this matter in the African Charter. Article 2(1) of the Charter provides as follows: 'Every State has and shall freely exercise full permanent

treaty between the United Kingdom and Mozambique 2007 *Treaty Series* No 15 also contains the Hull formula in Article 5.

⁶⁷ States desiring to embark on nationalization measures to meet their economic imperatives may not immediately have resources to pay for the equivalent market value of the investment, effect immediate payment, or have the requisite foreign exchange to make the payment fully realizable and freely transferable.

sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.’ Article 2(2) goes on to declare that:

‘Each State has the right:

- a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investors; ...
- c) To nationalize, expropriate or transfer ownership of foreign property in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means’.

In light of these provisions, the *volte-face* of African states in ‘agreeing’ to bilateral investment treaties that incapacitate their exercise of sovereign rights is thus theoretically inexplicable. The plausible practical explanation is that in trying to comply with the requirements of economic globalization, for example, liberalization of the economy, they have privileged the promotion and protection of foreign investment over and above their human rights obligations under the African Charter. This privileging of foreign investment over human rights is even reinforced by the existence of international legal rules that extol and sanctify contractual rights over the exercise of sovereign rights. The tensions that arise from this state of affairs were brought to the fore in the *Texaco Overseas Petroleum Company/California Asiatic Oil Company vs. The Government of the Libyan Arab Republic*.⁶⁸ The dispute arose out of 14 Deeds of Concession concluded between the Libyan authorities and the oil companies on the exploitation of petroleum resources in Libya. Significantly, Clause 16 of the Agreement provided as follows:

The Government of Libya will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual

⁶⁸ (1978) 17 ILM 1, hereafter the ‘*Texaco Arbitration Case*’.

rights expressly created by this concession shall not be altered except by the mutual consent of the parties.

However, the Libyan Government by Law No.66 of 1973 (Decree of Nationalization) nationalized 51% of all property, rights and assets of these companies relating to the Deeds of Concession held by them, and under Law No.11 of 1974 (Decree of Nationalization) nationalized all the properties and interests, rights and assets of the companies. Article 2 of both Decrees provided for the payment of compensation by the State the amount of which was to be determined by a Committee appointed by the Minister of Petroleum. The companies were dissatisfied and declared a dispute with the government and nominated their Arbitrator. The Libyan Government rejected the request for arbitration and so did not appoint an Arbitrator. Based on a request by the Plaintiffs in accordance with the Concession Agreement, the President of the International Court of Justice appointed a Sole Arbitrator, Professor Rene-Jean Dupuy. In its Memorandum objecting to the arbitration, Libya contended that the disputes were not subject to arbitration because the nationalizations were acts of sovereignty and placed reliance on relevant United Nations resolutions.

After reviewing the legal effect in international law of the General Assembly resolutions concerning permanent sovereignty over natural wealth and resources, the Arbitrator concluded that the resolutions could not be used by the state to violate its contractual obligations in commercial transactions. Relying on the decision in the *Aramco Case*⁶⁹ that ‘nothing can prevent a State, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights’, the Arbitrator concluded:

The result is that a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of the same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract.⁷⁰

Even more explicitly, he stated that ‘the recognition by international law of the right to nationalize is not sufficient ground to empower a State to disregard its commitments,

⁶⁹ 1963 *International Law Reports* 117 at 168.

⁷⁰ Note 68, p.24.

because the same law also recognizes the power of a State to commit itself internationally, especially by accepting the inclusion of stabilization clauses in a contract entered into with a foreign private party'.⁷¹

Equally worrisome is the fact that the conditions for expropriations and nationalizations stipulated in BITs are usually far more onerous than the constitutional provisions or national laws of states on this subject, thus ensuring the grant of preferential treatment to foreign investors than nationals of the affected states in cases of expropriation or nationalization. Such nationals therefore have less protection from state interference with their investments than investors from countries with BIT Agreements with their countries.⁷² For instance, in the case of South Africa, the constitutional provision on the payment of compensation in the event of a 'taking' as contained in Article 25 of the 1996 Constitution is that it must be just and equitable, and reflect a balance between the public interest and the interests of those affected, whereas in the BIT between Italy and South Africa which came into force on 16 March 1999, the required standard is that of 'immediate, full and effective compensation'. Moreover, such compensation must be based on the 'genuine value of the investment... payable from the date of expropriation at a normal commercial rate of interest, without delay and effectively realizable and freely transferable'.⁷³ This ensures that Italian investors in South Africa are accorded treatment over the national treatment standard, a provision that recently gave rise to the case of *Piero Foresti and 10 others v Republic of South Africa*.⁷⁴ The limitations on the exercise of sovereign rights through conditions attached to expropriations has been fortified by the increasingly expansive interpretations of

⁷¹ Ibid, pp. 24-25. The tension inherent in the exercise of sovereign rights and the upholding of contractual rights are examined in D.E. Vielleville, and B.S. Vasani, 2008, 'Sovereignty over natural resources versus rights under investment contracts: Which one prevails?', 5(2) *Transnational Dispute Management*, pp.1-21 at 7-13.

⁷² D. Schneiderman, note 59, pp.144-146.

⁷³ Article VIII; see also the Agreement between the United Kingdom and the Republic of Kenya, 1999 which entered into force 13 September 1999 and contains the same phrase in Article V thereof.

⁷⁴ Case No. ARB (AF) /07/1 concluded 4 August 2010. The implications of this case on the exercise of sovereign rights by the South African Government within the context of the globalization process will be examined later in this work.(Chapter 5). For the moment it is sufficient to mention that South Africa's bilateral investment treaties have been described as 'a double-edged sword' by providing certainty to foreign investors, and security to outward-bound South African investors and at the same time constraining government policy-making. L.E. Peterson, 2006, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights*, Occasional Papers No.26, Geneva: Dialogue on Globalization, p.8.

expropriation over the years – interpretations that have borrowed heavily from the American constitutional experience relating to the taking of private property for public purposes.⁷⁵ The result is that today any action of the host state government that leads to interference with the right to property – with property defined as a bundle of rights in classical jurisprudence - can be said to amount to expropriation. Indeed, as Sornarajah has pithily remarked, under such circumstances, ‘a state’s regulatory powers are so marginalized that measures taken to protect the environment or those taken in response to financial crises are construed to be compensable expropriation making the protection of foreign investment trump even vital interests of the state’.⁷⁶

Finally, the right to disposal of natural wealth and resources has been used by the African ruling elite as a license to appropriate these resources in the name of the State, for their own benefit to the detriment of the people. It is indeed ironical that the resource endowment of most African countries has been turned into a ‘resource curse’ because of the capture of state apparatus and resources by the ruling elite.⁷⁷ Equatorial Guinea, Gabon, and Nigeria are classic examples where the natural resources of the countries have been deployed to serve the interests of the ruling cliques rather than being used for the development of the countries.

The problem created by the corrupt tendencies of the ruling group is exacerbated by the willingness of the international community to accord recognition to any group controlling governmental powers in a country as the legitimate authority in dealing with the resources of the country regardless of how it came to power. This situation which has been described as the ‘resource privilege’ confers on the ruling group the powers and privileges of disposing of their country’s resources without question.⁷⁸ Again, the examples are legion in Africa; Sani Abacha of Nigeria, Mobutu Sese Seko of Zaire (now

⁷⁵ D. Schneiderman, note 59, p.56; a development that has been characterized as the ‘Fourteenth Amendment psychology’, *ibid.*

⁷⁶ M. Sornarajah, 2006, ‘Power and Justice: Third World Resistance in International Law’, 10 *Singapore Year Book of International Law*, pp.19-57, at 33.

⁷⁷ E. Duruigbo, 2006, ‘Permanent Sovereignty and Peoples’ Ownership of Natural Resources in International Law’, 38 *George Washington International Law Review*, pp.33-100 at 33; T. Pogge, 2008, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge: Polity Press, pp.118-120.

⁷⁸ T. Pogge, 2007, ‘Severe Poverty as a Human Rights Violation’, T. Pogge, ed. *Freedom from Poverty as a Human Right: Who owes what to the very poor?*, Oxford: Oxford University Press, pp.1-74 at 48-51; L. Wenar, 2008, ‘Property Rights and the Resource Curse’, 36(1) *Philosophy and Public Affairs*, pp.1-32.

DRC), Omar Bongo Ondimba of Gabon, Nguema Mbasoga of Equatorial Guinea etc. Such developments call for a people-centred construction of the right to disposal of the natural wealth and resources to ensure that the natural resources are actually used by the people rather than being appropriated by the kleptocratic political leaders acting on behalf of the State. This gives importance to the recent approach adopted by the African Commission in the *Endorois Case*⁷⁹ when it interpreted the right to the disposal of natural resources as one equally vested in the people who can exercise such rights. The decision must be seen as a progressive development in the efforts to ensure that African leaders do not continue to dispose of the state's natural resources in ways that marginalize the human rights of people where those resources are located. It also gives impetus to the quest for deploying human rights norms to constrain the deleterious effects of economic globalization.

3.3.3 Right to development

One other area where the mutual impact between human rights and the globalization process is evident within the context of the African Charter is in relation to the right to development. Initially formulated by the Senegalese jurist, Keba M'baye in 1972⁸⁰, the right to development is now accepted by the international community as an important strategy in the efforts to promote the social and economic development of states. The recognition of this right did not come without objections and challenges concerning its normative status, including questions such as who has the right, and who owes the duty to the enforcement of the right? Indeed, one of the foremost critics of the right to development, Jack Donnelly, had described it as 'conceptually and practically misguided... a legally and morally confused notion that is likely to be positively detrimental to the realization of human rights'.⁸¹ He also contended in the same context that, 'the political consequences of recognizing such a right are highly undesirable from a

⁷⁹ Note 31.

⁸⁰ In a lecture delivered at the International Institute of Human Rights, Strasbourg, see, M.Bedjaoui, note 58, p.1179.

⁸¹ J. Donnelly, 1984, 'The Right to Development: How not to link Human Rights and Development' C.E. Welch, Jr. and R.I. Meltzer, eds. *Human Rights and Development in Africa*, New York: State University of New York Press, pp.261-283 at 261.

human rights perspective'.⁸² Notwithstanding such objections, the international community with a near-unanimous voice adopted the Declaration on the Right to Development⁸³ in 1986 and expressly declared the right to development as a human right. The Declaration states in its preamble that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.'

It is also declared in Article 2(1) of the Declaration that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized. It further declares that the human person is the central subject of development and should be the active participant and beneficiary of the right to development.⁸⁴ By giving prominence to the 'active, free and meaningful participation' in the development process, the Declaration on the Right to Development deploys the rights-based approach which is now regarded as the central feature of the development process.

On the beneficiaries of the right, the Declaration refers to 'every human person and all peoples' as right holders. However, at the international level, individuals cannot assert the right alone and require the instrumentality of the state which becomes the conditional duty bearer and agent of the entire population and individuals in the state.

Although the Declaration on the Right to Development is not a treaty and so lacks the legal effects attributable to treaties, it has been recognized and referred to by subsequent

⁸² Ibid, p.264. His sustained attack on the right to development is also contained in the following writings J. Donnelly, 1985, 'In Search of the Unicorn: The Jurisprudence of the Right to Development', 15 *California Western International Law Journal*, pp.473-509; J. Donnelly, 1993, 'Third Generation Rights', C. Brolmann, et al, eds. *Peoples and Minorities in International Law*, Dordrecht: Martinus Nijhoff Publishers, pp.119-150.

⁸³ Adopted 4 December 1986, GA Res.41/128 (Annex), UN GAOR, 41st Sess., Supp. No.53, at 186, UN Doc. A/41/53 (1987). The United Nations General Assembly adopted the Declaration by a majority of 146 in favour and 1 against with 8 abstentions, including Germany, Japan and United Kingdom. However, the vote cast against the Declaration was that of the United States of America, a hegemonic power, with enormous influence regarding the emergence of the legal status of the right to development.

⁸⁴ Art. 2(1). The centrality of participation in the development process is examined in A. Orford, 2001, 'Globalization and the Right to Development', P. Alston, ed. *Peoples' Rights*, Oxford: Oxford University Press, pp.127-184, at 138-139.

General Assembly resolutions and can be said to have political and legal ramifications.⁸⁵ Indeed, the fundamental importance of the right to development in human rights jurisprudence has been underscored by Mohammed Bedjaoui. According to him:⁸⁶

The right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the *core right* from which all the others stem.

The international community reiterated the significance of the right to development in the Vienna Declaration and Programme of Action in 1993. The Vienna Declaration concludes that, 'the right to development, as established in the Declaration on the Right to Development, is a universal and inalienable right and an integral part of fundamental human rights'.⁸⁷ In significant respects, this is a reinforcement of Amartya Sen's analysis of the instrumental and constitutive dimensions of human rights as important components of the development process.⁸⁸

A preliminary point which has relevance to the impact of the right to development on the globalization process is that starting from its adoption in 1986, the right to development has remained a highly politicized one – a baggage that trails it to the present day. Its articulation and adoption was part of the anti-colonial sentiment of the 1970s derived from the concern by newly independent states to promote the economic development of their states. They considered the international economic system to be inequitable and called for a new international economic order. This culminated in the adoption of the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States in 1974. However, absent the support of developed Western states, implementation of the new economic order has not advanced beyond hortative declarations.⁸⁹ The developing states therefore used the right to development as another avenue for placing their developmental challenges squarely

⁸⁵ D Aguirre, 2008, *The Human Right to Development in a Globalized World*, Hampshire: Ashgate Publishing Ltd, p.70.

⁸⁶ M. Bedjaoui, 1991, note 58, p. 1182 (emphasis in original text).

⁸⁷ Article 10. An analysis of the historical processes and dynamics that culminated in the adoption of the Declaration is given by A. Sengupta, 2002, 'On the Theory and Practice of the Right to Development', *24 Human Rights Quarterly*, pp.837-889.

⁸⁸ A. Sen, *Development as Freedom*, Oxford: Oxford University Press, p.3.

⁸⁹ The developed Western states were unwilling to support the realization of the measures contained in these Resolutions which seemed targeted at diluting their economic advantages.

before the international community. Through this approach, the right to development became a legal mechanism to promote the political and economic goals of developing states, while it also generated entrenched opposition from developed Western states. This political connotation surrounding the right to development has subsequently continued to dominate issues concerning its international recognition and enforcement. As Daniel Aguirre points out:

‘The politicization of the right to development was entrenched when the United States cast the lone dissenting vote against the Declaration on the Right to Development, thereby affirming its stance against the political goals of the developing states. Significantly, this influential resistance has prevented the advancement of the right to development both in terms of implementation and a source of binding legal obligations’.⁹⁰

It is from this perspective that one must understand the ever-present rhetoric concerning the right to development at the international arena as developed states often make promises and commitments concerning it which are easily ignored when vital economic interests are at stake. This also explains the limited impact the right to development has had on the globalization process as positive measures for its realization have not matched the pronouncements of support for it. Western opposition to the Declaration is predicated on two key points; namely, the alleged imprecise nature of the Declaration, which makes it vague and inconsistent, and the view that the right to development is a national priority for which there should be no legal obligations for members of the international community.⁹¹ This position however ignores the fact that a corollary of the interdependence of states is the obligation for states to stand together and support those in difficulties to guarantee genuine world prosperity for the benefit of all – a recognition now reflected in the Millennium Development Goals.⁹²

⁹⁰ D. Aguirre, 2008, note 85, p.79. Even the current move towards a binding legal standard based on the Declaration is being opposed by many developed states.

⁹¹ It bears mentioning that opposition to the right to development has not waned. The United States Representative at the Human Rights Commission emphasized this point when he stated: ‘We cannot support the call to make progress on realizing the right to development. There is no internationally accepted definition of such right. Making such a call is premature and irrelevant’. Statement by Joel Danies, U.S Representative to the UN Human Rights Commission, Summary Record of the 63rd Meeting, 59th Sess, UN Doc., E/CN.4/2003/SR.63 (2003), paras.5 and 15.), p.87.

⁹² United Nations Millennium Declaration, A/55/L.2. It was adopted by the General Assembly at the 8th Plenary Meeting 8 September 2000. A critique of the Millennium Goals is provided in M. Alegre, 2007, ‘Extreme Poverty in a Wealthy World: What Justice Demands Today’, T. Pogge, ed., *Freedom from*

Interestingly, developed Western states are now more willing to commit to the right to development because development is increasingly being seen within the prism of the neo-liberal project and the previous radical and revolutionary tone of advocacy for the right to development has been considerably mellowed down. Most of the developing countries are now willing to accept a right to development tied to the neo-liberal economic paradigm in their quest to attract foreign investment.⁹³ In this process, the human rights corpus has been given a secondary position in the scheme of things.

Nevertheless, the right to development has had significant impact on other developments in the international system. The increased international acceptance of the right to development and its contemporary impact on the globalization process is evidenced by the fact that it is expressly referred to in the Millennium Development Goals. Thus in Article 11 of the Goals, the Heads of State and Governments declared that:

We will spare no effort to free our fellow men, women and children from abject poverty and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want’.

Moreover, in Article 24 the international community declared that it would ‘spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development’. However, with barely four years to the target of eradication of extreme poverty by the year 2015, the indicators do not point in a positive direction in terms of actualization of those goals especially in Africa.⁹⁴ As indicated in the Millennium Development Goals Report 2010, this is principally because, ‘unmet commitments, inadequate resources, lack of focus and accountability, and insufficient dedication to sustainable development have created shortfalls in many areas’.⁹⁵ The more likely

Poverty as a Human Rights: Who owes what to the very Poor ?, Oxford: Oxford University Press, pp.237-254 at 242-244.

⁹³ D. Aguirre, note 85, p.82. Notice their eagerness to sign BITs with developed states mentioned in the previous subsection. A classic epitome of this eagerness is demonstrated in the BIT between Nigeria and United Kingdom which was signed on 11 December 1990 and entered into force on the same date!

⁹⁴ G. Schmidt-Traub, 2009, ‘The Millennium Development Goals and human rights-based approaches: Moving towards a shared approach’, 13(1) *International Journal of Human Rights*, pp.72-85 at 74.

⁹⁵ United Nations, 2010, *The Millennium Development Goals Report 2010*, New York: United Nations, p.4 available www.un.org/millenniumgoals/pdf/MDGReport2010Enr15-lowres20100615-.pdf . See also,

scenario is that just before 2015, the goal post would be shifted further after a ritualized reiteration of the factors that prevented realization of the targets.

Although it is now impossible to deny the existence of the right to development, the crucial challenge remains how well it can be implemented by the international community to make positive impact on the globalization process considering the absence of a binding legal instrument on it at the global level. The importance of a binding instrument leads to an examination of the African Charter on Human and Peoples' Rights which is so far the only binding international mechanism that specifically includes the right to development. Thus Article 22 of the Charter provides as follows:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The relevance of these provisions to the development discourse in Africa was demonstrated in the first inter-State Communication brought before the African Commission on Human and Peoples' Rights. In *Democratic Republic of Congo (DRC) v. Burundi, Rwanda, and Uganda*⁹⁶ the complaint of DRC was that the armed forces of the Respondent States had committed grave and massive violations of human and peoples' rights in the Congolese provinces where there had been rebel activities since August 1998. DRC further stated in the Communication that the Ugandan and Rwandan governments had acknowledged the presence of their respective armed forces in the eastern provinces of DRC under the pretext of safeguarding their interests. The Communication chronicled instances of such grave violations that ranged from assassination of Congolese nationals, killing of innocent civilians, including women and children, rapes and even the exploitation and looting of the natural resources of DRC.⁹⁷ The Commission came to the conclusion that the Respondent States had violated several Articles of the African Charter.

United Nations, 2010, *World Economic and Social Survey 2010: Retooling Global Development*, New York: United Nations, p.183 which calls for a retooling of the existing aid, trade and financial architectures with the aim of overcoming the present shortcomings. E/2010/50/Rev.1;ST/ESA/330. Interestingly, a High Level Summit of World Leaders on the MDGs held in September 2010 also highlighted these challenges.

⁹⁶ Note 25.

⁹⁷ Ibid, paragraphs 2-6.

In particular, it found that the illegal exploitation and looting of the natural resources of the Complainant State was in contravention of Article 21 of the Charter. According to the Commission:

The deprivation of the right of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.⁹⁸

Equally worthy of mention is the fact that the adoption of the African Charter in 1981 when the Declaration on the Right to Development was still under consideration by the United Nations played a crucial role in influencing the international discourse on development and encouraged the eventual adoption of the Declaration. The provisions of the African Charter on the right to development has also impacted on a number of initiatives adopted by the United Nations, development agencies and the policies and programmes of international economic institutions. As indicated in the last chapter, African States also relied on these provisions in the Charter to formulate some development programmes and initiatives such as the New Partnership for Africa's Development and the African Peer Review Mechanism. These initiatives represent the commitment of African States to fast-track the development of the continent, even within the parameters of the neo-liberal paradigm in order to address the gross underdevelopment of the continent. It would seem, however, that the impacts of the African Charter on the processes of economic globalization have been greatly impeded by the present international economic system, and the situation is likely to remain so for a long time unless there is a significant restructuring of the international economic order.

3.4 Conclusion

This chapter has highlighted the connection between the adoption of the African Charter on Human and Peoples' Rights and the globalization process with specific focus on some human rights norms embodied in the Charter that have influenced, and been influenced by the dynamics of that relationship. It has been shown that, in general, the Charter

⁹⁸ Ibid, paragraph 95.

represents the desire by African states to deploy the human rights framework in the task of promoting economic development of the continent within the context of globalization. In this connection, the human rights corpus has been used as an instrument in their fight for international recognition of the continent's developmental challenges and for a fairer international economic system. This has been done under the auspices of the right to political and economic self-determination of peoples. However, a number of problematic issues relating to the exercise of these rights were identified. These relate principally to the indeterminacy of the term 'people' as used in the relevant instruments and the various interpretations thereof. The inherent contradiction and conflict in the exercise of the right to disposal of natural wealth and resources between the state and the component units of the state under the umbrella of ethnic groups, minorities or even indigenous peoples were also highlighted.

The manifest contradiction between the advocacy for the exercise of sovereign rights and the practical response by African states to the imperatives of globalization which constrained them to take certain actions and adopt policy measures at variance with the rights contained in the African Charter was also explored. This was shown to be indicative of the privileging of some components of the globalization process, such as foreign investment over human rights by African states. Nevertheless, the African Commission's elaboration of the dynamics involved in the exercise of human and peoples' rights in the *Social and Economic Rights Case*⁹⁹ and its pronouncement in late 2009 on the concept of 'people' under the Charter in the *Endorois Case*¹⁰⁰ represents a positive development capable of generating great impact on the exercise of the rights entrenched in the African Charter and their intersection with the globalization process.

While there are noticeable deficiencies in the enforcement of decisions and recommendations of the African Commission,¹⁰¹ the fundamental impact of such landmark decisions by the Commission must be acknowledged as representing modest harvests evidencing the impact of human rights norms on the globalization process. On this score, it is necessary to mention that the impacts of such decisions and developments

⁹⁹ Note 48.

¹⁰⁰ Note 31.

¹⁰¹ For instance, the Nigerian government is yet to fully implement the recommendations of the Commission in the *Social and Economic Rights Case* relating to the environmental clean - up of Ogoniland several years after the decision.

cannot always be measured with precision as they often constitute vital components within a multi-causal framework. Nevertheless, they remain important testaments to the transformative potentials and catalyzing role of the human rights corpus.

How this transformative role of the human rights corpus plays out in its interaction with international economic institutions will be the subject of the next chapter.

4 Chapter 4: Human Rights Norms and International Economic Institutions

4.1 Introduction

The central focus of this chapter is to examine how human rights norms came to permeate the operations of international economic institutions and the impact this has had on the globalization process in Africa.¹ This inquiry is informed by the understanding that international institutions such as the IMF, World Bank and World Trade Organization (WTO) not only play a crucial role in the present international economic system but constitute the engine room of globalization.² It follows that the impacts of human rights on their policies and programmes have a direct bearing on the globalization process. While their pre-eminent role in economic matters is generally acknowledged, the correlation between their operations and the quest for the protection of human rights is not so obvious. This explains the initial reluctance and difficulty encountered in integrating human rights norms into the operations of these institutions since it was assumed that as economic institutions, human rights issues were outside the purview of their mandates.

However, given that their policies and programmes usually have a fundamental impact on the social and economic conditions of people in the affected states and the enjoyment of human rights, the institutions were compelled to realign the interpretation of their mandates with these concerns. Moreover, as institutions involved in the promotion of economic development it became apparent that they had to take account of human rights

¹ A substantial part of the research in this chapter has recently been published in N. S. Okogbule, 2011, 'Modest harvests: appraising the impact of human rights norms on international economic institutions in relation to Africa', 15(5) *International Journal of Human Rights*, pp.728-748.

² A. Anghie, 2000, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', *New York University Journal of International Law and Policy*, pp.243-290 at 247.

since the latter are constitutive elements of the development process.³ With this realization, the crucial challenge has been how to formulate and legitimize the consideration of human rights issues by these institutions since their institutional mandates do not expressly mention human rights. Flowing from this is the problematic issue of determining which conception of human rights has been, or should have been, adopted by these institutions since the human rights corpus is susceptible to being appropriated to serve hegemonic or counter-hegemonic purposes. This is particularly acute when it is institutionalized. It is against this background that the inquiry pursued here assumes merited significance as the study examines the extent to which the policies and operations of these institutions have been reshaped and constrained by the imperatives of human rights.

Specifically, it will be shown that initially these institutions adopted restrictive interpretations of their mandates which prevented them from taking or supporting progressive measures to promote human rights. The institutions ensured that this understanding of their mandates prevailed for several decades. Indeed, it is argued, these institutions are typically founded on the 'hegemony' of the ideology of economic neo-liberalism. This analysis relates to Antonio Gramsci's concept of 'hegemony' which he defined as the 'spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group'.⁴ According to Gramsci, 'this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production'.⁵ However, two parallel but complementary developments led to a dramatic change in this approach. First, there was a realization of the inadequacy of the restrictive interpretation of 'development' in some ways, the goal of these institutions,

³ Paragraph 2 of Preamble to the United Nations Declaration on the Right to Development adopted as General Assembly Resolution 41/128 of 4 December 1986 expressly recognizes development as a comprehensive process embracing several social and economic values.

⁴ A. Gramsci, 1971, *Selections from the Prison Notebooks*, Q. Hoare and G.N. Smith, eds. London: Lawrence & Wishart, p.12. Professor John Agnew has also defined hegemony as 'the enrolment of others in the exercise of your power by convincing, cajoling, and coercing them that they should want what you want', and that 'it represents the binding together of people, objects, and institutions around cultural norms and standards that emanate over time and space from seats of power (that have discrete locations) occupied by authoritative actors'. J.A. Agnew, 2005, *Hegemony: The New Shape of Global Power*, Philadelphia: Temple University Press, pp.1-2.

⁵ Ibid.

and the need for a more holistic conception which includes human rights. Second, the growing agitation against the debilitating effects of the policies and prescriptions of these institutions on the social and economic conditions of Third World countries, including Africa, championed by human rights NGOs and other social movements, made a change of approach inevitable, which compelled the institutions to broaden the interpretation of their mandates.

The second development enumerated above is a clear demonstration of the transformative and emancipatory capacity of human rights, in contrast with a self-induced adoption of liberal interpretative approach by the institutions, as is often portrayed in the conventional narration of these changes. To provide a foundation for this contention, I will examine first, how the IMF, World Bank and the WTO began to deploy human rights norms in their policies and programmes, followed by an appraisal of the nature of human rights adopted by the institutions. It will be demonstrated that these changes buttress in significant ways, Gramsci's ideas of 'passive revolution' and the emergence of counter-hegemonic practices that challenge any existing order.⁶ However, it will be contended that, though evident, the impact of the utilization of the language of human rights by these institutions has not been significantly remarkable largely because the institutions have merely adopted the hegemonic version of human rights, with its emphasis on formal and constitutional provisions and structures, rather than substantive protection of these rights, which is the hallmark of the counter-hegemonic conception. I conclude the chapter by positing that only the adoption of a counter-hegemonic version of human rights will be able to catalyze the required paradigm shift in the direction of a desirable globalization process.

4.2 Theoretical Foundations

As the name indicates, international economic institutions are supranational organizations whose functions revolve around the economic development of states. Although there are several such organizations, the attention of this chapter is limited to the IMF, World Bank and WTO because of the significant impact of their activities on the policies of African

⁶ A. Gramsci, 1971, note 4, p.46.

states and the protection of human rights in the continent. While the mandate of each of these institutions as defined by its charter is unique, one common thread is the non-specific mention of human rights in their Articles of Agreement. This has made the engagement of international economic institutions with issues of human rights a subject of considerable discussion in recent years.⁷ In turn, such concerns are driven by the increasing realization of the mutually reinforcing relationship between human rights and the economic policies and processes associated with globalization such as liberalization, privatization, and deregulation promoted by these institutions. Considerable interest has been generated in ascertaining whether or not these policies actually lead to the reduction of poverty and inequality in the world and their implications for human rights. Indeed, it has been asserted that the present global institutional order is associated with massive incidence of avoidable poverty and the imposition of the largest form of human rights violations ever committed in human history.⁸

While this assertion merits full consideration and will be addressed later, it is sufficient for the moment to mention that such concerns are heightened by the assumed disjuncture between human rights and the specific functions assigned to the institutions under their Articles of Agreement. The emphasis on the specific functions of the institutions is itself a reflection of the overbearing influence of the functionalist theory of international organizations which was the guiding principle in the formulation of the Articles of Agreements. It may be mentioned that the hallmark of the functionalist theory is its emphasis on the non-political character of international organizations which are expected to perform their functions with objectivity and expertise.⁹ According to Bartram Brown:

Functionalism is a theory of international organization which holds that a world community can best be achieved not by attempts at the immediate political union of states, but by the creation of non-political international agencies dealing with specific economic, social, technical, or humanitarian functions.

⁷ H.V. Morals, 2001, 'The Globalization of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights', 33 *George Washington International Law Review*, pp.71-96 at 88.

⁸ T. Pogge, 2007, 'Severe Poverty as a Human Rights Violation', T. Pogge, ed. *Freedom from Poverty as a Human Right: Who owes what to the very poor?* Oxford: Oxford University Press, p.52.

⁹ A. Anghie, 2000, note 2, pp.264-265.

Functionalists assume that economic, social and technical problems can be separated from political problems and insulated from political pressures’¹⁰

In the case of the IMF and the World Bank, the notion that specialized, technocratic functions should be performed independent of politics is manifested in the provision, though differently couched, in their Articles of Agreement preventing them from interfering in the political affairs of their member states.¹¹

The second possible cause of disjuncture between the operations of these institutions and human rights is traceable to the fact that the institutions, especially IMF and World Bank, were established before the advent of contemporary international human rights law which explains why their Articles of Agreement are silent on issues of human rights. To be sure, it was only after the adoption of the United Nations Charter in 1945 and subsequently, Universal Declaration of Human Rights in 1948, that the centrality of human rights in international discourse became generally accepted. Although the institutions have existed over these years the challenges raised by their lack of sufficient consideration of human rights norms has only become prominent because of the increasing recognition of development as a holistic concept that embraces human rights. These international economic institutions have therefore had to contend with a choice between religious adherence to the abstract wordings of their Articles of Agreement, and facing the challenges associated with changes in societal expectations and realities including the growing salience of human rights.¹² This is more so since the universal acceptance of human rights has had significant impacts on all aspects of the globalization process including, the policies and practices of international economic institutions. However, in order to properly situate the extent to which human rights issues have been integrated into the policies and practices of these institutions, it is expedient, as a preliminary issue, to examine the legal status of the institutions in relation to international human rights law.

¹⁰ B. S. Brown, 1992, *The United States and the Politicization of the World Bank*, London: Kegan Paul International, pp.14-15.

¹¹ A. Anghie, 2000, note 2, p.266.

¹² It has even been asserted that these institutions have drifted away from the initial economic vision that informed their establishment. N. Woods, 2006, *The Globalizers: The IMF, the World Bank, and their Borrowers*, Ithaca and London: Cornell University Press, pp.1-2; A. Orford, 2001, ‘Globalization and the Right to Development’, P. Alston, ed. *Peoples’ Rights*, Oxford: Oxford University Press, pp.127-184 at 148-149.

4.2.1 International Legal Personality and Human Rights Obligations

Perhaps there can be no better statement of principle concerning the legal personality of international institutions than the well-known formulation of the International Court of Justice (ICJ) in the *Reparations for Injuries Suffered in the Service of the United Nations Case*.¹³ As the Court put it:

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.

It was based on this principle that the ICJ held that the United Nations Organization is a subject of international law possessing international personality, deriving this conclusion from the guiding indicia formulated. This principle was re-emphasized by the Court in the *Advisory Opinion in the WHO and Egypt Case*¹⁴ wherein it declared that:

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties’.

It can therefore be said that as subjects of international law, international economic institutions have rights and duties, separate from, and in addition to those of their member states.¹⁵ Since international human rights law is an important part of international law and is expressed in conventions, customary international law, peremptory norms, international obligations *erga omnes*, and general principles, it follows that as a general proposition, the institutions also have obligations concerning the international law of human rights

¹³ ICJ Reports (1949) 174, at 178-179; *Advisory Opinion concerning Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Reports, (1996) 66 at 78-81, paragraphs 24-26.

¹⁴ Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, 73 at 89-90; 1980 ICJ Reports.

¹⁵ F. Mackay, 2002, ‘Universal Rights or a Universe unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Operational Policy 4.10 on Indigenous Peoples’, 17 *American University International Law Review*, pp.527-624, at 561. In the case of the IMF, Joseph Gold, its longest serving General Counsel, (1960-1979) had stated that ‘... the international juridical personality of the Fund is an objective fact in international law which goes beyond relations with members’. J. Gold, 1965, *The International Monetary Fund and International Law: An Introduction*, Washington, D.C.: International Monetary Fund, p.2.

with regard to their internal and external activities.¹⁶ The implication of this is that the institutions are obliged to ensure that their policy formulation and implementation account for, and respect the human rights obligations of their member states. Additionally, as specialized agencies of the United Nations,¹⁷ the IMF and the World Bank have obligations derived from the United Nations Charter, and are therefore required to act in conformity with the Charter's provisions on human rights.¹⁸

It is from this perspective that Professor Daniel Bradlow's distinction between 'operational' and 'institutional' human rights issues as they relate to the international financial institutions derives its salience. According to him, the operational issue 'pertains to the human rights impact of the IFIs'[i.e. international financial institutions'] operations in their Member States', and focuses 'on the IFIs' responsibilities for ensuring that the design and implementation of their projects, programs, policies and in-country activities are consistent with internationally recognized human rights standards'. The institutional human rights issue pertains to the internal rules and procedures of the IFIs and it focuses on 'the responsibilities of the international financial institutions to ensure that their own internal operating rules and procedures are consistent with internationally recognized human rights standards'.¹⁹ It follows that on both scores, the institutions are obliged to take measures that enhance the promotion and protection of human rights.

Having established the international legal status and obligations of these institutions in respect of human rights, it is appropriate to ascertain whether their operational and institutional mechanisms have in any way been impacted upon by the growing salience of human rights. To carry out this inquiry, it is necessary to explore the insight provided by the fundamental transformation of the concept of development.

¹⁶ F. Mackay, 2002, note 15, p.562.

¹⁷ By virtue of the relationship Agreement separately between them and the UN, namely: Agreement Between the United Nations and the International Monetary Fund, Article IV(2), 16 U.N.T.S 328, 332 (1948); Agreement Between the United Nations and the International Bank for Reconstruction and Development, Article IV(2), 16 U.N.T.S. 346, 348 (1948).

¹⁸ S.I. Skogly, 2004, 'The Position of the World Bank and the International Monetary Fund in the Human Rights Field', R. Hanski and M. Suksi, eds. *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd ed., Turku/Abo: Institute for Human Rights, Abo Akademi University, pp.231-250 at 244-245.

¹⁹ D. D. Bradlow, 1996, 'The World Bank, IMF and Human Rights', 6 *Transnational Law and Contemporary Problems*, pp.47-90 at 51.

4.2.2 Emergence of a new 'Development' paradigm

The fact that the Articles of Agreement of the World Bank, the IMF and the WTO do not expressly mention human rights as one of the purposes posed a major challenge to the consideration of human rights by these institutions. This challenge was, however, overcome through a broad interpretation of the term 'development' which is instead mentioned in the Articles of Agreement of the World Bank and IMF, and the Marrakesh Agreement establishing the WTO.²⁰ It may be mentioned that in classical economics, 'development' was seen as a process of economic growth premised on the belief that high average growth rates of production would lead to reduced poverty either as a result of a 'trickle-down' effect or of deliberate government policies.²¹ According to Paul Streeten, under this paradigm 'the goals of development were defined narrowly in terms of GNP and its growth, and other goals such as greater equality, eradication of poverty, meeting basic human needs, conservation of natural resources, abating pollution, and the enhancement of the environment, as well as non-material goals, were neglected or not emphasized sufficiently'²². This meant that emphasis was placed more on economic growth than on human welfare.

One consequence of this pre-occupation with economic growth was that the forces of capitalism were seen as inherently inimical to democracy and human rights by destroying the society's civic culture and sense of community. The traditional and communal mode of social organization with its emphasis on human solidarity was displaced in the process. This position is well represented by the analysis of Karl Polanyi who demonstrated how the 'Great Transformation' brought about by capitalism radically altered the social structure of European societies especially England.²³

²⁰ Articles 1(ii) of IMF Articles, Article 1(i) and (iii) of the Articles of Agreement of IBRD, and the Preamble to the Marrakesh Agreement establishing the WTO, mention development as part of the goals of these institutions.

²¹ P. Streeten, 1981, *Development Perspectives*, London: The Macmillan Press Ltd., p.123.

²² Ibid, p.124. This approach is reflective of W.W. Rostow's doctrine of stages of growth, the inadequacies of which are examined in I. Alechina, 1982, 'The Contribution of the United Nations system to formulating development concepts', UNESCO, *Different Theories and Practices of Development*, Paris: UNESCO, pp.9-68 at 18.

²³ K. Polanyi, 2001, *The Great Transformation: The Political and Economic Origins of our Time*, Boston: Beacon Press, pp.42-44. A similar, but controversial argument has been advanced in respect of the impact of globalization on human rights in developing countries. R.E. Howard-Hassmann, 2005, 'The

This restrictive conception of development was however jettisoned and replaced by a broader definition that sees human rights as an integral part of the development process. Pioneered by writers such as Amartya Sen, this movement underscored the fact that ‘development’ is not simply an economic concept but one that takes cognizance of social, economic and even environmental issues. Thus Amartya Sen argues in his influential book *‘Development as Freedom’* that development must be seen as a ‘process of expanding the real freedoms that people enjoy’.²⁴ According to him, ‘focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization’²⁵. Sen therefore argues that ‘an adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income-related variables’²⁶, and be more concerned with enhancing the lives we lead and the freedoms we enjoy.²⁷

This means that recognition must be given to such issues as good health, literacy and education, the ability to participate in the life of the community, and the freedoms of expression and association. In other words, development covers the whole range of economic, cultural, social as well as civil and political rights meaning that all human rights are part and parcel of development. This conception also emphasizes the instrumental linkage between human rights as the basic freedoms are causally interdependent.²⁸ For example, freedom of association allows people to participate in decisions that affect their ability to benefit economically and socially from the process of development. In this connection, reference may be made to the United Nations Declaration on the Right to Development, 1986 which expressly recognizes that ‘development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of

Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization’, 27 *Human Rights Quarterly*, pp.1-40 at 3-6.

²⁴ A. Sen, 1999, *Development as Freedom*, Oxford: Oxford University Press, p.3.

²⁵ Ibid.

²⁶ Ibid, p.14

²⁷ Ibid.

²⁸ Ibid, pp.36-40.

individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from'.²⁹

This indicates the increased understanding that development represents a bundle of interlocking concepts embracing a broad spectrum of issues such as environmental, socio-economic, political and institutional matters which are intimately connected with human rights. It is this broad interpretation of development that has led to the acceptance of a human rights-based approach to development which requires that human rights norms and methodologies be of central importance at all stages of the development process. This entails 'mainstreaming' of human rights policies into the activities of governmental, institutional and other actors. Indeed, it has been said that:

A rights-based approach to development is one that explicitly ties development policies, objectives, projects, and outputs to international human rights standards requiring that development be directed towards fulfilling human rights. Conversely, it is a proactive strategy for converting rights into development goals and standards. For example, health, education, or land reform projects will be informed, framed by, and substantially directed towards fulfilling the procedural and substantive aspects of the associated rights. In essence, this converts development goals and objectives into rights, entitlements, responsibility and accountability'.³⁰

It is also important to mention that there is a trend among multi- and bilateral development actors, including United Nations specialized Agencies to adopt a rights-based approach to development or to tie their programmatic work to human rights standards. This followed their agreement in 2003 embodied in a 'Common Understanding' of how to apply a human rights-based approach to their work.³¹ Thus the United Nations Development Programme, UNDP has explicitly adopted a general human rights-based approach to development, while others such as the United Nations Children

²⁹ Note 3, *ibid*.

³⁰ F. Mackay, 2002, note 15, p.534.

³¹ 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among United Nations Agencies', 2003 available at www.undp.org/governance/docs/HR_GuidesCommonUnderstanding.pdf, accessed 18 March 2010. Significantly, bilateral agencies such as the Swedish Development Corporation Agency and DFID have also taken giant strides in this respect; M. Robinson, 2005, 'What Rights Can Add to Good Development Practice', P. Alston and M. Robinson, eds. *Human Rights and Development: Towards Mutual Reinforcement*, Oxford: Oxford University Press, pp.25-41 at 29.

Fund (UNICEF) and the United Nations Development Fund for Women (UNIFEM) have tied their programmatic work to human rights conventions related to their mandates.³²

Perhaps it was in order to align with this new conception of development that the World Bank in 1999 adopted the Comprehensive Development Framework (CDF) which looks at development from a holistic perspective. As the then President of the Bank, Paul Wolfensohn put it:

The Comprehensive Development Framework I am proposing highlights a more inclusive picture of development. We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa. Integration of each of these subjects is imperative at the national level and among the global players'.³³

Against this background, it becomes important to ascertain how international economic institutions have responded to this increasing recognition of the intimate relationship between development and human rights.

Since the approach adopted by each of these institutions will be examined in some detail in the next subsection, it suffices to state here that they have generally shaken off their initial reluctance on this subject and, in varying degrees, broadened the interpretation of their mandates by restructuring and refocusing their policies and programmes, and become ardent advocates of the imperative of good governance and human rights in their relationship with member states.

It is my contention that the existing hegemonic order has been challenged to some extent by counter-hegemonic drives, as envisaged by Gramsci in his study of hegemony.³⁴ First, the new approach to human rights did not emerge simply as a measure of the broad interpretation of their mandates, but in the words of Rajagopal, as a 'complex dialectic' of the relations between these institutions and human rights and social movements which had become increasingly more vocal since the 1980s.³⁵ Reference can

³² Namely; Convention on the Rights of the Child, and Convention on the Elimination of All Forms of Discrimination Against Women, respectively; F. Mackay, 2002, note 15, pp.533-534.

³³ J.D. Wolfensohn, 1999, *A Proposal for a Comprehensive Development Framework*. Available at www.worldbank.org/WRVPP4RV7 accessed 28 March 2010.

³⁴ A. Gramsci, 1971, note 4, pp.238-239, where he refers to the transition from the 'war of manoeuvre' to the 'war of position'.

³⁵ B. Rajagopal, 2004, *International Law from Below: Development, Social Movements and Third World Resistance*, Cambridge: Cambridge University Press, p.155.

be made to the various anti-SAP riots and demonstrations in several African countries in the 1980s and early 1990s which were instrumental to the change of approach by these international economic institutions. Indeed, those were periods when such riots were regular occurrences in African cities resulting in the death of several persons and the loss of millions of dollars in damaged and looted properties.³⁶ As ably documented by Mark Ellis-Jones, the series of protests and civil unrests in developing countries during this period were directed against the policies championed by the IMF and the World Bank and African countries such as Angola, Ghana, Kenya, Malawi, Mozambique, Nigeria, South Africa, and Zambia witnessed various forms of protest against the adoption of the economic policies of these institutions.³⁷

Second, the rejection of the Multilateral Agreement on Investment (MAI) in 1998 also showed the tremendous impact of counter-hegemonic forces and social movements in generating change. The draft MAI, which was being negotiated by the twenty-nine member countries of the Organization for Economic Co-operation and Development (OECD), contained far-reaching enforceable provisions on the promotion and protection of foreign direct investment. The countries of the developing world were to be pressured to adopt this range of protections for foreign investments in their countries. However, further negotiations on it were stalled and eventually halted by the coordinated action of several NGOs against it using the Internet.³⁸

Third, equally significant in this respect although with limited substantive success, are the yearly demonstrations (started in 1999 with the protest at the WTO Ministerial Conference in Seattle) against the WTO, the Bretton Woods institutions and the Davos World Economic Forum Summits, as well as the demonstrations against the Free Trade Area of the Americas (FTAA). The significant work of the World Social Forum in galvanizing and sustaining these measures is worthy of mention. It is today one of the pillars of the global movement questioning neo-liberal globalization through forging links

³⁶ D. Green, 2008, *From Poverty to Power: How active citizens and effective States can change the World*, Oxford: Oxfam International, p. 296.

³⁷ M. Ellis-Jones, 2002, *States of Unrest II: Resistance to IMF and World Bank Policies in Poor Countries*, London: World Development Movement, p.4.

³⁸ D. Schneiderman, 2008, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge: Cambridge University Press, pp.201-203. Admittedly, there were also other factors, such as oppositions from the US Congress, as well as France and Canada over cultural concerns, but these were even accentuated by the increasing opposition of the NGOs.

between local, national and global social movements and non-governmental organizations involved in the counter-hegemonic struggles.³⁹ These developments have ensured that the human rights discourse has become not only the language of progressive politics world-wide, but also that of governance shaping policies in diverse areas of institutional reform, economic and social policy, and political reform.

The international economic institutions have consequently announced that they would adopt new, broader approaches to development and human rights. The impact of the counter-hegemonic critique on the neo-liberal hegemony of these institutions, however, has to be assessed empirically. Indeed, a doubt is raised: is the adoption of the human rights language by these institutions a genuine embracement of the counter-hegemonic 'passive-revolution' or is it not, rather, an attempt to contain the demands of mass movements while guaranteeing the sustenance of the neo-liberal economic policies?

To contextualize these issues and ascertain how human rights came to permeate the policies and programmes of the World Bank, IMF and WTO, it is proposed to examine the institutions separately, beginning with the World Bank.

4.3 The World Bank⁴⁰

The World Bank was established in July 1944 at the Bretton Woods Conference, together with the IMF. As envisioned, its primary duty was to assist in the reconstruction efforts after the devastation of the Second World War and play a major role in the economic development of developing states. Specifically, it is stated in Article 1(iii) of the Articles of Agreement that one of the purposes of the Bank is:

[T]o promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.

³⁹ B. de Sousa Santos, 2006, *The Rise of the Global South: The World Social Forum and Beyond*, London: Zed Books Ltd, p. x.

⁴⁰ The World Bank group consists of the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), International Development Association (IDA), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for the Settlement of Investment Disputes (ICSID). In this work, except where any specific institution within the group is mentioned, reference to World Bank includes the Group.

It is clear that this and the other provisions specifying the Bank's purposes place enormous responsibility on the institution and the attendant mandate broad enough for the Bank to play an important role in the economic development of states. However, as would be shown shortly, in relation to human rights, the mandate was not initially looked at from this broad perspective.

4.3.1 Normative Framework

It is noteworthy that from its existence, the World Bank had always faced the predicament of dealing with two contrasting interpretations of its mandate: one sees the Bank as a technocratic agency with a narrow economic purpose; the other sees it as the international institution that can bring about progressive social goals.⁴¹ These approaches which resonate from the prevailing views at the time of its establishment have continued to have its hold on the Bank. While the first school of thought favours a restrictive interpretation of its Articles of Agreement, the liberal view accepts a broader interpretation. On this score, it is important to assess how these debates inform the behaviour of the World Bank with respect to human rights. Two provisions of the Bank's Articles of Agreement that have given rise to these differing interpretations of the Bank's mandate in relation to human rights are Articles III S.5 (b) and Article IV S.10. Article III S.5 (b) provides as follows:

The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency without regard to political or other non-economic influences or considerations

On its part, Article IV S.10 provides that:

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.

⁴¹ G. Brodnig, 2001, *The World Bank and Human Rights: Mission Impossible?* Carr Center for Human Rights, Policy, Working Paper T-01-05, p.4. Available at www.hks.harvard.edu/cchrp/Web%20Working%20Papers/BrodnigHR&WorldBank.pdf accessed 15 March 2010.

Although these provisions do not expressly mention human rights, their interpretation by the Bank has raised a number of issues relating to the relevance of human rights in its operations. Relying on these provisions, the narrow functionalist school contends that the Bank is essentially a technical, non-political institution, and that political issues that include human rights should be the concern of institutions such as the United Nations and its agencies concerned with similar matters. In the first few decades of the Bank's existence, this viewpoint prevailed and its mandate was interpreted in a manner that excluded other social and political considerations. It was in reliance on this technocratic and functionalist view of its mandate that the Bank in the 1960s rejected calls for it to refuse to approve loans to South Africa and Portugal because of their apartheid and colonial policies respectively.⁴²

At best, the Bank rejected an interpretation of its mandate that encompasses *all* human rights, but accepted a restrictive approach that excluded civil and political rights from its purview in preference for social and economic rights.⁴³ Setting the tone for an interpretation of the Bank's mandate that advocates the selective inclusion of some human rights in the Bank's operations and the exclusion of others, Ibrahim Shihata, the former General Counsel of the Bank made the following formulation:

For any international financial institution, such as the World Bank, the question becomes, not whether human rights are relevant to development, but whether the mandate of any institution, as defined and limited by its Articles of Agreement, can cover the promotion and protection of all human rights, or is limited to the rights which have an economic or social character as opposed to a political character.⁴⁴

In answering this question, Shihata maintained that a textual and teleological interpretation of the language of the Articles especially Article IV S.10 precludes the Bank's attention to a broad range of human rights issues. According to him, the Bank's Articles exclude political considerations and prohibit it from taking non-economic

⁴² I.F.I. Shihata, 1993, 'Human Rights, Development, and International Financial Institutions', 8 *American University Journal of International Law and Policy*, pp.27-37, at 32.

⁴³ I.F.I. Shihata, 1995, *Prohibition of Political Activities in the Bank's Work: Legal Opinion by the Senior Vice President and General Counsel*, July 12, 1995. These points had earlier been canvassed by Shihata in an article, I.F.I. Shihata, 1988, 'The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements', 17 *Denver Journal of International Law and Policy*, pp.39-66.

⁴⁴ I.F.I. Shihata, 1993, note 42, at 28.

considerations into account. Although he admitted that in reality it may be difficult to isolate ‘economic considerations’ from political considerations, especially in policy-based lending, he nevertheless made a distinction between economic, social and cultural rights and civil and political rights. As he put it:

...while there are limits on the possible extent to which the World Bank can become involved with human rights, especially those of civil and political nature, the Bank certainly can play, and has played, within the limits of its mandate, a very significant role in promoting various economic and social rights.⁴⁵

Putting it more directly in relation to civil and political rights, he submits that:

...the Bank cannot, in my view, use its operations as a reward for the countries, which respect political rights or a punishment for those, which do not. Such a criterion is not only alien to the Articles of Agreement; it runs counter to the above-quoted provisions of these Articles which enjoin the Bank from interference in the political affairs of its members.⁴⁶

It is however, significant that Shihata acknowledges two exceptions to his formulation. The first one concerns the participation of affected people in the design and implementation of projects. According to him, for such participation and consultation to be useful, a reasonable measure of free expression and assembly is required and the Bank would be acting within proper limits if it insisted that such freedom be insured for the purpose of the project.

The second exception relates to a situation where there is ‘an extensive violation of political rights which takes [such] pervasive proportions [that it] could impose itself as an issue in the Bank’s decisions. This would be the case if the violation had significant economic effects’.⁴⁷ From this formulation, the violation of civil and political rights must directly jeopardize the economic objectives of the Bank in order to become an ‘economic consideration’ within the meaning of Article IV S.10.⁴⁸

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid, pp. 32-33; also, I.F.I. Shihata, 1997, ‘Democracy and Development’, 46 *International and Comparative Law Quarterly*, pp.635-643 at 640.

The fact that these formulations by Shihata have informed the Bank's policies and practices over the years makes its subjection to scrutiny imperative. In fact, several aspects of Shihata's views raise criticism.

First, on the prohibition against interference in the 'political affairs' of any member state, it can be mentioned that it is now increasingly accepted in international law that 'political affairs' refer only to those issues that are not subjects of concern for the international community as a whole. It is now well established that this does not include violations of fundamental human rights, which transcend a state's autonomous jurisdiction. Such rights represent obligations of an individual state to the international community as a whole and are therefore not the subject of its 'political affairs'.⁴⁹

Second, the distinction presented by Shihata between the duties of the Bank in relation to economic, social and cultural rights on the one hand, and civil and political rights on the other hand, in the Bank's operations, ignores the concept of the indivisibility and interdependence of human rights, and the corresponding international obligations for their concurrent enforcement. It is in fact generally accepted in the doctrine, as also enunciated in the United Nations declarations that because of their interconnected nature human rights cannot be so divided.⁵⁰

Third, the determination of whether an issue raises political considerations and consequently to be ruled outside the mandate of the Bank is itself 'political'. This is because it invariably entails making value judgments, since the links between human rights violations, political stability and economic development are not clear-cut. For example, many civil conflicts affecting African countries, though apparently political, are also intricately driven by economic considerations.⁵¹ The difficulty with determining what constitutes 'political affairs' is further buttressed by the fact that the Bank itself has throughout time re-defined 'corruption' from a political issue to an economic one.⁵²

⁴⁹ G. Brodnig, 2001, note 41, p.19.

⁵⁰ See the Declaration on the Right to Development, 1986 and the Vienna Declaration and Programme of Action, 1993, paragraph 5.

⁵¹ The Sudanese conflict between the North and the now independent Southern Sudan illustrates this point. D.H. Johnson, 2003, *The Root Causes of Sudan's Civil Wars*, Bloomington, Indiana: Indiana University Press, pp.61-64; Human Rights Watch, 2003, *Sudan, Oil, and Human Rights*, New York: Human Rights Watch, pp.137-157.

⁵² This re-definition and re-classification was done in 1996 during the tenure of James Wolfensohn as President of the Bank. M. A. Thomas, 2007, 'The Governance Bank', 83(4) *International Affairs*, pp.729-745 at 741-742; I.F.I. Shihata, 1997, 'Corruption – A General Review with an Emphasis on the

Furthermore, although Shihata argues that the Bank should not advocate through its operations any particular political system or form of government, it is obvious that the Bank's good governance agenda⁵³ is largely driven by the ideals of a liberal democracy and the value systems of the leading shareholders of the Bank.⁵⁴ It is also obvious that issues of governance include accountability, transparency and rule of law, all of which have direct bearing on civil and political rights. Under this umbrella, the Bank has had to support activities such as judicial reform, strengthening the press, and even reform of government institutions. What could be more political than these? This belies the Bank's purported non-involvement in issues of a political nature because when found convenient, it has unabashedly been involved in such matters. In trying to depoliticize its role the World Bank seeks to deflect responsibility or culpability away from itself for the dramatic growth of poverty and social inequality across the globe and even the gradual erosion of social safety nets where these exists, especially in relation to states that adopt its economic prescriptions.⁵⁵ This it does by casting itself in the robe of a technocratic, non-political institution and seeking thereby to sustain the confidence of its borrowers. Yet the political role and influence is hardly disguisable.

In light of the foregoing, it is not surprising that there is now a shift in emphasis from the Shihata interpretative model as evidenced in the opinion of the new General Counsel of the Bank, Roberto Danino.⁵⁶ After stating that it is consistent with the Bank's Articles of Agreement for the decision-making processes of the Bank to incorporate social, political and other factors that may have an impact on its economic decisions, he continued:

This same line of analysis applies to the discussion of which human rights are relevant for the making of economic decisions. Some assert that only economic rights are relevant, not political rights. In my view there is no stark distinction

Role of the World Bank', 15 *Dickinson Journal of International Law*, pp.451-485 at 474-477. A recent analysis of the Bank's perception of corruption is contained in C.P.B. Munhoz, 2008, 'Corruption in the Eyes of the World Bank: Implications for the Institution's Policies and Developing Countries', 26 *Pennsylvania State International Law Review*, pp.691-708.

⁵³ To be discussed later, *infra*.

⁵⁴ G. Brodnig, 2001, note 41, p.17.

⁵⁵ B. de Sousa Santos, 2002, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. London: Butterworths, LexisNexis, p.341.

⁵⁶ R. Danino, 2005, 'Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts', P. Alston and M. Robinson, *Human Rights and Development: Towards Mutual Reinforcement*, Oxford: Oxford University Press, pp.509-524, at 517.

between economic and political considerations: there is an interconnection among economic, social, and cultural rights on the one hand, and civil and political rights on the other. Indeed, it is generally accepted at the political level that all human rights are universal, indivisible, interdependent and interrelated. Also from a financial point of view I believe the Bank cannot and should not make a distinction between different types of human rights. It needs to take all these considerations into account⁵⁷

One can therefore say that drawing from a holistic approach to development, it is not out of place for the Bank to take on board *all* issues of human rights since these are intricately related to the developmental challenges that nations face.

However, advocacy for a broad interpretation of the Bank's Articles to incorporate *all* human rights is not an endorsement of unbridled interpretation to bring within its purview other issues that impinge on the sovereignty of states. Indeed, it can be said that, in a way, this is already happening in a number of states in Africa as the economic institutions now play a crucial role in economic policy formulation, public service reforms, and judicial reforms in these countries.⁵⁸ There is therefore the need to strike a delicate balance between adopting a broad enough interpretation that brings within its purview human rights considerations, and taking over the basic policy functions of borrower governments.

4.3.2 World Bank's policies and practices in relation to human rights

Within the scope of its mandate, the Bank has adopted a number of policies and programmes in its determination to promote economic development of its members which have some connection with human rights. One such policy adopted by the Bank to meet the changing needs of its members is the concept of 'good governance'.

4.3.2.1 Good Governance

From a theoretical point of view, 'good governance' is an essentially contested term with several meanings.⁵⁹ In general, it can be said that good governance 'refers to the

⁵⁷ Ibid.

⁵⁸ A. Anghie, 2000, note 2, pp.266-267; B.S. Chimni, 2004, 'International Institutions Today: An Imperial Global State in the Making', 15 *European Journal of International Law*, pp.1-37 at 6-13.

⁵⁹ A. Anghie, 2004, *Imperialism, Colonialism and the Making of International Law*, Cambridge: Cambridge University Press, p.247. An analysis of the transformation of the term is provided in M. Doornbos, 2003, 'Good Governance: The Metamorphosis of a Policy Metaphor', 57(1) *Journal of International Affairs*, pp.3-17.

ensemble of policies, discourses, initiatives and institutions that seek to transform the practices of development in the Third World'.⁶⁰ It was formulated essentially to deal with the assumed lack of governance in developing countries that had rendered previous development efforts in these countries ineffective. Its articulated package includes liberal democracy, human rights, rule of law, free market economy, and the principles derived from these concepts. The Bank began to focus on borrower 'good governance' as a key component of its relationship with developing countries in the early 1990s.⁶¹ This resulted in a dramatic shift of emphasis from what has been described as 'bricks and mortar infrastructure'⁶² to large-scale inclusion of human development, institutional reform, and social development. It meant moving away from 'hard lending' to 'soft lending', or, simply put, from project to policy-based lending. Indeed, the Bank's conception of 'good governance' is one that incorporates transparency, accountability, and a predictable legal framework. According to the Bank:

Good governance is epitomized by predictable, open, and enlightened policy making (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law'.⁶³

The Bank accordingly places great reliance on good governance as a condition for development and a critical factor in its assistance to member countries. It has made the disbursement of loans conditional on improvements to the quality of governance in borrower states. In particular, the lending arm of the Bank, International Development Association (IDA) has explicitly introduced governance conditionality and made good governance an allocation criterion for IDA resources, which represent the majority of

⁶⁰ O. Onazi, 2009, 'Good Governance and the Marketization of Human Rights: A Critique of the Neoliberal Normative Approach', *Law, Social Justice & Global Development*, (An Electronic Law Journal), pp.1-18, at 2.

⁶¹ M.A. Thomas, 2007, note 52, p.729. This new concern by the Bank is reflected in the number of policy documents and programmes recently rolled out under this head. These include: *Governance: The World Bank Experience*, Washington, D.C, World Bank, 1990; *Governance and Development*, Washington, D.C., World Bank, 1992; *Helping Countries Combat Corruption: The Role of the World Bank* *Poverty Reduction and Economic Management*, Washington, D.C., World Bank, 1997; *Development and Human Rights: The Role of the World Bank*, Washington, D.C., World Bank, 1998; *Reforming Public Institutions and Strengthening Governance, A World Bank Strategy*, Washington, D.C. November 2000.

⁶² R. Danino, 2005, note 56, p.512.

⁶³ *Governance: the World Bank's experience* 1994, Washington D.C: World Bank.

loans to least-developed countries.⁶⁴ Not surprisingly, it has been said that the Bank for Reconstruction and Development has become the ‘Bank for Good Governance’.⁶⁵

Although it has also been argued that the Bank’s insistence on this concept is a replication of the ‘civilizing mission’,⁶⁶ the fact that it is annexed to the neo-liberal economic policies predicated on the ‘Washington Consensus’⁶⁷ makes it highly questionable as a mechanism that can promote genuine development in African countries. While reserving appraisal of the concept for later discussion, it is pertinent to mention here that this advocacy of good governance and latter-day embrace of human rights by the Bank has also raised another problematic. This relates to the interpretation to be given to such policy shift and its intended objective(s), since the advocacy is capable of at least three plausible interpretations.

First, it may be seen as a genuine self-realization by the Bank of the need to promote development and the protection of human rights world-wide. This represents the conventional, non-committal interpretation of the new approach. Second, it could be regarded as a classic case of appropriation of the language of rights by the Bank with the hidden objective of promoting the economic interests of Western capitalist states through strengthening governments in developing countries to guarantee political and economic stability. This reading is driven by the belief that the hegemonic forces understand the immense emancipatory capacity of law and the universal appeal of the human rights language, and are intent to deploy it to achieve their particular economic objectives. A third reading of this change is to see it as a response by the Bank and its twin institution, the IMF, to the increased human rights activism that had deplored their operational *modus* and demanded more democratic, accountable and humane relationships with the affected states. The possibility of these different readings of the good governance mantra by the

⁶⁴ G. Brodnig, 2001, note 41, pp.6-7.

⁶⁵ M.A. Thomas, 2007, note 52, p.730.

⁶⁶ A. Anghie, 2004, note 59, pp.249-250. It has been suggested that notwithstanding the rhetoric, the focus of the governance mantra is on ensuring that the developing countries are integrated into the global market economy. P. McAuslan, 1997, ‘Law, Governance and the Development of the Market: Practical Problems and Possible Solutions’, J. Faundez, ed. *Good Government and Law: Legal and Institutional Reform in Developing Countries*, London: Macmillan Press Ltd., pp.25-44 at 41.

⁶⁷ The inadequacies of the Washington Consensus have recently been comprehensively examined by leading economists resulting in the adoption of what they call ‘the Barcelona Development Agenda’. N. Serra, et al, 2008, ‘Introduction: From Washington Consensus Towards a New Global Governance’, N. Serra and J.E. Stiglitz, eds., *The Washington Consensus Reconsidered: Towards a New Global Governance*, Oxford: Oxford University Press, pp.3-13 at 3-7.

Bank derives from the malleability of the human rights corpus as a tool that can be used to actualize either hegemonic or counter-hegemonic purposes.⁶⁸ As mentioned earlier, there is always the possibility of governments, institutions and even NGOs appropriating the language of rights to achieve particular objectives after they have been integrated into their operational structures.

Furthermore, the Bank has also demonstrated its involvement with the promotion and protection of human rights through development. Thus, in 1998, at the fiftieth anniversary of the Universal Declaration of Human Rights (UDHR), the Bank published a Manual entitled, *Development and Human Rights: The Role of the World Bank*,⁶⁹ which emphasized the important contributions of the organization in securing and promoting economic, social and cultural rights and the impact of its governance lending on building a favourable environment for a broader range of human rights.

The document also contains a number of far-reaching statements and declarations by the Bank concerning its perception of the relationship between development and human rights. Thus it emphasizes the Bank's belief that creating the conditions for the attainment of human rights is a central and irreducible goal of development,⁷⁰ and that sustainable development is 'impossible without human rights'.⁷¹ Moreover, it states that it is the manner in which economic reform lending programs are implemented that is crucial to secure the needs of the poor'.⁷² It also stresses the Bank's belief that human rights cannot be guaranteed without a strong, accessible and independent judiciary'.⁷³ Furthermore, according to the Bank, 'the world now accepts that sustainable development is impossible without human rights. What has been missing is the recognition that the advancement of an interconnected set of human rights is impossible without development'.⁷⁴

These statements are further buttressed and concretized by the Bank's Comprehensive Development Framework which 'takes a holistic approach to development. It seeks a

⁶⁸ B. de Souza Santos, 2002, note 55, pp.280-282; O. Onazi, 2009, note 60, p.5; R. Falk, 2009, *Achieving Human Rights*, London and New York: Routledge, pp.35-37.

⁶⁹ World Bank, 1998, *Development and Human Rights: The Role of the World Bank*, Washington, D.C: IBRD.

⁷⁰ Ibid, p.2.

⁷¹ Ibid.

⁷² Ibid, p.8.

⁷³ Ibid, p.15.

⁷⁴ Ibid, p.2.

better balance in policy making by highlighting the interdependence of all elements of development - social, structural, human, governance, environmental, economic, and financial, and goes further to acknowledge that ‘without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible’.⁷⁵

Taken together, these statements and policy formulations clearly show the Bank’s recognition of the mutual relationship between development and human rights and its important role in ensuring their realization through its various programmes. However, in order to demonstrate the extent to which human rights norms have impacted on the operations of the World Bank and look beyond the hortatory statements, it is necessary to examine the Bank’s policies in relation to two important aspects of its activity, namely; projects affecting Indigenous Peoples and the Involuntary Resettlement of Displaced Persons arising from Bank-funded projects.

4.3.2.2 Case Studies

1. Projects affecting Indigenous Peoples

One area where the impact of human rights is evident in the operations of the Bank is in its approach to projects relating to indigenous peoples. In 2001 the Bank formulated an operational document known as OP 4.10, which details its policies and expectations concerning the execution of projects relating to indigenous peoples. The significance of this Operational Policy for the present purpose, lies in the fact that it is the only Policy document where the Bank expressly used the term ‘human rights’.

The adoption of this Operational Policy is traceable to 1981 when the Bank began to give consideration to the need to avoid encroachment on the territories used or occupied by tribal groups in the implementation of its supported projects. This led to the adoption of an Operational Manual Statement OMS 2.34 dealing with Tribal People Bank-Financed Projects.⁷⁶ Subsequent reviews eventually led to the adoption of the current 4.10 in 2001, as revised in 2005.

The Policy proclaims the Bank’s commitment to ‘ensuring that the development process fully respects the dignity, *human rights*, economies, and cultures of Indigenous

⁷⁵ Ibid.

⁷⁶ F. Mackay, 2002, note 15, p.584.

Peoples’ as a way of contributing ‘to the Bank’s mission of poverty reduction and sustainable development’.⁷⁷ Furthermore, it states that for all projects that are proposed for Bank financing which affect indigenous peoples, the Borrower is ‘to engage in a process of free, prior, and informed consultation’ in order to ensure broad community support for the project by the affected indigenous peoples.⁷⁸ The Policy enshrines the Bank’s recognition that:

...the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impact from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.⁷⁹

Several key aspects of the Policy contain provisions designed to enhance the rights of indigenous peoples. Thus any project requiring the financing of the Bank must have a Social Assessment by the borrower state, an Indigenous Peoples Plan, and Indigenous Peoples Planning Framework. More importantly, such a project must go through ‘a process of free, prior, and informed consultation with the affected Indigenous Peoples’ communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project’.⁸⁰

In view of the complex issues involved in relocation, the Bank requires a borrower state to explore alternative project designs to avoid physical relocation of indigenous peoples. However, ‘when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected indigenous peoples communities as part of the free, prior, and informed consultation process’.⁸¹ This is to ensure that the rights of the indigenous peoples to freedom of information and participation in matters concerning their well-being are protected. Such participation also has the potential of resulting in the adoption of measures that minimally disrupt the social, economic and cultural life of the people. To make participation of indigenous peoples meaningful in this circumstance, the borrower will be required to prepare a resettlement

⁷⁷ Paragraph 1, (emphasis added).

⁷⁸ Ibid.

⁷⁹ Ibid, paragraph 2.

⁸⁰ Paragraph 6(c).

⁸¹ Paragraph 20.

plan in accordance with the requirements of OP 4.12 on Involuntary Resettlement which is next considered.

2. Projects resulting in Involuntary Resettlement OP 4.12

Closely related to the Operational Policy on Indigenous Peoples is the Bank's Policy document on Involuntary Resettlement of persons affected by projects funded by the Bank. This Policy is informed by the understanding that if not properly managed, involuntary resettlement could have severe economic, social, and environmental challenges for the affected peoples. For example, it could lead to loss of sources of income and consequent impoverishment of the affected people, the weakening of community institutions and social networks, dispersal of kin groups, adjustment problems in new environment, diminution of established traditional authority and cultural identity.⁸² It is in consideration of these likely consequences that the central objective is to ensure that where feasible, involuntary resettlement for the purpose of executing a project is avoided, or minimized, or indeed alternative project designs explored. However, where this is not possible, resettlement activities should be conceived and executed in a manner that enables the displaced persons to share in the benefits of the project.⁸³

More importantly, displaced persons should be meaningfully consulted and should have opportunities to participate in the planning and implementation of resettlement programs.⁸⁴ The Policy also requires that:

...displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of the project implementation, whichever is higher.⁸⁵

The policy covers direct economic and social impacts that result from Bank-assisted investment projects caused either by the involuntary taking of land or the involuntary restriction of access to the particular area as a result of the project. In order to deal with the impacts arising from such involuntary resettlement, the Policy requires the borrower state to prepare a resettlement plan or resettlement policy framework specifying measures

⁸² Paragraph 1 of Policy.

⁸³ Paragraph 2(b).

⁸⁴ Ibid.

⁸⁵ Paragraph 2(c).

that are designed to ensure that the displaced persons are informed about their options and rights pertaining to resettlement, that they are consulted and provided with technically and economically feasible resettlement alternatives, and provided prompt and effective compensation for losses attributable to the project.⁸⁶

These are no doubt far-reaching policy measures designed to stem the human rights abuses most often cited in connection with development projects funded by the Bank. The policy changes evidence recognition that large-scale development projects, especially in rural areas, may either lead to the displacement of people or adversely affect their natural environment and livelihood, hence the emphasis on respecting the human rights of such people.

However, well-crafted policies are meaningless in the absence of effective compliance with their stipulations and implementation of required measures. Sadly, this appears to be the case with these World Bank Operational Policies, as a wide gulf exists between their stipulations and the actual implementation on the ground. Two examples are the Sardar Sarovar project in India, and recently, the Chad/Cameroon project. In the case of the former project, the report of the Independent Review Panel noted a number of inadequacies and human rights abuses on the part of both the Bank and the Indian government, bordering on non-compliance with the policy stipulations and lack of consultation with the people affected by the project.⁸⁷ The Chad/Cameroon project partly funded by the Bank has fared no better. In particular, the genuine complaints of the people affected by the project in both Chad and Cameroon were not adequately taken into consideration by the Bank, just as it ignored flagrant violations of the agreement by the Chadian government noted for its poor human rights record.⁸⁸

Recognizing these challenges, the Bank has also taken some other measures designed to enhance the promotion and protection of human rights. These include the

⁸⁶ Paragraph 6.

⁸⁷ T.R. Berger, 1993, 'The World Bank's Independent Review of India's Sardar Sarovar Projects', 9 *American University Journal of International Law and Policy*, pp.33-48 at 41. It is important to mention that the Sardar Sarovar project is a massive dam project in the Indian Narmada River valley to which the World Bank contributed a loan in the amount of 450 million dollars.

⁸⁸ G.H. Uriz, 2001, 'To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions', 14 *Harvard Human Rights Journal*, pp.197-231 at 219-221; K. Horta, 2002, 'Rhetoric and Reality: Human Rights and the World Bank', 15 *Harvard Human Rights Journal*, pp.227-243 at 233-237.

establishment, in 1993, of the Independent Panel, which investigates projects funded by the Bank to determine whether they are complying with the Bank's policies and procedures, and provides a forum for people who believe that their rights and concerns may be affected by Bank-financed operations to bring such concerns to the highest decision-making levels of the World Bank.⁸⁹ The Bank also established a justice and human rights Trust Fund in 2006 to further the mainstreaming of human rights in its policies and programmes, through research and training of Bank staff on the mutual connection between human rights and the mission and work of the Bank.⁹⁰

Perhaps it is in consideration of the foregoing that the Bank could declare, in 2006, that its work:

...substantially contributes to the realization of rights of people in a number of areas, such as health, education, gender, participation, accountability, environment, and institutional reform activities, and, above all, the fight against poverty itself as a fundamental denial of human rights. Other Bank activities also contribute to the realization of human rights: these include fighting corruption, increasing transparency in governance'.⁹¹

The extent to which it is justified in this self-praise would be considered later after examining the approach of the other two institutions, the IMF, and WTO beginning with the former.

4.4 International Monetary Fund (IMF)

Established in 1944 to deal primarily with balance of payment difficulties of states, the IMF has over the years played an important role in international financial management. Though it has increasingly come under the criticism of Third World countries because of the debilitating social and economic impact of its policies in these countries, the Fund has remained an important reference point in international financial matters. In contrast to

⁸⁹ The Inspection Panel was established in September 1993 by the World Bank Board of Directors and it started operations in August 1994. For a detailed account of the circumstances that led to the establishment of the Panel and its mandate, see The Inspection Panel, 2009, *Accountability at the World Bank: The Inspection Panel at 15 Years*, Washington, D.C: International Bank for Reconstruction and Development and International Development Association, pp.2-4.

⁹⁰ The Fund, known as the Nordic Trust Fund, is a \$20 million multi-year and multi-donor Fund with contributions from Denmark, Iceland, Norway, Finland and Sweden. Available at www.go.worldbank.org/PKPT16FU40 last accessed 3 March 2011.

⁹¹ R. Danino, Legal Opinion on Human Rights and the Work of the World Bank (27 January 2006 (3 and 7)).

the World Bank which is more involved with microeconomic issues, the primary concern of the IMF is with implementing macroeconomic policies. This frame of operations coupled with the shorter period of its intervention to correct the balance of payments deficits of members have conspired to shelter the Fund from greater involvement with human rights issues.⁹²

4.4.1 IMF and Human Rights: The initial position

It must be recognized that the IMF was originally designed as a monetary institution with a mandate to ensure the short-term stabilization of the economies of member states with balance of payments problems. This was to ensure that members do not engage in measures that would be destructive of the international economy.⁹³ In furtherance of this objective it adopted a restrictive and technocratic approach that excluded human rights concerns, relying on Article 1 of its Articles of Agreement, which states that one of the purposes of the IMF is:

To give confidence to members by making the general resources of the fund temporarily available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.’

Similarly, Article V S.3 (a) provides that:

The Fund shall adopt policies on the use of its general resources, including policies on stand-by or similar arrangements, and may adopt special policies for special balance of payments problems, that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this agreement and that will establish adequate safeguards for the temporary use of the general resources.⁹⁴

In the performance of this function, the IMF provides short-term financial assistance to member countries with balance of payments deficits on the condition that such

⁹² C. Ochoa, 2003, ‘Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse’ 23 *Boston College Third World Law Journal*, pp.57-114, at 87. The International Monetary Fund will hereinafter be referred to either as ‘IMF’ or simply, ‘the Fund’.

⁹³ This was a reference to the kind of protectionist and competitive economic policies adopted by states during the 1930s which precipitated the Second World War.

⁹⁴ Article V S.3(a).

countries agree to implement a number of measures aimed at reducing the deficits.⁹⁵ The inclusion of these measures that have come to be known as conditionalities⁹⁶ has been one of the main sources of criticism of the Fund. Not only have the measures become standardized, they are usually prescribed irrespective of the peculiar economic circumstances of borrower states. The conditionalities usually include reduction in government spending, withdrawal of welfare services, removal of subsidies on basic food and public services, privatization, deregulation, etc. Not surprisingly, the implementation of such prescriptions had often led to protests, strikes and demonstrations in several African countries because of their negative social and economic impacts, not least of which are human rights violations.

It is in response to this widespread criticism that the IMF has now re-invented itself by making its resources available for longer periods with lower conditionalities. This has resulted in a radical change in its character from that of a short-term monetary institution to a medium- and long-term financial institution.⁹⁷

The second approach adopted by the Fund in refusing to play a role in the promotion of human rights, is its reluctance, at least, theoretically, to be involved in political matters deemed prohibited by its Articles. Although there is no express prohibition in the IMF Articles prohibiting it from considering 'political factors' in its decisions and policies (as opposed to the World Bank Articles of Agreement), several articles arguably contain implicit prohibitions. For instance, Article IV S.3 (b) states that in exercising surveillance over exchange arrangements, the IMF's principles 'shall respect the domestic social and political policies of members'.⁹⁸ It is in reliance on this provision that the IMF has been reluctant to allow its policies and programmes to be filtered by the human rights lens.⁹⁹

⁹⁵ B. Rajagopal, 1993, 'Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights', 11 *Boston University International Law Journal*, pp.81-107 at 89.

⁹⁶ On the relevance of conditionality in the IMF's operations, see, J. Gold, 1971, *Use of the International Monetary Fund's Resources: 'Conditionality' and 'Unconditionality' as Legal Categories*, Washington, D.C: IMF, pp.21-25; F. Steward, 1987, 'Should Conditionality Change? K.J. Havnevik, ed. *The IMF and the World Bank in Africa: Conditionality, Impact and Alternatives*, Uppsala: Scandinavian Institute of African Studies, pp.29-45 at 29-35

⁹⁷ B. Rajagopal, 1993, note 95, p.91.

⁹⁸ To the same effect is Article IV (1) which requires the Fund to 'respect the domestic social and political policies of members, and in applying these principles [general obligations of members] 'pay due regard to the circumstances of members'.

⁹⁹ J. Gold, 1984, *The Rule of Law in the International Monetary Fund*, Washington, D.C.: IMF, pp.59-68. However, as argued earlier in relation to the World Bank, even such provisions do not preclude

4.4.2 Change in Policy Direction

However, the turning point occurred when, under pressure by international public opinion, the IMF began to accept responsibility to address the ‘social dimensions’ of the macroeconomic policies it prescribes for member states.¹⁰⁰ This admission compelled it to become involved in dealing with the structural causes of balance of payments problems, as well as the social implications of its adjustment programmes. Naturally, not only are such issues concerned with long-term development, they also invariably entail consideration of human rights matters. According to Margot Salomon this new approach led to greater collaboration between the Fund and the World Bank and invited ‘greater visibility for human rights’.¹⁰¹

In effect, development is more and more redefined as a process incorporating material and non-material needs including human rights, and the latter are now being increasingly integrated into national and international development strategies.¹⁰² Moreover, as argued earlier, its relationship agreement with the UN as an agency of the world body puts it under obligation to fulfil the human rights purposes set forth in Article 55 of the UN Charter.

Accordingly, since 1999 the Fund has adopted a more direct and focused recognition of human rights imperatives through its acceptance of a role in poverty reduction. Thus it replaced its discredited Enhanced Structural Adjustment Facility (ESAF) with the Poverty Reduction and Growth Facility (PRGF). In general, loans under the PRGF are provided to the world’s poorest countries and are based on Poverty Reduction Strategy Papers (PRSP) which articulate each borrowing country’s strategy for poverty reduction and integrate macroeconomic, structural, and social policies into one document.¹⁰³

The IMF’s adoption of PRSP – a holistic approach to poverty reduction - provides a useful window for the Fund to effectively give greater attention to human rights issues. It

consideration of human rights which are no longer matters within the exclusive domestic jurisdiction of states.

¹⁰⁰ C. Ochoa, 2003, note 92, at 88; *IMF, Social Dimensions of the IMF’s Policy Dialogue* 1-4 (1995), IMF Pamphlet Series No. 47. Here it acknowledged the fact that ‘the importance of social issues for sustainable economic and social development has become increasingly evident’.

¹⁰¹ M. E. Salomon, 2007, *International Economic Governance and Human Rights Accountability*, LSE Law, Society and Economy Working Papers No.9, London School of Economics and Political Science Law Department, p.5.

¹⁰² B. Rajagopal, 1993, note 95, p.97.

¹⁰³ C. Ochoa, 2003, note 92, p.89.

provides borrowing countries with the opportunity to both assess their human rights situations and to design and implement strategies for improving domestic human rights protections. One fundamental aspect of human rights norms embedded in this strategy is popular participation; as the principal object of PRSP is to ensure that local populations are involved in development programmes affecting their communities. It can thus be said that the IMF has used the instrument of the PRSP to integrate this important aspect of human rights in its work. This participatory process that underpins the strategy is designed to reinforce voice and empowerment by incorporating the views of the relevant stakeholders in its formulation. These include relevant government officials, civil society organizations, non-governmental organizations, trade unions, women's groups and other private sector bodies. This wide spectrum of stakeholders is required to be involved in the three stages of design, implementation, and monitoring of the PRSP process.

The emphasis on participation ensures the promotion of such key human rights principles as freedom of expression, of association, the right to self-determination as well as transparency and accountability of government.¹⁰⁴ An example can be found in the PRSP of Burkina Faso which was adopted in May 2000. This broad-based poverty reduction strategy focuses on economic, health, environmental, food, and individual and political security. It gives prominence to local governance through decentralization in order to guarantee citizen participation in the formulation and choice of projects, and their execution.¹⁰⁵ The PRSP also stipulates the drawing up of an Action Plan to foster participation in the process of poverty assessment through the involvement of community representatives and other components of civil society.¹⁰⁶ It is on this score that this particular PRSP has been said to exemplify a strategy that 'places a high priority on human rights in its development and structural adjustment efforts'.¹⁰⁷

It is significant that some other countries have also followed this Burkina Faso's approach by taking advantage of the mutual relationship between economic development

¹⁰⁴ G. Nankani, et al, 2005, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?', P. Alston and M. Robinson, note 31, pp.475-497 at 484.

¹⁰⁵ Paragraph 4.2.4.2.1 of the PRSP available at www.imf.org/external/NP/prsp/2000/bfa/01/-300k (Last accessed 26 February 2011).

¹⁰⁶ Ibid, paragraph 6.3.1.

¹⁰⁷ S. P. Leite, 2001, 'Human Rights and the IMF', 38(4) *Finance and Development*, December 2001 available at www.imf.org/external/pubs/ft/fandd/2001/12/leite.htm, accessed 12 March 2010.

in terms of poverty reduction and the advancement of human rights.¹⁰⁸ However, even ‘participation’ that is hailed as the most significant innovation of the PRSP process has been found to be faulty in important respects, thus putting into question the capacity of the process as currently being implemented to deliver on its acclaimed promises. A crucial flaw relates to what may be described as a ‘participation gap’. In the first place, it has been observed from the preponderance of the practice in several countries involved in the process that key stakeholders such as trade union representatives, women’s groups, and civil society organizations based outside the capital or main urban areas have been systematically excluded from the discussions.¹⁰⁹ Yet, the reality is that in several poor countries a large proportion of the extremely poor live in the rural areas, and their representatives are thus excluded from participation in the PRSP processes designed to address their situation.

Second, the extent to which those groups usually included in the discussions can be said to be true representatives even of the urban poor has been brought to serious question. This is because the participants are often those whose views and positions are favourable to the government, since they are usually nominated by government officials while critical organizations and groups are bypassed in the process.¹¹⁰ Above all, the PRSP predicated as it does on neo-liberal economic principles can hardly enhance the promotion and protection of human rights in the affected countries, considering the inherent negative impacts of implementation of the neo-liberal economic policies on African countries.¹¹¹

¹⁰⁸ These include the following African countries, Cameroon, Tanzania, Uganda, and Rwanda; C. Ochoa, 2003, note 92, p.90.

¹⁰⁹ G. Nankani, et al, 2005, note 104, p.486. The deficiencies of the participation process under the PRSP are tellingly examined in F. Stewart and M. Wang, 2005, ‘Poverty Reduction Strategy Papers within the Human Rights Perspective’, P. Alston and M. Robinson, note 31, pp.447-474 at 456-462.

¹¹⁰ N. Molenaers and R. Renard, 2006, *Participation in PRSP Processes: Conditions for Pro-Poor Effectiveness*, Antwerp: Institute of Development Policy and Management, p.22.

¹¹¹ R. Sandbrook, 1991, ‘Economic Crisis, Structural Adjustment and the State in Sub-Saharan Africa’, D. Ghai, ed. *The IMF and the South: The Social Impact of Crisis and Adjustment*, London and New Jersey: Zed Books Ltd., pp.95-114.

4.4.3 Human Rights Enabling Provisions

Having examined aspects of IMF's policies and programmes that have been impacted upon by the growing recognition of human rights, it is appropriate to also highlight areas through which the Fund can further deepen this integration of human rights.

Three mechanisms within its procedures as provided for in the Articles of Agreement create avenues through which the Fund can play a more active role in the promotion and protection of human rights. These are the provisions relating to consultation, and conditionality and the use of surveillance powers. These provisions in Article IV Section 3(a) and (b) enable the Fund to carry out periodic consultation with its borrower members as well as surveillance over their performance and implementation of agreed conditionalities. The IMF can demand information from such member countries on their human rights situation and even insist that it be included as part of its conditionalities. There is no doubt that the effective use of these avenues will greatly enhance the integration of human rights in the operations of the Fund even as it carries out its primary function of assisting members with balance of payments difficulties.¹¹²

Moreover, as an agency of the United Nations, it is imperative for the Fund to play an important role in the promotion and protection of human rights through its policies and programmes and through this contribute to the attainment of the human rights objectives of the United Nations. It is apparent, from the above analysis, that the impact of human rights on the IMF has not been as visible as the impact on the World Bank. This is attributable to the Fund's late acceptance of a role in reducing poverty which has been identified as one of the key consequences of its intervention in the balance of payment difficulties of states.

4.5 *World Trade Organization (WTO)*

The Organization which came into being in 1994 as a successor of the General Agreement on Tariffs and Trade (GATT) can be said to have been born at a time when scepticism among Third World countries, about the usefulness of international institutions as then constituted was at its highest.¹¹³ The GATT had shown its inability to deal with

¹¹² Rajagopal is of the view that as a practical matter, the surveillance powers will be more acceptable a mechanism to be deployed by the Fund. B. Rajagopal, 1993, note 95, p.106.

¹¹³ This stemmed from the fact that most Third World countries found, to their chagrin that resort to the international financial institutions worsened, rather than improved their economies and the living

the overbearing role of Western capitalist states in its operations and had, within Third World circles, been consigned to the same category as the IMF and the World Bank.

While there is no express provision in the GATT specifically mentioning human rights, understandably due to the circumstances of its adoption in 1947, the same explanation cannot be given concerning the WTO which was established by the Marrakesh Agreement in 1994, by which time the centrality of human rights in the development process had become sufficiently recognized. It would seem that the delegates were more concerned with formulating trade rules without adequate consideration of the mutually reinforcing relationship between trade and other social, economic and political values, such as human rights. To some extent, this is not totally surprising, since many trade experts do not see any connection between trade and human rights.¹¹⁴

The implication of this is that like the other two institutions discussed, the WTO has had to reshape some of its policies and programmes in response to the growing salience of human rights. In this connection, the crucial task is to examine how the organization has been able to use its institutional architecture to assure the promotion and protection of human rights while advancing free trade. This is because as the UN Committee on Economic, Social and Cultural Rights pointed out, trade liberalization ‘must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression’.¹¹⁵

4.5.1 WTO and Human Rights

Although the primary function of the WTO is to promote free trade and eliminate discriminatory trade practices by states, a fundamental issue has been raised as to the degree of compatibility between this agenda and the need for the protection of human rights. While there is some measure of agreement on the correlation between advancement of trade rules and the realization of human rights, it is problematic to

conditions of their people. The World Trade Organization will hereinafter be referred to simply as ‘WTO’.

¹¹⁴ R. Howse and M. Mutua, 2000, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, Montreal, International Centre for Human Rights and Democratic Development, p.3; yet the truth remains that ‘human rights and trade are fundamentally linked and must be seen as complementary, not oppositional’.p.7. See also, S. Charnovitz, 1999, ‘The Globalization of Economic Human Rights’, 25 *Brooklyn Journal of International Law*, pp.113-124 at 116-118.

¹¹⁵ UN Doc. E/C.12/1999/9-26 November 1999.

establish the extent to which human rights can beneficially be integrated into trade rules without being undermined in the process. In this respect, reference may be made to the proposal by Ernst-Ulrich Petersmann for a United Nations 'Global Compact' for integrating human rights law into WTO and other international economic institutions.¹¹⁶ The author contends that 'citizen-driven market integration can provide strong incentives for transforming market freedoms into fundamental rights which...can reinforce and extend the protection of basic human rights'¹¹⁷ Petersmann consequently advocates for a right to free trade.¹¹⁸ However, Petersmann's model has received scathing criticism from international human rights specialists.¹¹⁹ In a remarkably strong opposition to Petersmann's approach, Professor Philip Alston has argued that it is one that

...is at best difficult to reconcile with international human rights law and at worst it would undermine it dramatically. In essence, the result of following the approach set out would be to hijack...international human rights law in a way which would fundamentally redefine its contours and make it subject to the libertarian principles....¹²⁰

Yet it can be said that, shorn of the methodological problems, high levels of abstraction and the underpinning neo-liberal slant that characterize Petersmann's proposal, it is possible to fashion a beneficial relationship between human rights and trade law in a manner capable of promoting social and economic development. This would be possible if trade law were appropriately recognized only as instrumental to the attainment of human rights among other social and economic values, rather than any clamour for constitutionalization of an assumed right to free trade and the quest for its recognition as a human right. Moreover, a sufficient integration of human rights norms within the WTO

¹¹⁶ E. Petersmann, 2002, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13(3) *European Journal of International Law*, pp.621-650.

¹¹⁷ Ibid, p.629. It is to the credit of Professor Ernst-Ulrich Petersmann that he has in his numerous writings over the last three decades consistently advocated the need to integrate human rights in the operations of international economic institutions especially GATT and now WTO.

¹¹⁸ E. Petersmann, 2002, note 116, p.629.

¹¹⁹ P. Alston, 2002, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann', 13(4) *European Journal of International Law*, pp.815-844; R. Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann', 13(3) *European Journal of International Law*, pp.651-659. For his reply, E. Petersmann, 2002, 'Taking Human Dignity, Poverty and Empowerment of Individuals Seriously: Rejoinder to Alston', 13(4) *European Journal of International Law*, pp.845-851.

¹²⁰ Ibid, pp. 816.

system may well provide the necessary key to strengthen the Organization's institutional legitimacy and serve the greater interest of humankind.¹²¹

Notwithstanding these theoretical disputations, the reality is that the practice of the WTO seems to have recognized the salience of human rights in some areas of its operations, and it is to those areas that I now turn.

4.5.1.1 Trade-Related Intellectual Property Rights

One aspect of human rights that has received significant recognition under the WTO regime and impacted its operations is intellectual property rights. This stems from the understanding that the protection of this right is essential for the advancement of trade. This led to the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995. However, the high protection given this right has been a source of controversy in recent years as developing countries view it as skewed in favour of the interests of powerful industrial entities in the advanced countries.¹²² Their fear is that high levels of intellectual property protection would not be appropriate to technology transfer and other social objectives such as the affordability and availability of essential medicines.¹²³ This is because many of the provisions of TRIPs reflect the views and demands of countries with powerful industrial lobbies for high levels of intellectual property protection.¹²⁴ It is arguably upon recognition of the validity of these views that the WTO General Council in 2002 approved a waiver under the TRIPS Agreement exempting least developed countries from the obligation to provide exclusive marketing rights for any new drugs until 2016 with the opportunity for such countries to seek for additional extensions thereafter.¹²⁵ This waiver was granted to ensure that the protection of intellectual property right does not infringe on the right to health through impeding access to medication in developing countries especially with the prevalence of

¹²¹ S. Picciotto, 2007, 'The WTO as a Node of Global Governance: Economic Regulation and Human Rights Discourses', *Law, Social Justice & Global Development (An Electronic Law Journal)*, pp.1-27 at 18.

¹²² According to Professor Boaventura de Souza Santos, the relationship between intellectual property rights, biodiversity and human health 'constitute today the battleground for one of the most serious conflicts between the North and the South', B. de Sousa Santos, 2002, note 55, p.477.

¹²³ R. Howse and M. Mutua, 2000, note 114, p.17.

¹²⁴ *Ibid*, p.18.

¹²⁵ General Council Decision of 8 July 2002, Vide WT/L/478. The decision derives from Article 66(1) of the TRIPS Agreement, which recognizes the special needs and requirements of least-developed member states.

the HIV/AIDS pandemic.¹²⁶ It equally brings to the fore the crucial question of dealing with a conflict between the exercise of intellectual property right and the right to health, a situation that took centre stage in South Africa and generated public outcry.¹²⁷

However, this interim waiver stands the risk of being undermined by the adoption of bilateral trade agreements where some of the developing countries are being pressured to enforce the intellectual property protection regimes earlier than the stipulated time under the WTO.¹²⁸ While the controversy over the beneficial or harmful effects of the global harmonization of intellectual property rights for developing countries rages,¹²⁹ the fundamental nature of the right to health must be recognized and intellectual property right made subservient to this higher human value. It is therefore important to strike a balance between the protection of intellectual property rights and the consequential right of access to medicines or even the need to promote economic development.

4.5.1.2 WTO, Transparency and Participation

One of the problems identified with the GATT was its extreme secrecy and the non-participation of NGOs and other interests in its operations. Accordingly, in order to address this deficiency and enhance broader participation, the WTO Agreement gives some prominence to the participation of NGOs in its operations. Article V (2) of the Agreement Establishing the World Trade Organization provides that ‘the General Council may make appropriate arrangements for consultation with non-governmental organizations concerned with matters related to those of the WTO’.¹³⁰ The Organization has thus initiated a number of reform measures designed to embed transparency¹³¹ and

¹²⁶ B. Konstantinov, 2009, ‘Human Rights and the WTO: Are They Really Oil and Water?’ 43(2) *Journal of World Trade*, pp.317-338, at 329.

¹²⁷ H. Klug, 2005, ‘Campaigning for Life: Building a New Transnational Solidarity in the face of HIV/AIDS and TRIPS’, B. de Sousa Santos and C.A. Rodriguez-Garavito, eds. *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge: Cambridge University Press, pp.118-139 at 131-133.

¹²⁸ B. Konstantinov, 2009, note 126, p.330.

¹²⁹ D.Y. Akers and S. Ecer, 2009, ‘The TRIPS Agreement and its Effects on the R & D Spending of US-Owned Multinational Companies in Developing Countries’, 43(6) *Journal of World Trade*, pp.1173-1192 at 1192 argue that only a case-by-case examination will determine whether intellectual property right protection is beneficial to the less developed countries or not.

¹³⁰ It has however been said that although the GATT operated with such secrecy and exclusion, there was sufficient legal basis under Article XXIII (2) for it to have involved NGOs in its deliberations. R. Howse and M. Mutua, 2000, note 114, p.13.

¹³¹ The issue of ‘transparency deficit’, or ‘democracy deficit’ is a subject of contemporary concern that has generated intense debate among academics and practitioners. J.H. Jackson, 2006, *Sovereignty, the WTO*

enhance NGO participation in its activities. The result has been a dramatic increase in the number of NGOs that normally participate in the organizations meetings. In this respect, the Doha Development Agenda adopted at the Fourth Ministerial Conference in November 2001 marked a watershed in the policy direction of the WTO. It was at this conference that the WTO accepted the imperative of a policy change and re-focused its work on the situation of the world's poorest nations and people. According to Christiana Ochoa, '...there is ample evidence that as a result of the Doha Development Agenda the WTO is undergoing a significant shift in its orientation and openness to human rights concerns and the welfare of the individuals affected by its work'.¹³²

Even though it can be said that with the Doha Development Agenda, the WTO is now more open and transparent in its operations, a number of concerns still remain in relation to the integration of human rights in its policies and programmes. In particular, three theoretical problems may be raised concerning the issue of inclusion and exclusion within the WTO system. In the first place, inclusion of NGOs alone is insufficient to guarantee adequate protection of human rights, since some of such organizations are either set up directly or funded by multinational entities to serve particular economic interests.¹³³ Secondly, only those civil society organizations that share the neo-liberal values underpinning the activities of the WTO are generally accredited in furtherance of the provisions of the Agreement which mentions NGOs working in the same area. The implication of this is that such organizations will readily support policies and programmes designed to further the hegemonic version of human rights. This would invariably entail the exclusion of NGOs that are opposed to the neo-liberal economic policies of the WTO. It raises the critical issue of a binary inclusion/exclusion which

and Changing Fundamentals of International Law, Cambridge: Cambridge University Press, pp.118-121; J. Atik, 2001, 'Democratizing the WTO', 33 *George Washington International Law Review*, pp.451-472.

¹³² C. Ochoa, 2003, note 92, p.92.

¹³³ U. Baxi, 2006, *The Future of Human Rights*, 2nd ed., New Delhi: Oxford University Press, pp.216-217. In the specific context of Africa, the point made by Issa Shivji about such NGOs is noteworthy. According to him, 'African NGOs that are set up, it would seem, are institutional mechanisms by which to obtain foreign funds: they are what might be called FEUNGOS (foreign funded NGOs) rather than grass-roots organizations of the intellectuals and the people to struggle for rights'. I.G. Shivji, 1989, *The Concept of Human Rights in Africa*, London: CODESRIA Book Series, p.61.

eventually impacts on the legitimacy of the organization.¹³⁴ Thirdly, it must not be forgotten that there could be a critical issue of exclusion even within a supposedly inclusive framework. Thus an NGO may be included in the WTO system, but excluded from entering the ‘green room’ where actual negotiations take place. Similarly, some vital documents may be classified and thus outside the reach of NGOs even when they participate at such deliberations. The enormity of these problems are underscored by the fact that even among states, most developing and less developed states are usually excluded from the ‘green room’ negotiations thus magnifying the lack of internal transparency and the democratic deficit of the organization. Worse still, in a manner symptomatic of classic co-optation, a few of the developing countries, notably India, and Brazil have now been incorporated into the green room process, thus diluting the power of the developing countries to effectively challenge the process. As Rahul Singh points out,

Ironically, countries that earlier used to mount a strong, vocal critique against the ‘green – room’ process seem to have embraced the idea when they themselves are in a relatively advantageous position....In their new-found role of leaders of developing countries, India and Brazil meet with the US and EU and set the agenda for any potential agreement on the text for Doha round.¹³⁵

These developments underscore the imperative of a more inclusive mechanism, which will enhance transparency in the decision-making process through the effective involvement of NGOs in WTO activities as well as providing level playing ground for the member states.

4.5.2 Human Rights Enabling Provision

Although the text of the GATT does not explicitly list human rights as grounds for the exclusion of products, it nevertheless contains provisions which could be used by states to protect and promote human rights through trade by taking certain measures against other states that violate human rights.¹³⁶ An important provision in the GATT through

¹³⁴ B. de Sousa Santos, 2005, ‘Beyond Neo-liberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality’, B. de Sousa Santos and C.A. Rodriguez-Garavito, eds. note 127, pp.29-63 at 37.

¹³⁵ R. Singh, 2008, ‘The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democracy Deficit’, 42(2) *Journal of World Trade*, pp.347-365, at 353.

¹³⁶ R. Howse and M. Mutua, 2000, note 114, p.12.

which the WTO can use the human rights filter over free trade rules is Article XX. The Article contains a wide range of exceptions which can be deployed by member states of WTO without violating the GATT. It provides *inter alia* that nothing in the GATT:

Shall be construed to prevent the adoption or enforcement by any contracting party of measures... necessary to protect public morals... human, animal or plant life or health, [or] relating to the conservation of exhaustible natural resource measures... essential to the acquisition or distribution of products in general or local short supply [and]... relating to the products of prison labour'

This provision indicates a clear recognition of the need to have trade rules subject to a range of human interests and basic values, providing a useful avenue for substantial integration of human rights within the framework of the WTO.¹³⁷ It must be acknowledged however, that under GATT, this Article was given a restrictive interpretation that did not reflect this understanding.¹³⁸ With the creation of the WTO and the growing salience of human rights it is hoped that the Dispute Settlement Body would find itself able to re-interpret Article XX in a manner that incorporates human rights as one of the exceptions mentioned in the Article.

4.6 Appraising the impact of human rights on international economic institutions

The international economic institutions studied above have, to a greater or lesser extent, accepted the imperative of integrating human rights in their policies and practices. Consequently, this study proposes to assess the kind of human rights that has been so adopted. As mentioned earlier, the malleability and global acclaim of the human rights corpus makes it susceptible to be appropriated and deployed to serve particular purposes. To be sure, the manner in which the institutions have deployed concepts such as 'good governance', and 'rule of law', both of which include human rights principles, indicate that they have only adopted the hegemonic version of human rights. Indeed, in some

¹³⁷ Ibid, p.10; S.A. Aaronson, 2007, 'Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO', 6(3) *World Trade Review*, pp.413-447 at 427-445. Contrast however, the position by Tatjana Eres who argues that 'the WTO is not an appropriate forum for enforcing human rights law, and Article XX is not a legal back door', T. Eres, 2004, 'The Limits of GATT Article XX: A Back Door for Human Rights? 35 *Georgetown Journal of International Law*, pp.597-635, at -.

¹³⁸ In the *Thai Cigarette (Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes, Report of the Panel, (1990)37 BISD200*, and the *Tuna Dolphin Cases*. (United States-Restrictions on Imports of Tuna(1991)30 I.L.M 1594; United States-Restrictions on Imports of Tuna, (1994) 33 I.L.M 936.

instances, they have merely used the vocabulary of human rights in order to provide legitimacy to their actions. Antony Anghie points out that under these circumstances:

... the principal danger is that important economic actors who are primarily concerned with profit and promotion of a problematic form of economic development are increasingly appropriating and distorting the language of rights to justify and legitimize their own actions. These actions often produce results completely contrary to the human rights goals of preserving and protecting human dignity. Consequently, any alliance between human rights and globalization could result in the assimilation of human rights and its ideals by the formidable forces of globalization'.¹³⁹

The significance of this point stems from the fact that these international economic institutions are fundamentally committed to the neo-liberal economic policies of liberalization, deregulation and privatization as a means of achieving development – policies that privilege the interest of hegemonic forces and global capital, and have proven inadequate to deal with the monumental problems of underdevelopment confronting African countries.¹⁴⁰ In a remarkable empirical study, Rodwan Abouharb and David Cingranelli have found that rather than enhance economic development and the human rights of Africans, structural adjustment programmes actually have the opposite effect. After examining 131 developing countries over the period 1981-2004 including several African countries, using the Physical Quality of Life Index (PQLI), they came to the following conclusion.

The findings presented indicate that the consequences of the World Bank and IMF structural adjustment agreements lowered levels of government respect for economic and social rights, contributing to a deterioration in the situation for the mass of the population in these countries. The impacts of these agreements have been detrimental to those countries entering into them, even accounting for the selection effects of these institutions. In the debate over how best to promote the Millennium Development Goals, the path undertaken by the World Bank and IMF of neo-liberal rapid economic liberalization appears to be having the opposite of the intended effect. Instead of promoting high-quality or equitable

¹³⁹ A. Anghie, 2000, note 2, p.254.

¹⁴⁰ R. Peet, 2008, *Unholy Trinity: The IMF, World Bank, and the World Trade Organization*, London: Zed Books, pp.16-29.

economic growth that lifts the poor out of poverty and social misery, the consequences of these programs have been to perpetuate these conditions.¹⁴¹

They however found that the implementation of structural adjustment programmes in these countries had improved procedural democracy in the countries where it was applied. According to them, 'Prolonged exposure to structural adjustment has led to greater respect for a variety of important procedural democratic rights.'¹⁴² This positive impact in relation to procedural democratic rights is not surprising and can be explained from two main perspectives. In the first place, the institutions have recently been deeply involved in the promotion of democracy, good governance and rule of law. This promotion of human rights is also one of the pillars (even though a faulty one) of the US foreign policy which enjoins it to support the grant of financial assistance to countries that respect human rights, later interpreted to mean democracy promotion. Secondly, as will be shown shortly, the kind of democratic rights promoted by these measures are those that focus on the minimal elements emblematic of representative democracy such as regular elections, freedom to vote, the presence of political parties that take part in elections. These measures neither insist on, nor do they result in a maximalist conception of human rights embodied in participatory democracy.¹⁴³

Accordingly, the marketization of human rights embedded in the neo-liberal paradigm needs to be reappraised and the historical conception of human rights as a liberating force for the protection of human dignity and social justice recovered and restored.¹⁴⁴ From this perspective, it is fitting to draw attention to the attendant danger in the neo-liberal human rights paradigm as highlighted by Professor Upendra Baxi who maintains that:¹⁴⁵

I believe that the paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm. This new paradigm reverses the notion that universal human rights are designed for the dignity and well-being of human beings and insists, instead,

¹⁴¹ M.R. Abouharb, and D. Cingranelli, 2007, *Human Rights and Structural Adjustment*, Cambridge: Cambridge University Press, p.149.

¹⁴² Ibid, p.221.

¹⁴³ B. de Sousa Santos, 2002, note 55, pp.344-348.

¹⁴⁴ A. Anghie, 2000, note 2, p.272.

¹⁴⁵ U. Baxi, 1998, 'Voices of Suffering and the Future of Human Rights', 8 *Transnational Law and Contemporary Problems*, pp.125- at 163-164. See also, U. Baxi, 2006, note 133, p.234.

upon the promotion and protection of the collective rights of global capital in ways that 'justify' corporate well-being and dignity over that of human persons'. However, while there is some justification for this alarm raised by Baxi, his position unduly venerates the Universal Declaration of Human Rights, whereas the Universal Declaration paradigm itself was formulated, laced and coloured by the political and economic philosophy of liberalism. The current neo-liberal globalization process has merely brought into sharper focus the elemental aspects of the hegemonic conception of human rights embedded in that paradigm.

In relation to 'good governance', it is pertinent to mention that the World Bank uses the doctrine as a justification for seeking to shape the political and legal institutions of a borrower country, its argument being that proper implementation of Bank-formulated development programmes can only be achieved by accountable, transparent, and democratic government. In a sense, such advocacy of good governance complements the commitment of human rights law for more democratic and accountable governments world-wide. However, predicating their promotion of good governance on neo-liberal economic principles has, ironically, often resulted in significant violations, rather than protection, of human rights in Africa.¹⁴⁶

Furthermore, although the IMF, World Bank, and the WTO have been vocal in advocating the virtues of good governance, democracy, accountability, and rule of law, a study of their governance structure and operations show that they are fundamentally undemocratic institutions.¹⁴⁷ For instance, in relation to the World Bank, any question relating to the interpretation of its Articles of Agreement is usually handled by the Executive Directors.¹⁴⁸ Thus an essentially legal question is decided by a non-legal body, which is a fundamental departure from the 'rule of law' requiring that executive actions be subject to review by an independent judicial process. Moreover, the decision-making structures of these institutions are heavily weighted in favour of the advanced capitalist

¹⁴⁶ A. Anghie, 2004, note 59, p.260. Contrast this position with the view of Sergio Leite who argues, in the case of the IMF, that 'the work of the IMF should not be seen as a threat to human rights, but as a key contribution' to its realization. Leite, 2001, note 107, *ibid*.

¹⁴⁷ A. Anghie, 2000, note 2, p.270.

¹⁴⁸ By virtue of Article IX(a) and (b). Similarly, Article XXIX(a) and (b) of the Articles of Agreement of IMF provides that any question of interpretation of the provisions of the Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for decision, and where a member is dissatisfied with the decision, the matter shall be referred to the Board of Governors whose decision shall be final.

states, which happen to be their majority shareholders. As Duncan Green has pithily remarked, while in general, the United Nations system largely works on a 'one country, one vote' principle, 'decisions at the IMF and World Bank are taken on the basis of 'one dollar, one vote' thus guaranteeing the dominance of the USA and other major donors.¹⁴⁹ Not surprisingly, their decisions very often reflect the underlying economic and political views of these countries.

Additionally, the tenor and content of the good governance mantra renders invisible the responsibility of these international economic institutions for the problems sought to be addressed; yet the institutions were, in some significant respects, complicit in the woeful economic conditions of these African countries where they imposed the now-discredited Structural Adjustment Programmes. The point is that it was the adoption of the prescriptions of these institutions by the borrower African countries in the first place that brought most of these countries to their present economic predicament. For instance, as Michel Chossudovsky has pointed out, it was the implementation of the Structural Adjustment Programmes (SAPs) in Somalia and Rwanda that partly led to the intensification of social and ethnic conflicts in these states.¹⁵⁰

Next, from the human rights perspective, the PRSP adopted by the IMF and the attempt to enhance participation within the structures of the WTO suffer from the problem of lack of sufficient substantive content, and reinforce selective implementation mechanisms that exclude a large proportion of those that should be the main beneficiaries of the programmes. This is underpinned by the current transparency, democracy, and participation deficits and gaps plaguing these institutions and the increasing calls for their restructuring.¹⁵¹

In consideration of the foregoing problems and challenges, one is constrained to agree with the sentiment that has been so aptly put:

¹⁴⁹ D. Green, 2008, note 36, pp.296-297; J. Glenn, 2008, 'Global Governance and the Democratic Deficit: Stifling the Voice of the South', 29(2) *Third World Quarterly*, pp.217-238 at 218-220.

¹⁵⁰ M. Chossudovsky, 1998, *The Globalization of Poverty: Impacts of IMF and World Bank Reforms*, London: Zed Books Ltd, pp.101-120.

¹⁵¹ Notable voices in this direction include: N. Woods, 2008, *From Intervention to Cooperation: Reforming the IMF and the World Bank*, London: Progressive Governance, pp.4-9; J.E. Stiglitz, 2008, 'The Future of Global Governance', N. Serra, and J.E. Stiglitz, eds. *The Washington Consensus Reconsidered: Towards a New Global Governance*, Oxford: Oxford University Press, pp.309-323 at 319-322.

Humanity has reached the limits of an era of centralized institutional power and control. The global corporation, the WTO, the IMF, and the World Bank are structured to concentrate power in the hands of the ruling elites shielded from public accountability. They represent an outmoded, undemocratic, inefficient and ultimately destructive way of organizing human affairs that is out of step with the needs and values of healthy, sustainable democratic societies as the institution of monarchy'.¹⁵²

4.7 Conclusion

The contemporary embrace and deployment of the language of rights by international economic institutions through the use of such concepts and programmes as good governance, poverty reduction, and increased transparency in their operational mechanisms, represents an incremental change and welcome acceptance of the relevance of human rights by these institutions. Starting from an initial position of discomfort with the language and practice of human rights, this new approach must be seen as representing modest harvests in the efforts to integrate human rights in the policies and programmes of the institutions. Springing from an increased understanding of the broad nature of their mandates – as institutions involved in accelerating the social and economic development of states under the existing neo-liberal paradigm – the institutions have found refuge in the hegemonic version of human rights with its emphasis on formal provisions and structures.

This acceptance provides a useful platform, and indeed, poses a fundamental challenge for human rights theorists and activists to insist on the deployment of the counter-hegemonic conception of human rights by these institutions to midwife a more democratic and equitable globalization process. This entails recuperating the emancipatory potential of human rights as the touchstone for their operations. Since we are in an 'age of rights',¹⁵³ the human rights corpus should provide a powerful framework

¹⁵² International Forum on Globalization, *A Better World is Possible! Alternatives to Economic Globalization*; cited from A.B. Zampetti, 2003, 'Democratic Legitimacy in the World Trade Organization: The Justice Dimension' 37(1) *Journal of World Trade*, pp.105-126, at 105.

¹⁵³ L. Henkin, 1990, *The Age of Rights*, New York: Columbia University Press, p.xvii. This proclamation is reflective of the general acceptance of human rights, though this acceptance is often rhetorical, as the touchstone underpinning social and economic development.

guiding the operations of international economic institutions in their bid to advance the economic development of African States, among others.

This will ensure that human rights norms do not merely adjust the outcomes of globalization, in a manner reflected in such phrases as ‘civilizing globalization’¹⁵⁴ or ‘humanising globalization’,¹⁵⁵ but that human rights itself determine the manner in which globalization occurs in the first place. The fact that the World Bank, the IMF and the WTO (back then in its embryonic form as GATT) were created over 60 years ago with different economic and political philosophies which had no consideration for human rights, and are now being called upon to perform functions and internalize principles and values that were never contemplated at the time of their founding, makes it imperative for the institutions to be fundamentally restructured with the human rights filter to build on the modest harvests recorded, and meet the increasing demands of a changing world society. The succeeding chapters will examine how some selected African States have responded to the growing salience of human rights in the development process within the context of globalization.

¹⁵⁴ D. Kinley, 2009, *Civilizing Globalization: Human Rights and the Global Economy*, Cambridge: Cambridge University Press, p.1.

¹⁵⁵ M. Camdessus, 2004, ‘The IMF at the start of the twenty-first century: what has been learned? On which values can we establish a humanised globalisation? D. Vines and C.L. Gilbert, *The IMF and its Critics: Reform of Global Financial Architecture*, pp.417-431 at 421-422.

Part Three

Selected African Case Studies

This part of the thesis examines the practice in three selected African states to test the validity of the argument. It highlights the interaction between globalization and human rights in these countries through the response of groups and human rights organizations to the processes of globalization. The selected countries, namely, South Africa, Nigeria, and Kenya are not only strategic in their various regions but play important roles in Sub-Saharan Africa as a whole. While South Africa is an important state in Southern Africa, Nigeria plays a crucial role in West Africa, as the most populous African state. Kenya, on its part, is a key state in Eastern Africa and is generally regarded as the most stable and industrialised country in that region. It can therefore be said that apart from minor local variations between countries, which are inevitable, the developments in these states can be taken to be representative of the general trend in sub-Saharan Africa.

The case studies amply support my contention that a mutual relationship exists between globalization and human rights, a connection that has the potential of enhancing the emancipatory capacity of the human rights corpus for the benefit of humankind.

Chapter 5: Globalization and Human Rights in Africa: Perspectives on South Africa

5.1 Introduction

This chapter seeks to examine the relationship between globalization and human rights in Africa with particular reference to South Africa. The central purpose is to demonstrate that even within national systems the relationship is not a linear one, but is reflective of a two-way traffic, with human rights norms impacting on key elements that underpin the globalization process, in the same way that the latter has been instrumental to the adoption of, and the nature of, human rights principles applied in states.

In the specific case of South Africa, the nature of the mutual relationship between globalization and human rights has additionally been defined and intertwined with the country's recent history of social and economic inequality which was the hallmark of the apartheid policy previously practised in the country. This historical element has played a fundamental role in shaping the constitutional framework, the kind of laws and policies now in place in South Africa, and the country's response to the globalization process. While the extent to which the Constitution and the derivative laws and policies contribute to the social and economic transformation of the country are issues of continuing debate,¹ the focus of this chapter is on how the human rights norms informing those laws and policies have interacted, and continues to interact, with the globalization process in the country. In significant ways therefore, the Republic of South Africa provides a veritable platform for examining how African states have used human rights norms attentive to their historical circumstances in grappling with the developmental challenges. For one thing, and with minor national variations, the social and economic challenges confronting the country epitomize the situation in other African countries after several years of political independence. For another, the African National Congress (ANC)-led South Africa is a leading voice in the continent advocating the adoption of neo-liberal economic policies dictated by contemporary economic

¹ P. Langa, 2006, 'Transformative Constitutionalism', 17(3) *Stellenbosch Law Review*, pp.351-360 at 355-359, where the Chief Justice of the Republic of South Africa outlined the transformative challenges facing the country and the role that legal mechanisms can play in their resolution.

globalization as the only path to the development of the continent.² This makes it more fitting to examine the interaction between components of the globalization process and human rights in the country. It is proposed to carry out this task through examining some specific provisions of the South African Constitution, the broad-based Black Economic Empowerment Scheme, and bilateral investment treaties between South Africa and other countries.

As the fundamental law of the country, the South African Constitution is not only the starting point in this analysis, but also provides the background for the exploration of the other themes of this chapter. Indeed, it will be shown that the Constitution itself is a classic manifestation of the mutual impact between globalization and human rights as some of the provisions therein sought to accommodate the mutual interests of capital driven by the requirements of economic globalization, and human rights. Furthermore, I will demonstrate that using the provisions on social and economic rights in the South African Constitution, human rights NGOs and other social movements have catalyzed remarkable policy changes that impact on the globalization process in the country, thus indicating the potential of counter-hegemonic forces in that society.

Though operating within the framework of the neo-liberal economic paradigm, and thus with limited progressive effects, the South African government has also used the equality provisions in the Constitution as a basis for adopting some economic empowerment measures that mediate the relationship between globalization and human rights. On the other hand, and indicative of the impact of globalization, the government has also concluded several bilateral investment agreements with other states that give priority to economic considerations, namely, the promotion of foreign investment over the human rights of South Africans. Yet even within this compass some stipulations of these treaties have been made subject to the human rights provisions of the Constitution.

Drawing from the South African situation, I conclude the chapter by positing that in light of the demonstrable mutual relationship between globalization and human rights, a proper

² This position is evident in its adoption of neo-liberal economic policies such as Growth, Employment and Redistribution (GEAR) and its support for the New Partnership for Africa's Development (NEPAD), a manifestly neo-liberal development framework as we saw in chapter 3. Though hugely ironic and disappointing, considering the radical position of the ANC before assumption of political power, such *volte face*' have been identified as the trademark of nationalist movements once in power. M. Hardt, and A. Negri, 2001, *Empire*, Cambridge, Massachusetts: Harvard University Press, p.133. The African National Congress shall hereinafter be referred to simply as 'ANC'.

utilization of the latter especially the counter-hegemonic version, can enable African states to effectively deal with the continent's developmental challenges, even within the context of contemporary globalization.

5.2 Globalization, Human Rights and the South African Constitution

The adoption of the South African Constitution in 1996 with the advent of majority rule was a significant milestone in the country's history. Not only did it signal the end of apartheid and its discriminatory policies, it also marked the incorporation of South Africa into the new phase of global capitalism that was spreading after the end of the Cold War.³ The South African Constitution was therefore largely shaped by the political, economic and social struggles that took place in the country in the period preceding its adoption coloured by developments in the international scene. This is manifest in the constitutional framework that eventually emerged, the elaborate provisions in the Bill of Rights and specifically, the provisions relating to property rights, equality and the application of international law in the country.

The Constitution sets the tone for the radical transformation of South African society by stating in the preamble that its objective is to:

Heal the divisions of the past and establish a society based on democratic values,
social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is
based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person...⁴

This transformative vision is further buttressed by the fact that the Constitution applies to all spheres of life, and is not limited to the relation between the state and citizens. In other words,

³ The collapse of the Soviet Union and the dismantling of the Berlin Wall in 1989 were momentous events that signalled the end of the ideological war between East and West and the emergence of a single hegemon, the United States of America spreading the gospel of capitalism worldwide. M.R. Ishay, 2008, *The History of Human Rights: From Ancient Times to the Globalization Era*, Berkeley: University of California Press, pp.246-247.

⁴ As Marius Pieterse puts it, 'the Constitution expressly strives towards the egalitarian transformation of society and the achievement of social justice...', M. Pieterse, 2004, 'Coming to terms with judicial enforcement of socio-economic rights', 20(3) *South African Journal on Human Rights*, pp.383-417 at 417.

it stipulates the vertical and horizontal application of human rights in the country, a provision that holds the promise for revolutionary constitutionalism.⁵

Another important point in relation to the Constitution which has salience for the place of human rights in South Africa and the present inquiry is the pre-eminent position occupied by the Constitutional Court in the country's legal system. Not only is it the final appeal court in relation to constitutional matters,⁶ but also, and largely because of this, its judgments have played a significant role in the social transformation of the country. Jackie Dugard and Theunis Roux underscore this point when they assert that:⁷

The Constitutional Court is ... today the most powerful court in South Africa, and one that has expressly committed itself to overseeing the transformation of the South African legal system so as to reflect the needs, values and aspirations of the country's predominantly poor black majority.

Although the normative underpinning and practical effect of its decisions on the enforcement of social and economic rights have some sour points, as will be shown later in this work, it can be said that *in general*, its judgments have given hope for more purposeful and accountable government policies designed to ensure the social and economic transformation of the country.⁸

In using the South African Constitution as a window for examining the mutual relationship between globalization and human rights in the country, the focal point of my analysis will be on social and economic rights, and property rights and compensation under the Constitution.

⁵ J. W.G. Van der Walt, 2005, *Law and Sacrifice: Towards a Post-Apartheid Theory of Law*, London: Birkbeck Law Press, pp33-53; J.W.G. Van der Walt, 2003, 'The Horizontal Application of Fundamental Rights and the Threshold of the Law in view of the Carmichele Saga', 19(4) *South African Journal on Human Rights*, pp.517-540 at 535-536.

⁶ S.167 (3) (a) of the 1996 Constitution of South Africa provides that the Constitutional Court 'is the highest court in all constitutional matters'.

⁷ J. Dugard, and T. Roux, 2006, 'The Record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004', R. Gargarella, et al (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Aldershot: Ashgate Publishing Ltd. pp.107-125 at 108. The jurisprudential underpinnings of the transformative agenda are explored in S. Liebenberg, 2006, 'Needs, Rights and Transformation: Adjudicating Social Rights', 17(1) *Stellenbosch Law Review*, pp.5-36 at 33-36.

⁸ R.J. Goldstone, 2006, 'A South African Perspective on Social and Economic Rights', 13(2) *Human Rights Brief*, pp.4-7 at 7; D. Moseneke, 2002, 'The Fourth Brian Fischer Memorial Lecture: Transformative Adjudication', 18(3) *South African Journal on Human Rights*, pp.309-319 at 313-319.

5.2.1 Social and Economic Rights under the South African Constitution

5.2.1.1 Background and Normative Framework

Since the end of the Cold War there has been increased recognition of the salience of social and economic rights. It should be recalled that during that period the ideological battle between East and West epitomized in socialism and capitalism respectively, ensured that each ideological orientation gave prominence to its preferred set of rights. Western capitalist countries extolled civil and political rights, while the then Soviet Union and its allies gave prominence (even if rhetorically), to social and economic rights. For Western countries, this meant that social and economic rights were treated as ‘untouchables’ during this period, although the welfare ethos in these countries precluded an open backlash against the non-enforceability of such rights.⁹ It can therefore be said that though often disguised, the discourse of social and economic rights today and their level of acceptability and enforceability in states is one that carries a lot of ideological baggage.

However, the tide has considerably changed with the near global ascendancy of neo-liberal orthodoxy and increasingly, Western states, prodded by academic writers, are now more prepared to concede to the justiciability of social and economic rights.¹⁰ The growing international recognition of such rights is reflected in the voluminous normative outpourings by the United Nations treaty bodies, notably the Economic and Social Council (ECOSOC), on this subject in recent times. In particular, it has elaborated the concept of minimum core aspects of social and economic rights that must be given attention by states. For example, in General Comment 3 (1990) the United Nations Committee on Economic, Social and Cultural Rights stated that:

[It] is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant

⁹ Realizing the manifest inequality and poverty precipitated by capitalism, a number of welfare programmes were put in place in industrialized capitalist states. These include unemployment benefits, free health care programmes and selective free education schemes. However, symptomatic of the crisis of capitalism, these are now increasingly being dismantled or seriously threatened in response to the demands of economic globalization.

¹⁰ However, voices of opposition (admittedly limited) to the enforceability of social and economic rights can still be heard; such as A. Neier, 2006, ‘Social and Economic Rights: A Critique’, 13(2) *Human Rights Brief*, pp.1-3.

number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligation under the Covenant. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.¹¹

This prevailing global notion about the desirability of making social and economic rights justiciable found expression in the new South African Constitution which specifically provides for the enforceability of such rights, together with civil and political rights. In several respects therefore, and in terms of Professor Boaventura de Sousa Santos' eminent categorization, this development can be regarded as a case of localized globalism, where global acceptability of a particular norm has been localized in the national sphere.¹²

Equally signal is the fact that the South African Constitution enjoins the courts to have recourse to international law in interpreting constitutional rights,¹³ a provision that enables South African law to conform to international standards of human rights jurisprudence. Moreover, the Constitution builds upon, and elaborates the indivisibility and enforceability of both civil and political rights, and economic, social and cultural rights contained in the African Charter on Human and Peoples' Rights.¹⁴ It is relevant here to bear in mind that the African Charter does not discriminate between both categories of rights in terms of their enforceability. The South African Constitution thus gives further flesh and impetus to the provisions of the African Charter in this regard. To be sure, the social and economic conditions of South Africa, as in other African countries, make it even more imperative for

¹¹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No.3: *The Nature of States Parties Obligations* (Art.2, para.1 of the Covenant), U.N. Doc. E/1991/23 (1990), at para.10. Recently, on 10 December 2008 the United Nations General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

¹² B. de Sousa Santos, 2002, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. London: Butterworths LexisNexis, p.179. Roland Robertson on his part refers to such developments as the 'particularization of universalism'. R. Robertson, 1992, *Globalization: Social Theory and Global Culture*, London: Sage, p.102.

¹³ S.39(1) (b) of the Constitution.

¹⁴ OAU Doc. CAB/LEG/67/3 Rev.5, reprinted in 21 *International Legal Materials* (1982) 59. It entered into force on 21 October 1986.

these rights to be justiciable. As the President of the South African Constitutional Court, Chaskalson, P. pointed out in *Soobramoney v Minister of Health, Kwazulu-Natal*:¹⁵

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁶

If anything, these conditions necessitate the adoption of counter-hegemonic pressures in order to catalyze both national and international actions to improve the conditions of the masses in African countries. The entrenchment of social and economic rights in the South African Constitution is therefore recognition of such concerns and provides a useful platform for advocacy for their realization. The Constitutional Court recently acknowledged the emancipatory potential of social and economic rights when it declared in *Mazibuko v City of Johannesburg*¹⁷ that: ‘Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights’.¹⁸

5.2.1.2 Social and Economic Rights and the Challenge to Power

Drawing inspiration from the relevance of social and economic rights, human rights NGOs and social movements in South Africa have commendably confronted power relations in a country steeped in the neo-liberal economic paradigm. This position was brought to sharp

¹⁵ 1998 (1) SA 765.

¹⁶ 1998 (1) SA 765, 770-771.

¹⁷ 2010 (4) SA 1 (CC).

¹⁸ 2010 (4) SA 1 (CC) at p.20. To be effective however, rights-based strategies for social change must be adopted within the broader framework of progressive social movements; A. Hunt, 1990, ‘Rights and Social Movements: Counter-Hegemonic Strategies’, 17(3) *Journal of Law and Society*, pp.309-328 at 325-326.

focus in the case of *Minister of Health and Others (No.2) Vs. Treatment Action Campaign and Others*¹⁹

The Treatment Action Campaign (TAC) and other civil society groups working on HIV/AIDS instituted this action against the national Minister of Health and the various Provincial authorities challenging the decision of the government to restrict access to a particular drug to designated health institutions. The HIV/AIDS epidemic is a major public health problem in South Africa and one of the most common methods of transmission of HIV in children is from mother to child at and around birth. The Medicines Control Council having found Nevirapine suitable for reducing the risk of mother-to-child transmission of HIV registered it for use for this purpose.

In July 2000 the manufacturers of Nevirapine offered to make it available to the South African government free of charge for a period of five years, for the purposes of reducing the risk of mother-to-child transmission of HIV. The government however decided to make Nevirapine available only at a limited number of pilot sites, which number two per province with the result that those doctors in the public sector, who do not work at any of the pilot sites, could not prescribe this drug for their patients, even though it has been offered to the government for free.

The applicants contended that this conduct of the government was irrational, in breach of the Bill of Rights, and contrary to the values and principles prescribed for public administration in section 195 of the Constitution and in breach of its international obligations. The Constitutional Court in adumbrating its approach to the justiciability of socio-economic rights stated that under the South African Constitution:

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.

¹⁹ 2002 (5) SA 721 (CC). For a critical assessment of this case, see, S. Friedman, and S. Mottiar, 2005, 'A Rewarding Engagement? The Treatment Action Campaign and the Politics of HIV/AIDS', 33(4) *Politics and Society*, pp.511-565; H. Klug, 2008, 'Law, Politics, and Access to Essential Medicines in Developing Countries', 36(2) *Politics and Society*, pp.207-246.

The Court held that the action of the state in this regard was not reasonable and it ordered the government to remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites, and permit and facilitate the use of the drug for that purpose by making it available at hospitals and clinics where it is medically indicated.

In this particular instance, the Treatment Action Campaign was able to combine legal and political modes of action in carrying out its campaign of affordable treatment for people living with HIV/AIDS and pregnant women in order to reduce the mother-to-child transmission of the disease.²⁰ The activities of TAC and other NGOs can thus be described as a challenge from ‘below’ to the dominant forms of state power which was able in this case to constrain the conduct of a state steeped in the dictates of the neo-liberal paradigm. As Heinz Klug points out, ‘the court’s decision to require the government to extend the provision of Nevirapine throughout the public health system represented a major success for civil society and legal strategies to enforce socio-economic rights’.²¹

The case of *Government of the Republic of South Africa and Others vs. Grootboom and Others*²² also provided an opportunity for deploying the enforceability of social and economic rights to constrain the action of the government in relation to the provision of housing. Irene Grootboom and most other respondents (390 adults and 510 children) lived in a squatter settlement called Wallacedene. Their living conditions were ‘lamentable’: very low income population, overcrowded shacks (95% of which lacked electricity), no water or sewage or refuse removal services, the area partly waterlogged and dangerously close to a

²⁰ R. Greenstein, 2004, ‘Socio-economic Rights, Radical Democracy, and Power: South Africa as a Case Study’, N. Gordon, ed. *From the Margins of Globalization: Critical Perspectives on Human Rights*, Oxford: Lexington Books, pp.87-126 at 115. Significantly, even after the judgment, the TAC also mobilized several other groups and volunteers to embark on a ‘disobedience campaign’ in order to force the government to comply with the court ruling and stop using delaying tactics to avoid putting in place a treatment plan’. R. Greenstein, 2004, p.119.

²¹ H. Klug, 2005, ‘Campaigning for Life: Building a new transnational solidarity in the face of HIV/AIDS and TRIPS’, B. de Sousa Santos, and C.A. Rodriguez-Garavito, eds. *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge: Cambridge University Press, pp.118-139 at 123. On the potential of social movements to deploy the constitutional provisions and the social and economic conditions in South Africa to promote social progress, see T. Madlingozi, 2007, Post-Apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa’, 34(1) *Journal of Law and Society*, pp.77-98 at 91-96.

²² 2001 (1) SA 46 (CC). See also *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217.

main thoroughfare. Many inhabitants who had applied for subsidized low-cost housing from the municipality had been on the waiting list up to seven years.

Facing the prospect of indefinitely long intolerable conditions, respondents began to move out of Wallacedene in September 1998, putting up shacks on vacant privately owned land (named 'New Rust') that was earmarked for eventual low-cost housing. Court proceedings brought by the owner resulted in an order of May 1999 instructing the sheriff to evict respondents and dismantle their shacks. The magistrate also ordered the parties and municipality to identify alternative land for permanent or temporary occupation by the New Rust residents. No mediation occurred, and the respondents were evicted, their houses bulldozed and possessions destroyed. They then took shelter on the Wallacedene sports fields under such temporary structures as were feasible, at the time when winter rains began.

The respondents' court-appointed attorney then applied to the Cape of Good Hope High Court for an order requiring the government to provide them with adequate basic housing until they obtained permanent accommodation. The High Court ordered the appellants to provide the respondents who were children and their parents with shelter. The appellants, representing all spheres of government responsible for housing (central government, province of the Western Cape, and Municipality), brought the present appeal to challenge that order. It is important to mention that S.26 of the South African Constitution provides as follows:

- '1) Everyone has the right to have access to adequate housing.
- 2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- 3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'.

The Constitutional Court, held that since S.7 (2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights' the courts are constitutionally bound to ensure that they are protected and fulfilled. According to the Court, 'the question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'. It further held that since S.26 (2) of the Constitution requires the state to devise and implement within its available resources a

comprehensive and coordinated programme progressively to realise the right of access to adequate housing, any programme so developed must include reasonable measures to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations, and that the programme adopted by the authorities in this particular case fell short of the obligations imposed in that it failed to make reasonable provision within its available resources for people in the situation of the Respondents.

Similarly, in the recent case of *Mazibuko and Others v. City of Johannesburg and Others*²³ the Constitutional Court reiterated its approach to the enforceability of social and economic rights under the South African Constitution. The applicants, residents of Phiri in Soweto, one of the poorer areas of the first respondent city, challenged the constitutionality of the city's decision to supply 6 kilolitres of free water per month to every account-holder in the city on the ground that the policy was in conflict with S.27 (1) (b) of the Constitution, which provides that everyone has the right to access to sufficient water. The applicants also argued that the city's installation of prepaid water meters for certain households was unlawful. The central question that arose for determination was the scope of the city's obligations as an organ of state in guaranteeing access to sufficient water.

It was held that the citizens' constitutional right of access to sufficient water did not require the state upon demand to provide every person with sufficient water without more; rather, it required the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources. Furthermore, that the obligation of progressive realisation imposed a duty on the state to continually review its policies to ensure that the achievement of the right is progressively realised even though on the strength of the evidence before it, it could not be said that the provision of 6 kilolitres of free water per household per month was unreasonable in the circumstance.

While to some extent, these decisions seem progressive,²⁴ the Court's rejection of the minimum core obligation in relation to the enforcement of social and economic rights has left

²³ 2010 (4) SA 1 (CC). On the implications of this case for the enforcement of socio-economic rights in South Africa, see M. Wesson, 2011, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v. City of Johannesburg*', 11(2) *Human Rights Law Review* pp.390-405 at pp.404-405.

²⁴ The decisions have received favourable comments both nationally and internationally. D. M. Davis, 2008, 'Socio-economic rights: Do they deliver the goods?', 6(3-4) *International Journal of*

a big scar on their relevance as transformative agents in South Africa. It may be mentioned that in the *Mazibuko case*,²⁵ the Court relied on its earlier decisions in *Treatment Action Campaign*²⁶ and *Grootboom*²⁷ and went further to reiterate its rejection of the minimum core obligation formula. It said: 'In *Grootboom* this court rejected the argument that the social and economic rights in our Constitution contain a minimum core which the State is obliged to furnish, the content of which should be determined by the courts'.²⁸ Adopting the reasoning in the earlier case the court declared:

'It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and opportunities for the enjoyment of this right'.²⁹

This interpretation of the enforceability of social and economic rights under the South African Constitution invariably diminishes the utility of the constitutional provisions. It is my contention that for the enforcement of these constitutional rights to be meaningful, the courts must be able to determine in any particular case whether the measures taken by the state meet some minimum core standards that define the relevance and existence of such rights. Contrary to the court's argument, it is even factors such as the income of applicants, their employment status, and level of poverty and similar indices that should be the basis for a court's assessment as to whether the measures adopted by the state meet the minimum core for the category of persons affected. The courts are already familiar with the deployment of

Constitutional Law, pp.687-711 at 710; T. Roux, 2009, 'Principle and Pragmatism on the Constitutional Court of South Africa', 7(1) *International Journal of Constitutional Law*, pp.106-138 at 124-125.

²⁵ 2010 (4) SA 1 (CC).

²⁶ 2002 (5) SA 721 (CC).

²⁷ 2001 (1) SA 46 (CC).

²⁸ 2010 (4) SA 1 (CC), at p.18.

²⁹ Note 28, p.18.

subjective indices in the determination of an objective standard of treatment and this approach can usefully be applied here.³⁰ Deriving from the constitutional commitment to the improvement of the quality of life of all South Africans and the promotion of equality, it is only proper that a minimum core obligation be required of the state in the progressive realization of enforceable social and economic rights. This is the only way to give teeth and relevance to these constitutional provisions.³¹

The above criticism of the Constitutional Court's approach notwithstanding, it can be said that the South African constitutional framework provides a useful model for other African states for the deployment of social and economic rights as instruments for constraining the globalization process. This is more relevant in view of the fact that the constitutions of virtually all other African countries do not make social and economic rights enforceable.³² Provisions relating to social and economic rights entitlements are merely stated as fundamental objectives and directive principles of state policy to be followed by the government and these are invariably not adhered to by African governments. It may however be questioned whether social and economic rights can provide the required purchase to constrain the globalization process only when they are made justiciable in constitutional instruments. While conscious of the paradox attendant with constitutionalization or institutionalization of rights,³³ it is important to underline the fact that the inclusion of enforceable constitutional rights facilitates social activism for the realization of such rights as the South African situation amply demonstrates. In countries where these rights are not

³⁰ It is trite for example, that in the determination of tortious liability and the standard of reasonableness in criminal law, the courts usually adopt the standard of a reasonable person in the position of the defendant – a mixture of subjectivity within a supposedly objective framework. It has also been suggested that the requirements of the minimum core obligations can be achieved if the courts exercise supervisory jurisdiction by evaluating the measures outlined by the state as appropriate in giving effect to the affected rights. M. Wesson, 2004, 'Grootboom and Beyond: Reassessing the socio-economic jurisprudence of the South African Constitutional Court', 20(2) *South African Journal on Human Rights*, pp.284-308 at 307.

³¹ D. Bilchitz, 2002, 'Giving Socio-Economic Rights Teeth: The minimum core and its importance', 119 *South African Law Journal*, pp.484-501 at 501; D. Bilchitz, 2007, *Poverty and fundamental rights: The justification and enforcement of social and economic rights*, Oxford: Oxford University Press.

³² It is however refreshing that the recent Kenyan Constitution adopted in August 2010, to a large extent, follows the South African model by making these rights enforceable, though subject to the progressive realization formula; see S.43(1) and S.20(5) respectively of the Constitution.

³³ These are extensively examined in N. Stammers, 2009, *Human Rights and Social Movements*, New York: Pluto Press, pp.110-130. In particular, Stammers makes the point at p.104 that 'in their institutionalised form, human rights stand in a complex and ambiguous relation to power.' The problems of constitutionalization of rights are magnified within the framework of a neo-liberal economic order. G.W. Anderson, 2004, 'Social Democracy and the Limits of Rights Constitutionalism', 17(1) *Canadian Journal of Law and Jurisprudence*, pp.31-59 at 39-41.

justiciable, even decisions from regional and other international tribunals may not be sufficiently enforced. In this connection, reference may be made to the challenges and problems of enforcement of decisions of the African Commission on Human and Peoples' Rights. For instance, after over eight (8) years of its decision in the *Social and Economic Rights Case*,³⁴ the Nigerian government is yet to fully implement the recommendations of the Commission concerning the cleaning-up of Ogoniland devastated by the activities of Shell Petroleum Oil Company with the active support and encouragement of the Nigerian government.

This emphasizes the need for constitutional provisions in African countries that make social and economic rights enforceable on the South African model. Only then can such rights play a more useful role in confronting and constraining power relations and the globalization process.

5.2.1.3 Property Rights and Compensation under the Constitution

Although there is no specific mention of the right to property in the South African Constitution, a number of provisions therein protect rights in property.³⁵ It may be mentioned that over the years the prominence given to property rights in constitutional documents had considerably waned, while some constitutions do not even mention it expressly at all. This indicates the changing vagaries of the constitutional right to property which was previously extolled as the classic human right that required state protection through constitutional means. Nevertheless, concomitant with this trend and emphasizing the contradictory nature of the globalization process, there is also an emerging emphasis on the protection of property rights as a defining feature of economic globalization, and this mantra is being promoted by international economic institutions through their good governance advocacy.³⁶ In order to balance these conflicting perspectives, the South African Constitution adopted a compromise position of not expressly guaranteeing the right, but making provision for the payment of

³⁴ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, (2001) AHRLR60 (ACHPR2001) (15th Annual Activity Report).

³⁵ S.25 of the Constitution provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

³⁶ The rhetoric of the good governance mantra by these institutions has been examined in some detail in section 4.3.2.1 of chapter 4.

compensation in the event of interference with private property.³⁷ The provision also represents a compromise between the initially radical position of the ANC on property through its advocacy for widespread nationalization, which would have required complete exclusion of a property clause in the Constitution, and the demands for strict protection of property through guaranteeing market value compensation in the event of any interference with property.³⁸ The compromise is also attentive to South Africa's particular history of dispossession and the need to ensure that redistributive rules and policies relating to property do not generate social disharmony.

In examining the interaction between the constitutional provisions on property rights and forces that underpin the globalization process; my focus will be on rules relating to the payment of compensation for interference with property, and efforts to constrain the exercise of patent rights in favour of the right to health. As discussed in chapter 3, the international standard for the payment of compensation in the event of interference with property rights has been a controversial issue in international law. While Western countries insist on the Hull formula which requires that the payment should be 'prompt, adequate and effective', developing countries advocated a less demanding standard. On this score, United Nations General Assembly Resolutions 1803(XVII)³⁹ and 3281(XXIX)⁴⁰ embrace the position advocated by developing countries by specifying that compensation should be reasonable and subject to the laws of the host state. However, as a form of legal globalization, and considering the unequal relations that exist in the international system, developing countries seem to have acquiesced or accepted the Western position embodying the Hull formula which is now the standard format contained in bilateral investment treaties. The debilitating effects of complying with its requirements are obvious for developing countries that do not have the resources to pay promptly the equivalent value of the property in question in the event of nationalization or other forms of interference with property. Such states are therefore

³⁷ See S.25 of the 1996 Constitution.

³⁸ H. Klug, 2000, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, Cambridge: Cambridge University Press, p.136.

³⁹ Entitled Permanent Sovereignty Over Natural Resources, the resolution was adopted on 14 December 1962.

⁴⁰ This resolution entitled, Charter of Economic Rights and Duties of States was adopted on 12 December 1974.

precluded from exercising their sovereign powers under international law and instruments.⁴¹ In the case of South Africa, adhering to the formula could even be more problematic considering the level of inequality in the country and the need for the government to take measures that promote redistribution of material resources, an action that necessarily entails interference with the property rights of some South Africans and foreign investors alike. This makes it more critical to examine how the constitutional provisions on property rights interact with this globalized rule on the payment of compensation. First, the Constitution provides in S.25 that:

- ‘25 (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application –
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
 - (a) the current use of the property;
 - (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.’

These provisions signal a departure from the international standard on payment of compensation as embodied in the Hull formula and in South Africa’s bilateral investment treaties. The South African Supreme Court of Appeal had cause to rule on the amount of compensation payable in the event of expropriation of property in the case of *Minister of Transport v. Du Toit*.⁴² Pursuant to a notice under the National Roads Act of 1971, the South

⁴¹ For instance, the powers conferred on states under Article 2 of the Charter of Economic Rights and Duties of States.

⁴² 2005 (1) SA 16.

African Roads Board temporarily took the right to use a portion of the respondent's land, for the purpose of certain road works in the area. The exercise of the temporary right to use the land included the permanent removal of gravel, which was utilized by the Board for road construction. The respondent sought compensation for his loss in terms of the Expropriation Act, 63 of 1975, or in the alternative on the right to just and equitable compensation enshrined in S.25(3) of the Constitution. The trial court held that since no open market existed for the right taken by the Board, it was appropriate to fix the amount of compensation due to the respondent by relying on proviso (b) to S.12(1) of the Expropriation Act which was an enhanced amount. On appeal, the Supreme Court of Appeal held that since Du Toit failed to prove that he suffered any actual financial loss as a result of the taking of the right to use his land, the amount offered by the Minister which represented the market value of the portion of the land, was a fair and equitable compensation for what was taken and satisfied the requirements of S.25 (3) of the Constitution.

The second area where property rights and the interests of global capital have been impacted upon by human rights activism in South Africa is in the campaign against the insistence of pharmaceutical companies on their patent rights. In this respect, the struggle over access to affordable medicines in furtherance of the right to health provided the opportunity for human rights NGOs and other social movements to demand for a reasonable balance between social needs and claims based on the assertion of property rights.⁴³

To place this development in context, it may be mentioned that the international regime of intellectual property protection under the TRIPS agreement makes provision, among others, for an extended period of protection to twenty years and provides limits on compulsory licensing even though the brand-name industry is still striving for what is now referred to as TRIPS-plus which includes a complete ban on compulsory licensing and parallel imports among others.⁴⁴ Moreover, notwithstanding this special transitional provision for developing countries and in order to affirm its position as a bastion of free trade and neo-liberalism, South Africa in signing the treaty creating the WTO in 1994 accepted immediate implementation of the agreement including TRIPS.⁴⁵ It was against this background that the South African government's enactment of the Medicines and Related Substances Control

⁴³ H. Klug, 2005, note 21, p.121.

⁴⁴ Ibid., p.120.

⁴⁵ Ibid., p.126.

Amendment Act in December 1997⁴⁶ in order to bring down the cost of medicines and promote the use of generic drugs through the availability of affordable drugs especially those relating to the HIV/AIDS pandemic, generated intense controversy.

The Act empowers the Minister of Health among others, ‘to prescribe conditions for the supply of more affordable medicines...so as to protect the health of the public... notwithstanding anything to the contrary in the Patents Act’’, and to ‘prescribe the conditions on which any medicine which is identical in composition, meets the same quality standard and is intended to have the same proprietary name as that of another medicine already registered in the Republic...may be imported’.⁴⁷ The effect of these provisions would have been to allow the parallel importation of medicines, generic substitution without the consent of the prescriber and even compulsory licensing.⁴⁸

This enactment was seen by the international pharmaceutical industry and the United States as violating patent rights. During the parliamentary hearings, the US government through its Ambassador in South Africa expressed her opposition to the amendment Bill and subsequently threatened to impose sanctions on the South African government unless it repealed the Amendment Act.

Opposition to this Act and the activism it generated can be examined at two levels, national and international. At the national level, the opposition to the Medicines Act was led by the Pharmaceutical Manufacturers’ Association of South Africa, which filed a suit on behalf of forty-two parties, including local companies, subsidiaries of transnational corporations, and the multinational corporations themselves, challenging the constitutionality of the 1997 amendment of the Medicines Act.⁴⁹ They argued that the provisions of the Act which empower the government to determine the extent to which rights granted under a patent in South Africa shall apply, and which allow the Minister of Health to prescribe conditions for the supply of more affordable generic medicines, together deprived owners of

⁴⁶ Act 90 of 1997.

⁴⁷ S.15C of the Act. This Act has now been further amended by the Medicines and Related Substances Act, No.72 of 2008.

⁴⁸ H. Klug, 2005, note 21, p.125.

⁴⁹ See *Pharmaceutical Manufacturers of South Africa: Re Ex Parte President of RSA* 2000(2) SA 674 (CC) paragraph 44. For further analysis of this contest between the pharmaceutical companies, the South African Government, and TAC see, J.C. Nwobike, 2006, *Pharmaceutical Corporations and access to drugs in developing countries: The way forward*, 4 *Sur International Journal on Human Rights*, pp.127-143 at 130-132.

intellectual property in the affected pharmaceutical products and violated their constitutionally protected property rights.⁵⁰ It was also contended that in addition to violating their patent rights, the Act was contrary to South Africa's legally incorporated international obligations under TRIPS.

On the other hand, the Treatment Action Campaign (TAC), together with other local and international organisations, including the World Health Organization, Oxfam, and Medicins Sans Frontieres, campaigned in support of the Act and the government on this occasion. TAC sought and was granted the status of *amicus curiae* despite the stiff opposition of the pharmaceutical industry. The TAC argued that the pharmaceutical industry was blocking attempts to reduce the prices of medicines needed to save the lives of those infected with HIV. This challenge eventually forced the Pharmaceutical Manufacturers' Association to withdraw the case considering the adverse effect of the TAC position and campaign on their corporate image in a country where millions are infected with HIV. Remarkably, the outcome of the case subsequently led to massive discounts in the prices of AIDS drugs in the country, making them much more accessible to the public.⁵¹

Internationally, the struggle over access to affordable medicines because of the devastating impact of the HIV/AIDS pandemic in sub-Saharan Africa also provided the impetus for solidarity among a range of activists and policy-oriented organizations not only in other African countries, but also in the US and Europe.⁵² These interventions coupled with Representative Jesse Jackson, Jr's 'Hope for Africa Bill' in February 1999 and the demonstrations in its support in Washington by several NGOs calling for compulsory licensing for HIV/AIDS drugs, eventually forced the US to withdraw its opposition to parallel importation or compulsory licensing of pharmaceutical drugs in South Africa. At the WTO level, the concerted efforts of African and other developing countries at the TRIPS Council ensured that developing countries were granted a waiver in relation to the parallel importation of essential drugs in the interest of public health until 2016. The TRIPS Council issued a declaration on TRIPS and public health, wherein it clarified that the TRIPS agreement 'does not and should not prevent members from taking measures to protect public

⁵⁰ H. Klug, 2005, note 21, p.127.

⁵¹ R. Greenstein, 2004, note 20, p.119.

⁵² These included organizations such as Act-Up, and Consumer Project on Technology in the US, MSF, Oxfam and the South Centre in Europe; and the Treatment Action Campaign in South Africa.

health... [and] that the agreement can and should be interpreted and implemented in a manner supportive of WTO members' rights to protect public health and, in particular, to promote access to medicines for all'.⁵³ In particular, this Declaration expressly recognized the public health problems facing developing countries 'especially those resulting from HIV/AIDS, tuberculosis and malaria and other epidemics'. Obviously, the inclusion of the phrase 'other epidemics,' ensures that the use of the exceptional provision is not limited to the listed epidemics.⁵⁴

These are, no doubt, crucial concessions which entailed recognition of the right of member states to grant compulsory licenses, determine what constitutes a national emergency or other circumstances of extreme urgency, and the right of each member to establish its own regime for the exhaustion of intellectual property rights. More importantly, the extension of the initial transition period for pharmaceutical products in these countries to January 2016 was a significant concession. This achievement underscores the potential of concerted national and transnational activism to constrain global rules and make them more hospitable to human rights norms. Outcomes such as this also show that states can, in exercise of their sovereign rights and human rights obligations, adopt policy measures that constrain their international economic commitments and the pressures of economic globalization.⁵⁵ This makes it necessary to examine the extent to which the South African government has been able to use its sovereign powers and human rights obligations to engender social and economic change through the Broad-based Black Economic Empowerment programme in this era of globalization.

5.3 Broad-Based Black Economic Empowerment Scheme

One of the pressing challenges that confronted the new ANC-led South African government upon its assumption of power in 1994 was how to redress the legacy of apartheid which limited access to social and economic amenities by the majority black population. Dealing

⁵³ Doha Declaration on the TRIPS Agreement on Public Health (Doha Declaration) WT/MIN(01)/DEC/2, 14 November 2001.

⁵⁴ K. Williams, 2007, 'Pharmaceutical Price Regulation', 23(1) *South African Journal on Human Rights*, pp.1-33 at 23.

⁵⁵ This raises the knotty question of the extent to which a state can avoid its international obligations. It can be said that the *pacta sunt servanda* rule that underlines such a legal position are mediated by the *clausula rebus sic stantibus* principle as the HIV/AIDS epidemic in South Africa constitutes an emergency unforeseen at the time of conclusion of the Agreement.

with this challenge required the adoption of a policy of redistribution of material resources to enhance equality and promote social transformation of the country. Although the negotiated settlement of 1994 translated into what has been described as ‘black control of politics and white control of the economy’,⁵⁶ there was soon recognition of the importance of control of the economy in ensuring social justice and economic development. It was generally thought that social transformation would follow the political demise of apartheid, a view probably informed by Kwame Nkrumah’s celebrated philosophy of seeking first the political kingdom, and every other thing will be added to it.⁵⁷ It was also assumed that the state would play a major role in the redistribution efforts to redress the legacy of apartheid. This assumption was not totally misplaced as the new government adopted a number of programmes designed to promote redistribution and economic justice. Starting from its Reconstruction and Development Programme (RDP), through the Growth, Employment and Redistribution (GEAR) strategy in 1997, the government’s objective in this regard was clear enough. The GEAR itself was expressly declared to be predicated on the operation of market processes, a development that demonstrated the neo-liberal direction of the government.

However, the most far-reaching of the measures designed to facilitate redistribution while promoting economic growth was the Broad-based Black Economic Empowerment Programme (BEE).⁵⁸ The enactment of the Broad-based Black Economic Empowerment Act⁵⁹ was in response to the pressure for more visible economic transformation as previous efforts in this regard had not produced the desired results.⁶⁰ It was also informed by the government’s conviction that social stability and sustainable economic development depended on the emergence of a broad-based development of black capital-owning classes. The Act requires corporate entities in South Africa to adopt Sector Empowerment Charters (SECs) to guide their efforts towards achieving black economic empowerment.

⁵⁶ O.C. Iheduru, 2008, ‘Why “Anglo licks the ANC’s boots”’: Globalization and State-Capital relations in South Africa’, 107(428) *African Affairs*, pp.333-360 at 340.

⁵⁷ K. Nkrumah, 1963, *Africa Must Unite*, London: Heinemann Educational Books, p.50. This was the view that galvanized nationalist movements during the struggle for independence in most African countries. Ironically, after over 60 years, the promised accompanying benefits of political independence, notably economic development, is yet to be experienced in the continent.

⁵⁸ Hereinafter referred to simply as ‘BEE’ except where it is deemed necessary to give the full title for emphasis.

⁵⁹ No.53 of 2003.

⁶⁰ An analysis of previous black empowerment measures and legislations before the BEE Act is examined by O.C. Iheduru, 2004, ‘Black economic power and nation-building in post-apartheid South Africa’, 42(1) *Journal of Modern African Studies*, pp.1-30 at 9-15.

Section 1 of the Act defines BEE to mean:

the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to -

- a) increasing the number of black people that manage, own and control enterprises and productive assets;
- b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workplace;
- (e) preferential procurement; and
- (f) investment in enterprises that are owned or managed by black people’.

Section 9 of the Act defines a ‘black-owned company’ as an enterprise that is 50.1 per cent economically owned by black people along with substantial management control of the company as well. A ‘black-empowered company’ must be 25.1 per cent owned by black interests exercising substantial management control in terms of non-executive directors. Section 9 also defines a ‘black woman-owned enterprise’ as a business with 25.5 per cent representation of black women at equity and management levels. Considering the multi-racial composition of the country, the Act defines ‘black people’ as referring to African, Coloured and Indians who could claim (or whose parents could claim) South African citizenship as at April 1994.

Moreover, S.10 of the Act requires ‘every organ of the state and public entity’ to take BEE measurements into account in granting procurement contracts, licenses, concessions, the sale of state-owned enterprise, and in entering into private sector partnerships. The broad scope of this provision ensures that it also applies to all suppliers falling within the scope of the Act and subcontractors of those companies, making it to impact on every sector of the economy through a bandwagon or cascading effect.⁶¹

⁶¹ O.C. Iheduru, 2008, note 56, p.343.

One fundamental aspect of this wealth redistribution programme is the introduction of ‘Sector Empowerment Charters’ (SECs) which requires private investors to turn over ownership of 25-50 per cent of the economy to these ‘historically disadvantaged individuals’ (HDIs) and bring a number of them into management ranks by 2014.

Within the context of the multi-racial nature of the South African society and the entrenched economic interests of the white minority, the BEE was therefore bound to be a highly contested policy from the outset whose success depended on the ability of the government to demonstrate that it was indeed for the overall benefit of all South Africans. It was initially seen by some corporate players as a business or investment risk requiring opposition, but over the years this perception has changed and rather than confrontation, there has been ‘a race to comply with BEE’ by various business enterprises in every sector of the South African economy.⁶² Given that there are powerful corporations in the country which could have adopted the exit option by moving to other countries in search for more competitive business environment in this era of globalization, the race by these companies to comply with the BEE requirements is interesting, and merits some comments.

First, it has been suggested that the attitude of corporate capital in South Africa towards BEE was greatly influenced by what can be described as ‘the ghost of Zimbabwe’, where the extreme land reform measures of President Robert Mugabe led to the forceful taking over of several lands owned by the white minority and the continuing discontent in the country.⁶³ The possibility that South Africa could degenerate into another Zimbabwe therefore led to the generation of a centripetal force that ensured the mutual acceptance of mild BEE measures by both the government and private investors. On the one hand, it made the government – already committed to the tenets of neo-liberal economic policies – to frame the BEE in such a manner as to offend foreign and South African investors as little as possible.⁶⁴ On the other hand, the economic survivalist instinct compelled private investors to comply with the requirements of BEE for fear that opposition to it may precipitate more radical expropriatory measures from the government in response to public demands. Indeed, a realization of the

⁶² Ibid., p.334.

⁶³ Z. Magubane, 2004, ‘The Revolution Betrayed? Globalization, Neo-liberalism, and the Post-Apartheid State’, 103(4) *The South Atlantic Quarterly*, pp.657-671.

⁶⁴ D. Schneiderman, 2008, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise*, Cambridge: Cambridge University Press, p.155.

possible adverse consequences of such a move made it easier for South African white investors to accept the mild BEE measures.

Second, the debilitating impact of globalization is also fingered as a critical factor compelling the companies to comply with the BEE requirements. As Okechukwu Iheduru puts it:

[W]hile globalization clearly constrains or weakens state regulation of markets and implementation of redistributive policies by subjecting states to competition with other states for economic goods available from capital, global integration equally exerts tremendous pressures on capital to accept some state intervention, especially if such action advances the pecuniary interests of capital as well.⁶⁵

He argues further that this ‘mutual vulnerability of both actors to globalization pressures compels them to cooperate, or strike a “fateful compromise” resulting in “bargained state autonomy” to implement policies that would otherwise be opposed by capital’.⁶⁶

Within the context of this work, it is my contention that the compliance of corporate entities in South Africa to this wealth redistribution policy underscores the fact that even within the framework of economic globalization, African states can still exercise their sovereign rights of regulating economic activities in their territories to meet their social and economic objectives and human rights obligations.⁶⁷ In addition to the rights under international instruments, states can, in exercise of constitutional powers and responsibilities, embark on policy measures that advance the human rights of their citizens even where such measures are detrimental to the interests of global capital. Indeed, notwithstanding its often exaggerated constraining powers on the sovereignty of states, globalization has not rendered the state completely powerless, as it even needs a powerful state to provide an environment conducive for its advancement. As Santos has ably demonstrated, the weak state consensus informing the contrary assertion is one of the ideological misconceptions underpinning hegemonic globalization.⁶⁸

In order to appreciate the role of the BEE programme in catalyzing South Africa’s response to the globalization process, it is necessary to examine its application in some spheres of state activity.

⁶⁵ O.C. Iheduru, 2008, note 56, p.336.

⁶⁶ Ibid.

⁶⁷ In exercise of rights conferred on them under international instruments.

⁶⁸ B. de Sousa Santos, 2002, note 12, p.315.

5.3.1 BEE and South Africa's Bilateral Investment Treaties

The dismantling of apartheid and the introduction of majority rule in South Africa in 1994 was immediately followed by the desire of other states to have economic ties or formalize existing relations with the new leadership of the country. Significantly, only five months thereafter, the United Kingdom entered into a bilateral investment agreement with South Africa.⁶⁹ As a form of legal globalization, this BIT served as a model for subsequent investment treaties in South Africa, as the country signed bilateral investment treaties with countries such as Italy, France, Germany, Luxembourg, Belgium, Netherlands, Switzerland as part of a wider policy of opening the country to greater foreign investment.⁷⁰ These treaties contained some provisions that reinforce the prevalent economic orthodoxy concerning the relationship between states in this era of globalization.

South Africa's bilateral investment treaties can be divided between those that were entered into between 1994 and the adoption of the final Constitution in 1996, and those adopted after the 1996 Constitution. The relevance of this categorization for the present analysis stems from the fact that compliance with the 1996 Constitution required the South African government to ensure the consistency of its international commitments with the provisions of the Constitution. Thus while the first group of treaties significantly incapacitate the state in exercising its sovereign powers in relation to nationalization and balancing these with the needs of its people, the second category contain stipulations expressly subjecting them to the provisions of the Constitution. In relation to the first category of treaties, there were provisions in the treaties that considerably incapacitate the state in exercising its sovereign powers. These include provisions precluding the state from nationalizing the property of foreign investors except for public purpose and upon the payment of prompt, adequate and effective compensation.

The tension between the exercise of sovereign powers and the pressures of global capital came to the fore when the South African government, in furtherance of its BEE programme, and in order to ensure greater control of the economy enacted the Minerals and Petroleum

⁶⁹ Entitled, 'An Agreement for the Promotion and Protection of Investment' this BIT, which was signed on September 20, 1994 is the first between South Africa and any other country.

⁷⁰ L.E. Peterson, 2006, *South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights*, Dialogue on Globalization, Occasional Papers, No.26, Geneva, p.6.

Development Act (MPRDA)⁷¹ This law, which entered into force in May 2004, declares that the state is the custodian of mineral and petroleum resources on behalf of all South Africans.⁷² Owners of existing mining rights are required under the Act to convert to ‘new order rights’ in which successful conversion is dependent upon compliance with BEE objectives. This means that they are to have 15 per cent BEE compliance by 2009 and 25 per cent by 2014.

This law and its BEE component however provoked a legal challenge and the first transnational investment dispute against South Africa. The suit in *Piero Foresti and 10 others v Republic of South Africa*⁷³ was instituted by Italian investors in Marlin and Red Graniti corporations which controls much of South Africa’s granite industry, and those from Luxembourg. Instituted in January 2007 at the International Centre for the Settlement of Investment Disputes (ICSID), the case raised very fundamental questions relating, among others, to the expansive interpretation of expropriation, and the impact of the Act on the existing mining rights of the claimants. It was predicated on South Africa’s bilateral investment treaties with the governments of Italy, Luxembourg, and Belgium which protect the rights of investors from those countries operating in South Africa. The claimants argued that by virtue of the BITs between South Africa and Italy and Luxembourg, they were protected from i) direct expropriation, ii) indirect expropriation, iii) measures having an effect equivalent to expropriation, and iv) measures limiting, whether permanently or temporarily, investors’ rights of ownership, possession, control or enjoyment of the investments.

The claimants argued that their shares in the operating companies have been expropriated by operation of the Black Economic Empowerment (BEE) equity divestiture requirements established by the twin operation of the Mining Charter and the MPRDA. The claimants noted that the Mining Charters requires foreign investors to sell 26% of their shares in relevant mining companies to historically disadvantaged South Africans (HDSAs). They argued that this equity divestiture scheme constitutes a direct and/or indirect and /or partial expropriation of their shares in the operating companies. They also argued that the host state must pay immediate, ‘full and effective compensation’ as stipulated in the BIT with Italy or

⁷¹ Act No. 28 of 2002.

⁷² S.3.

⁷³ Case No. ARB(AF)/07/1 4th August 2010.

‘prompt, adequate and effective compensation’ in terms of the BIT with Luxembourg and therefore claimed 260 million Euro in compensation for alleged discrimination against it in favour of HDSAs.

On its part, the Respondent State contended that the alleged expropriation of the old order mineral rights and shares in the operating companies were undertaken for multiple and important public purposes which included ameliorating the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular, reducing the economically harmful concentration of mineral rights and promoting the optimal exploitation of mineral resources. In particular, the Respondent argued that the 1991 Mineral Rights Act which was repealed by the MPRDA was an instrument that entrenched white privilege in the minerals sector which could not withstand the coming to power of a democratically elected government. It is pertinent to mention here that the BITs between Italy and Belgium are based on the South African-UK model and do not have an equality exception clause as in other subsequent BITs between South Africa and other countries.

However, the matter was eventually settled by the parties and the action was discontinued in July 2010 by the claimants. Nevertheless, this dispute raises the fundamental issue of how this claim would have been treated by the South African Constitutional Court particularly in balancing the claims of the plaintiffs with the equality provisions of the Constitution.⁷⁴

Significantly, for the second category of BITs, human rights norms especially the equality provisions of the South African Constitution have been deployed to limit the scope of their coverage in relation to the rights of foreign investors. With the adoption of the final Constitution in 1996, subsequent bilateral investment treaties entered into by the South African government had to be structured so as to make them consistent with the government’s constitutional obligations and accommodate policy measures such as the BEE. Accordingly, although its treaties with China, Iran, Russia, and the Czech Republic, among others, contain the requirements of national treatment, most favoured nation (MFN), and fair and equitable treatment for foreign investors, these are made subject to laws and measures, ‘taken pursuant to Article 9 of the Constitution... the purpose of which is to promote the

⁷⁴ The arbitration clause in the treaty ensured that the matter was taken to ICSID rather than the South African Constitutional Court.

achievement of equality in its territory, or designed to protect the advance of persons, or categories of persons, disadvantaged by unfair discrimination’.⁷⁵

That the South African government was able to insert this exception provision in this second category of BITs is testament to the fact that even in the face of the pervading effects of economic globalization or the need to conform to its requirements, a state could still assert its sovereign powers.

This victory for state sovereignty in an era of globalization is, however, a limited one. This is because the equality exception does not extend to measures that might be considered equivalent to expropriation or nationalization. Thus the problems identified earlier with bilateral investment treaties in relation to these subjects are still operative in South Africa. It would seem then that in the case of South Africa, and deriving from the supremacy of the Constitution, bilateral investment treaties must defer to the government’s constitutional commitment of equality. This is the only way government measures and enactments such as BEE can spread economic wealth to those economically and socially disadvantaged by apartheid and promote social and economic justice. This leads to an examination of the possible tension between the BEE programme and the equality provisions of the South African Constitution.

5.3.2 BEE and Equality provisions in the Constitution

Although the general interpretation of the concept of equality emphasizes the equal treatment of all in any given set of circumstances, the peculiar challenges presented by the South African situation necessitated standing this principle on its head. The apartheid regime generated so much inequality and discrimination that it was necessary to adopt *normatively unequal measures* to promote and achieve equality. Yet, it is a truism that very often measures designed to achieve equality in an unequal environment end up generating another set of unequal relations. As Amartya Sen has cogently pointed out: ‘The demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter’.⁷⁶ It is therefore of the utmost importance to strive for

⁷⁵ See for example, the South Africa-Iran BIT, 2000.

⁷⁶ A. Sen, 1992, *Inequality Reexamined*, Oxford: Oxford University Press, p.1.

equilibrium in the quest for attainment of equality and social justice. This is even more apposite in the South African situation.

It is from this perspective that the South African BEE initiated in furtherance of the constitutional commitment to the promotion of equality in the country must be assessed. It may be mentioned that the Constitution requires that ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken’.⁷⁷ Drawing inspiration from this, the preamble to the BEE Act expressly declares that the bill is intended to ‘promote the achievement of the constitutional right to equality’. In a state that had just emerged from the throes of extreme inequality engendered by the apartheid policy, such constitutional provisions require the state to perform a variety of redistributive functions to guarantee equal access to property, land, adequate housing, health care, education and social security.⁷⁸

However, one of the downsides of the implementation of the BEE programme in South Africa has been the emergence, as beneficiaries, of a small privileged group of former ANC activists, a development that has led to widespread criticism of the programme as steeped in corruption and cronyism, and questions being asked whether the revolution that led to the emergence of the ANC-led government has not, in fact, been betrayed.⁷⁹ This negative consequence seems not to have been remedied or minimized, as the next sub-section shows.

5.3.3 Appraisal of BEE

The BEE is one of the high profile policies adopted by the South African government to redress decades of enforced social and economic inequality in the country. In trying to achieve this objective the government has had to contend with the requirements of economic globalization. Deriving from its acceptance of the alluring promises of economic neo-liberalism, the government framed the BEE policy in such a way as to sustain the existing paradigm and offend private investors as little as possible. However, the human rights norms

⁷⁷ S. 9 (2).

⁷⁸ D. Schneiderman, 2008, note 64, p.150.

⁷⁹ Z. Magubane, 2004, note 63, p.658. In relation to the application of BEE in the fisheries sector, the verdict is equally damning. S. Ponte and L.V. Sittert, 2007, ‘The Chimera of Redistribution in Post-Apartheid South Africa: BEE in Industrial Fisheries’, 106(424) *African Affairs*, pp.437-462.

that inform the policy, notably, the equality provisions of the South African Constitution have also been deployed to constrain some aspects of the economic globalization process.

One of the fundamental problems with the BEE programme is that it is predicated on neo-liberal economic principles, and does not require the government to take effective control of sectors of the economy to enhance empowerment and redistributive measures. Instead, private companies are allowed to comply with the measures as they desire, except that non-compliance is an important factor in assessing such entities for contract awards, supplies, licensing and related activities. On this score, it is obvious that one of the pitfalls of the scheme is its heavy emphasis on voluntarism and reliance on the ideas of soft regulation and good governance or a 'third way' approach.⁸⁰

More importantly, the BEE seems to have failed in its primary goal of promoting equality through economic empowerment of the black population. It is hugely depressing that though well-intentioned, the scheme has not had a significant impact in redressing the grave inequality between the white capitalists and the black majority in terms of business and other economic opportunities in the country. Indeed, rather than ensuring the redistribution of wealth and positions to the black majority, the BEE has led to the emergence of few black beneficiaries, while the majority of black South Africans remain poor and marginalized. This makes the words of Albie Sachs in 1993 about the prospects of a post-apartheid South Africa hugely prophetic. According to him:⁸¹

The danger exists in our country as in any other that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and the oppressed, oppressed. The only difference will be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have non-racial oppression.

It is on this score that even the current President of the country, Jacob Zuma, has admitted that BEE has failed, as it has benefited only a few blacks and widened the gap between the rich and the poor in the country.⁸² This verdict does not come as a surprise to radical commentators since the programme itself is predicated on a delicate neo-liberal compromise

⁸⁰ D. Schneiderman, 2008, note 64, p.151.

⁸¹ A. Sachs, 1993, *Advancing Human Rights in South Africa*, Oxford: Oxford University Press, p.xii.

⁸² *The Economist*, 3 April 2010, p.48.

of attempting to promote social and economic justice through the framework of economic globalization. It can therefore be said that for the BEE to achieve the desired objectives, the South African government must demonstrate the required political will and exercise its sovereign rights to rework and reformulate the programme and play a more direct role in key sectors of the economy to effectively empower the black majority in the country, for the overall benefit of all South Africans.

5.4 Conclusion

Using South Africa as a case study, this chapter has shown that social and economic rights have played an important role in the interaction between globalization and human rights in Africa. The strategic position of South Africa in the continent, and its peculiar historical circumstances, has made it even more apposite for examining the relationship between globalization and human rights. Drawing inspiration from the constitutional provisions that make social and economic rights enforceable in the country, human rights activists and social movements have successfully deployed these rights in the quest to ensure social and economic justice in the country and constrain economic globalization manifested through the activities of international capitalists.

Although working within the ambit of the neo-liberal economic order, the South African government has also latched onto its constitutional obligations and adopted policy measures that privilege human rights norms over international economic interests. This embrace of neo-liberal economic policies as the driving force of its activities has militated against the government's realization of the goals of its programmes. Such challenges underscore the imperative of the adoption of counter-hegemonic conceptions of human rights and globalization in order to place the interest of the masses at the centre-piece of development activities.

Chapter 6: Resisting Globalization and Marginalization of Human Rights: A Reformist Approach in Nigeria?

6.1. Introduction

This chapter seeks to examine how the marginalization of human rights, especially social and economic rights, through processes of globalization has been challenged in Nigeria and its broader implications for the relationship between globalization and human rights. Although the most populous country in Africa, and notwithstanding its enormous natural resource endowment, Nigeria has over the years tottered on the path to political and economic development.¹ It has adopted and implemented neo-liberal economic policies and programmes that have had deleterious effects on the promotion and protection of human rights in the country. For instance, the Structural Adjustment Programme (SAP) implemented by the country in the late 1980s and early 1990s based on the prescriptions of the International Monetary Fund and World Bank had a tremendous impact on human rights in the country with reverberating effects that are still visible today.²

Moreover, in furtherance of its embrace of such economic policies under the rubric of economic globalization, the Nigerian government has given primacy to the promotion of foreign investment and supported the operations of transnational corporations in the country even when such operations engendered massive human rights violations. Indeed, transnational corporations in Nigeria have been known to be complicit in human rights violations either directly through their operations or indirectly through active support for

¹ The country has a population of over 150 million people and is the 8th largest exporter of crude oil in the world. Its inability to deploy these endowments to great use has led to her been described as ‘a crippled giant’. E.E. Osaghae, 1998, *Crippled Giant: Nigeria since Independence*, London: Hurst & Company; or ‘the giant as Lilliput’, W. Adebani, and E. Obadare, 2010, ‘Introducing Nigeria at fifty: the nation in narration’, 28(4) *Journal of Contemporary African Studies*, pp.379-405 at 379.

² The pains and costs of structural adjustment in Nigeria are captured in J.O. Ihonvbere, 1993, ‘Economic Crisis, Structural Adjustment and Social Crisis in Nigeria’, 21(1) *World Development*, pp.141-153 at 145-148; while an appraisal of the political economy of the country during this period is examined in P. Lewis, 1996, ‘From prebendalism to predation: The political economy of decline in Nigeria’, 34 *Journal of Modern African Studies*, 79-103.

public security officers often deployed to their facilities.³ To be sure, the negative impacts on human rights of the activities of such corporations driven by the processes of globalization are monumental and well-documented.⁴ What has not received adequate attention however, is whether, and if so, the extent to which, human rights norms have also impacted on such processes relative to the country. It is therefore intended to show that the deployment of legal actions and mass movement protests have been instrumental in challenging and shaping the contours and contexts of processes of globalization in relation to Nigeria. In this connection, the legal challenge by a non-governmental organization, Social and Economic Rights Accountability Project (SERAC) of the actions of the Nigerian government in collaboration with a transnational corporation, Shell Petroleum Development Company Limited, for violating the social and economic rights of Nigerians as graphically illustrated in the *Economic and Social Rights Case*⁵ before the African Commission on Human and Peoples' Rights will be discussed. Similarly, the recent decision of the Economic Community of West African States (ECOWAS) Court of Justice on the enforceability of the right to education in Nigeria⁶ under the rubric of the African Charter on Human and Peoples' Rights will be used to demonstrate the interaction between national, sub-regional and regional mechanisms and activism for the protection of social and economic rights in Africa.

In addition to exploring these legal approaches, I will also examine the impacts of social or mass movement actions and protests, notably, that of the Nigerian Labour Congress (NLC) against the deregulation policy of the government featuring removal of subsidy on petroleum products and the consequent increases in the prices of such

³ Human Rights Watch, 1999, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, pp.78-92.

⁴ The following may be taken as representative of recent writings on the human rights obligations of transnational corporations including instances of their violations, D. Kinley, ed., 2009, *Human Rights and Corporations*, Surrey: Ashgate Publishing Ltd; P. Alston, ed., 2005, *Non-State Actors and Human Rights*, Oxford: Oxford University Press; A. Clapham, 2006, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press. In relation to Nigeria, see for example, I. Okonta, and O. Douglas, 2003, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta*, London: Verso.

⁵ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR2001) (15th Annual Activity Report).

⁶ *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP V. Federal Republic of Nigeria and Universal Basic Education Commission*, Suit No. ECW/CCJ/APP/08/08, ruling of 27 October 2009.

products – one of the neo-liberal economic policies of the Nigerian government acting under the pressure of IMF and the World Bank.

I conclude the chapter by arguing that relative to Nigeria, these progressive movements, though largely reformist, must be seen as incipient counter-hegemonic strategies to reshape and restructure contemporary economic globalization and guarantee the promotion of human rights norms as one of the central goals of development initiatives in the country.

6.2 *Foreign investment, transnational corporations and human rights in Nigeria*

6.2.1 Normative Framework

Two underlying considerations inform my focus on foreign investment as an index of the globalization process and to examine its relationship with human rights in Nigeria. First, the promotion of foreign investment is one of the central components of neo-liberal economic globalization and is touted as an important strategy for the economic development of states.⁷ In order to support the continuance of such investments, states have taken some policy measures and actions which have proven to be manifestly inimical to the protection of human rights. Second, the foreign investments of transnational corporations in Nigeria supported by the government whose activities are inimical to the protection of human rights are increasingly being challenged by human rights NGOs and other elements of civil society in the country.

To begin with, it must be stated that although foreign direct investment is an important force in the international economy, the extent of its impact on human rights has not been without some controversy.⁸ While some writers have argued that it impacts positively on human rights, others hold the view that it is inherently inimical to human rights.⁹

⁷ This is the cardinal creed of the classical theory on foreign investment, a position that is however severely challenged by the dependency theory. M. Sornarajah, 2004, *The International Law on Foreign Investment*, 2nd ed. Cambridge: Cambridge University Press, pp.52-59.

⁸ This controversy has arisen because in addition to their relationship with the host state, foreign investors also come in contact with the local populations while their activities usually impact on the environment.

⁹ On the positive impact, see, W.H. Meyer, 1996, 'Human Rights and MNCs: Theory Versus Quantitative Analysis', 18 *Human Rights Quarterly*, pp.368-397. D.L. Richards, et al, 2001, 'Money with a Mean Steak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries', 45(2) *International Studies Quarterly*, pp.219-239. For the negative impact, see, J. Smith, et

According to Debora Spar, foreign investment tends to ‘improve the condition of human rights in developing countries either as a direct result of a firm’s activity or as the indirect result of improved conditions created by these investments’.¹⁰ In her view, this is because in the course of seeking higher returns, multinationals also advance the cause of human rights.¹¹ She however qualifies this general assertion by admitting that when the investment is driven by a search for raw materials, its deleterious effects are more obvious than where the motive is for commercial and similar kinds of investment. Her contention is that in the case of natural resources, the investor needs to forge relations with the state to enable her to obtain concessions, secure a lease and arrange terms of ownership and taxation. Under such circumstances, the local people usually see little benefit from the investment and may be subjected to abuse by the state with the active support of the transnational corporation.¹² On the other hand, according to her, when the motive is essentially for markets in order to increase sales, the activities of multinational corporations would have a positive impact on human rights.¹³

A contrary view, however, is that in this era of globalization, foreign investment whether of the first or second kind, has been impacting negatively on human rights in developing countries.¹⁴ The argument is that, in order to facilitate exploitation of the natural resources in a developing country or explore such markets, foreign investors invariably collaborate with the ruling elite and deploy the repressive mechanisms of the host state to perpetrate human rights violations.¹⁵ This alignment is underpinned by the

al, 1999, ‘Human Rights and the Global Economy: A Response to Meyer’, 21 *Human Rights Quarterly*, pp.207-219; B. Stephens, 2002, ‘The Amorality of Profit: Transnational Corporations and Human Rights’, 20 *Berkeley Journal of International Law*, pp.49-90.

¹⁰ Debora Spar, 1999, ‘Foreign Investment and Human Rights’, 42(1) *Challenge*, pp.55-80 at 57. The same argument is advanced in her earlier article, D. L. Spar, 1998, ‘The Spotlight and the Bottom Line: How Multinationals Export Human Rights’, 77(2) *Foreign Affairs*, pp.7-12.

¹¹ D. Spar, 1999, note 10, p.75. She also states that the ‘Spotlight phenomenon’ has equally been instrumental in ensuring that multinational corporations respect human rights norms in their host countries as they now find it increasingly difficult to sustain the previous attitude of indifference to human rights violations by their foreign subcontractors.

¹² D. Spar, 1999, note 10, pp.60-61.

¹³ *Ibid.*, p.67.

¹⁴ See for example, E.A. Duruigbo, 2003, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry*, New York Transnational Publishers, p.xviii, describing transnational corporations as ‘hydra-headed monsters’. P. Muchlinski, 2009, ‘Social and human rights implications of TNC activities in the extractive industries’, 18(1) *Transnational Corporations*, pp.125-136, at 125-127.

¹⁵ This contention resonates with Vladimir Lenin’s early analysis on this subject matter. Lenin argues that imperial expansion and the exploitation of foreign markets was a necessary stage in the development of

mutuality of interest between the transnational corporation and the ruling elite; the former desiring access to the exploitation of the natural resources or markets, while the ruling clique in the developing country needs the royalties and other benefits from the investments to bolster and line their pockets.¹⁶ This position is validated by the role of foreign investment in Nigeria as evident in the collaboration between Shell Petroleum Development Company Limited and the Nigerian government for the violation of the human rights of Nigerians as revealed in the Ogoni case. The Nigerian ruling elite have appropriated the instrumentality of the state to enact laws and make policy decisions that essentially serve the interests of the capitalist class, both foreign and domestic, notwithstanding the negative effects of such policies and activities on human rights.¹⁷

A major consequence of this capture of state apparatus in Nigeria has been the liberalization of the legal regime governing foreign investment and enhancement of the environment for transnational corporations to be involved in massive human rights abuses in the country. On this score, two fundamental legal provisions governing foreign investment in Nigeria deserve mention. First, the 'open-door' economic policy of the Nigerian government under the direction of international economic institutions such as IMF and World Bank was formalized with the enactment of the Nigerian Investment Promotion Commission Act.¹⁸ This Act, which is today the principal legislation regulating foreign investment in the country, was enacted with the central aim of stimulating foreign investments.¹⁹ This is evident from the fact that it opened up all

advanced capitalism which will ultimately widen the bifurcation between the capitalists and the exploited classes and lead to human rights abuses. V. I. Lenin, 1948, *Imperialism: The Highest Stage of Capitalism*, A popular Outline, London: Lawrence & Wishart Ltd, pp.148-151.

¹⁶ L. Wenar, 2008, 'Property Rights and the Resource Curse', 36(1) *Philosophy and Public Affairs*, pp.2-32 at 3-6.

¹⁷ This will also be shown in relation to the enactment of the Nigerian Investment Promotion Commission Act.

¹⁸ Cap N117 Laws of the Federation of Nigeria, 2004. It was initially enacted as Decree No. 15 of 1995 and amended in 1998. It repealed the Industrial Development Co-ordination Committee Decree No. 36 of 1988 and the Nigerian Enterprises Promotion Decree of 1972, as amended in 1977 and 1989, which imposed equity participation restrictions on foreign investment.

¹⁹ K.U.K. Ekwueme, 2005, 'Nigeria's principal investment laws in the context of international law and practice', 49(2) *Journal of African Law*, pp.177-206. It has thus been described as 'a turning point in foreign investment regulation in Nigeria' since it adopts a 'promotional' rather than 'control' approach to foreign investment regulation. O. Obayomi, 1997, 'Nigeria's New Investment Laws', *Journal of Business Law*, pp.593-604 at 595; see also T.I. Ogowewo, 1995, 'The Shift to the classical theory of foreign investment: Opening up the Nigerian market', 44 *International and Comparative Law Quarterly*, pp.915-926 stating at 926 that with the liberalization of the legal regime governing foreign investment, 'the government has now adopted a more sensible and realistic policy towards foreign investment'.

sectors of the Nigerian economy to foreign investment by removing the conditions on the ownership of shares in Nigerian enterprises by foreigners imposed by previous investment laws in the country.²⁰ S.17 of the Act permits foreign investors to own 100% equity participation in Nigerian enterprises and to carry out business activities in any enterprise in Nigeria subject to the provisions of S.18 that previously excluded petroleum activities from the ambit of the enactment.²¹ This liberalization was not accompanied by any corresponding regulation or restriction on how such corporations are to operate in relation to human rights. Consequently, the corporations have continued to operate without due regard to the human rights of people in their host communities.

Second, the NIPC Act makes elaborate provisions on the protection of foreign and local investors from the risks of expropriation and nationalization and in the process emasculates the exercise of sovereign rights by the Nigerian State. Accordingly, Section 25(1) provides that:

Subject to subsections (2) and (3) of this section

- a) no enterprise shall be nationalized or expropriated by any Government of the Federation; and
 - b) no person who owns whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.
- 2) There shall be no acquisition of an enterprise to which this Decree applies by the Federal Government unless this acquisition is in the national interest or for a public purpose and under a law which makes provision for:
- a) payment of fair and adequate compensation; and
 - b) a right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled.
- 3) Any compensation payable under this section shall be paid without undue delay, and authorization for its repatriation in convertible currency shall, where applicable, be issued.

In precluding the expropriation or nationalization of foreign investments, except under the mentioned circumstances, and codifying the Hull formula on payment of

²⁰ K.U.K. Ekwueme, 2005, note 19, p.179.

²¹ It may be mentioned that S.18 of the Act was amended in 1998 to remove the exclusion of petroleum enterprises from the scope of the NIPC Act'. In addition, section 21 of the NIPC Act allows foreign enterprises to purchase, in convertible currency, the shares of Nigerian enterprises without any restrictions provided the sale is carried out through the Nigerian Stock Exchange ('NSE').

compensation,²² the legal regime on foreign investment has not only inhibited the full exercise of sovereign powers by the Nigerian State in relation to the right to development but correspondingly, strengthened transnational corporations in their operations in ways that have been deployed to violate human rights.

Apart from the fact that these measures have not led to any major positive transformation of the investment environment in Nigeria,²³ some of the investments in the form of transnational corporations either brought into the country, or strengthened by the new legal regime have actually had deleterious consequences on the protection of human rights as the next section seeks to demonstrate.

6.2.2 Transnational corporations and human rights in Nigeria

A transnational corporation may be described as a corporate entity registered under the municipal laws of a particular country but whose network of operations transcends national boundaries.²⁴ Usually, such corporations adopt operational models involving multiple corporate entities, spread across and within countries. They have come to be recognized as the most visible embodiments of globalization in contemporary society. As Henry Steiner et al point out: ‘Globalization has contributed to, and in part been driven by, the increasing central role of transnational corporations (TNCs) in the international and domestic economic orders’.²⁵ Accordingly, their importance in the economic development efforts of states can hardly be over-emphasized, as they not only determine

²² The implications of the Hull formula for African states have been discussed in chapter 3 of this work. It is also pertinent to mention that S.24 of the Act guarantees investors ‘unconditional transferability’ of their dividends or profits from investments in the country, a provision similar to that contained in S.15 (4) of the Foreign Exchange (Monitoring and Miscellaneous) Provisions Decree No.16 of 1995.

²³ After examining the available data on foreign direct investment inflow into Nigeria between 1995 and 2004, Khruschev Ekwueme comes to the conclusion that the enactment of the Act has been unable to significantly spur high volumes of foreign investment in the country, meaning that the liberalization of the legal regime of foreign investment is not the ‘silver bullet’ needed to attract high levels of foreign investment. K.U.K Ekwueme, 2005, note 19, p.204.

²⁴ Article 20 of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights states that the term transnational corporation ‘‘refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively’’; (2003)E/CN.4/Sub.2/2003/12. For an analysis of other definitions of transnational corporations, see C.D. Wallace, 2002, *The Multinational Enterprise and Legal Control: Host State Sovereignty in an era of Economic Globalization*, 2nd ed., The Hague: Martinus Nijhoff Publishers, pp.101-158. In this work, the term ‘corporations’ and ‘companies’ will be used interchangeably where necessary.

²⁵ H.J. Steiner, et al, 2008, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed., Oxford: Oxford University Press, p.1387.

directly or indirectly, the level and direction of such strategies, but their activities usually have far-reaching effects on a country's overall development. In the enduring words of Professor Michael Ajomo:

Transnational corporations in a capitalist setting rule the world; they constitute today a major factor in international economic relations by virtue of their resources, size and methods of operation. They control directly capital, the most important of the three main factors of production, and indirectly, labour. They can re-order the priorities of nations and hold such nations to ransom. ... In a Third World country, therefore, the scenario is complete; the transnationals are the originator and executor of economic development which, undoubtedly, is the key to the survival of any nation.²⁶

The impacts are usually more pronounced when the transnational corporations operate in developing countries which largely depend on them for the exploitation, and even, utilization of the natural resources in their territories. It is obvious that in the exploitation of these resources, several socio-economic and environmental issues come into play. One of the key issues often generated from such activities is the nature and extent of human rights violations involving these corporations in the host countries. Such issues assume greater prominence and visibility in countries with weak governance structures and a poor human rights record. The fact that Nigeria sadly falls into this category²⁷ makes it even more apposite to examine the human rights implications of the operations of transnational corporations in the country. To be sure, in recent times there has been considerable attention on the activities of transnational corporations in the country, especially those in the oil and gas industry, for their culpability either directly or indirectly, in massive human rights violations in the country in the course of their operations.²⁸ In addition to their direct involvement in external human rights violations

²⁶ M.A. Ajomo, 1984, *Of Order and Disorder: The Relevance of International Law*, Lagos: Lagos University Press, p.22; S. Joseph, 1999, 'Taming the Leviathans: Multinational Enterprises and Human Rights', 46(2) *Netherlands International Law Review*, pp.171-203 at 172. According to Beth Stephens, 'the enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate'. B. Stephens, 2002, note 9, p.46.

²⁷ At present, Nigeria occupies the unenviable position of 14 among the failed states in the world. See, The Fund for Peace, *2011 Failed States Index*, Washington, D.C.: The Fund for Peace. Available at: www.fundforpeace.org/global/?q=fsi-grid2011 accessed 8 July 2011.

²⁸ National and international NGOs have been in the forefront of this campaign. Notable among them is Amnesty International's reports on human rights abuses in the country exemplified by the following, among others. Nigeria: Are Human Rights in the Pipelines? Amnesty International Report A1 Index:

such as destruction of religious and cultural sites, disruption of community lives, environmental rights,²⁹ and labour rights, there is also overwhelming evidence of their indirect involvement in these and other violations through the activities of state security forces who provide surveillance over their facilities. Since the human rights abuses by these security forces are usually carried out within the sphere of influence of the transnational corporations, with their knowledge, and for their benefit, the corporations are deemed to be complicit in such abuses. Indeed, complicity in human rights abuses has been defined as follows:³⁰

Corporate complicity in human rights abuses means that a company is participating in or facilitating human rights abuses committed by others, whether it is a state, a rebel group, another company or an individual. A company is complicit in human rights abuses if it authorizes, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse. The participation of the company need not actually cause the abuse. Rather, the company's assistance or encouragement has to be to a degree that, without such participation, the abuses most probably would not have occurred to the same extent or in the same way.

Drawing from the above definition, it can be said that the following factors are important in determining a company's risk of being complicit in human rights violations: i) the company's proximity to, knowledge of, and the duration of the violation; ii) the benefit

AFR44/020/2004, 9 November 2004; Nigeria Ten Years On: Injustice and Violence haunt the Oil Delta AFR44/022/2005; Nigeria: Odioma – One Year After: fears of continuing human rights violations AFR44/005/2006 of 19 February 2006.

²⁹ A major part of the struggle of the Ogonis was the devastation of their environment by the activities of Shell Petroleum Development Company Limited.

³⁰ This is the description of the Office of the UN High Commissioner for Human Rights, see, Global Compact: Embedding human rights in business practices, available: www.unglobalcompact.org/content/newsdocs/ehrbp.pdf accessed 8 July 2010. According to Irene Khan, companies risk being complicit in human rights abuses in the following instances; armed conflict, slavery and forced labour, child labour, trade union rights, making surveillance technology available to states for use in tracking down dissidents, and acquiescing with discriminatory policies of states. I. Khan, 2005, *Understanding corporate complicity: Extending the notion beyond existing laws*, London: Amnesty International Index: POL34/001/2006; A. Clapham and S. Jerbi, 2001, 'Categories of Corporate Complicity in Human Rights Abuses', 24(3) *Hastings International and Comparative Law Review*, pp.339-350 at 342-349 classifying corporate complicity for human rights abuses into three categories; direct, indirect and silent complicity.

gained by the company from the violation; iii) the nature of the company's relationship with the perpetrator; and, iv) the company's intent with regard to the violation.³¹

The operations of oil companies in Nigeria and the nature of their relationship with public security forces lend credence to their complicity in human rights abuses. In particular, these companies are known to give financial assistance to public security officers guarding their installations, provide logistical support in the form of transportation to and from their locations, and make sundry welfare provisions. Ordinarily, these are responsibilities which ought to have been borne by the Nigerian Government, but because of the high level of corruption, and lack of transparency and accountability in governance,³² public security forces are not adequately catered for by the government. These companies have thus been compelled to provide such logistical support to public security forces in order to facilitate their business operations and effectively secure their facilities.

The oil companies' closeness with public security forces also makes them complicit in human rights violations committed by the latter in their locations during community protests and demonstrations. In this respect, three examples may be given to show how this robust relationship with public security forces lead to massive violations of human rights in the country.

First, on 30 and 31 October 1990, youths from Umuechem community east of Port-Harcourt, Rivers State protested at Shell Petroleum Development Company's (SPDC's) facility in the community demanding for the provision of electricity, water, roads, and other compensation for oil pollution of crops and water supplies. The response of the police at the behest of the company to this demonstration was the killing of some eighty unarmed demonstrators and the complete destruction or extensive damage of 495 houses. Indeed, on October 29, 1990, the divisional manager of SPDC's eastern division had

³¹ Although this is not a criminal matter, the formulation of the requirements in this manner is similar to the criminal law analysis of complicity in the commission of an offence. A. Ashworth, 2006, *Principles of Criminal Law*, 5th ed., Oxford: Oxford University Press, pp.410-443.

³² For a recent exposition on the challenges of corruption and good governance in Nigeria, see C.A. Odinkalu, 2010, 'Corruption and Governance in Africa: How do we break the cycle in Nigeria?' CLEEN Foundation, in *Corruption and Governance Challenges in Nigeria: Conference Proceedings*, Lagos: CLEEN Foundation Monograph Series no.7, pp.14-42. Although there have been recent measures to deal with the menace of corruption in Nigeria, these have, sadly, not yielded any significant results. N. S. Okogbule, 2006, 'An appraisal of the legal and institutional framework for combating corruption in Nigeria', 13(1) *Journal of Financial Crime*, pp.92-106 at 101-102.

written to the Rivers State commissioner of police to request ‘security protection’, with a preference for the paramilitary Mobile Police, in anticipation of an ‘impending attack’ on SPDC’s facilities in Umuechem allegedly planned for the following morning. Following peaceful protests by village youths on the company’s premises on October 30, the company again made a written report to the Governor of Rivers State, a copy of which was sent to the Commissioner of Police. Consequently, on October 31, the Mobile Police team attacked the peaceful demonstrators with teargas and gunfire. They returned at 5.am the next day, shooting indiscriminately, in a purported attempt to locate three of their numbers who had not returned the previous evening. It was in the course of this indiscriminate shooting that the killings and destructions were carried out. Although a judicial commission of inquiry established by the government found no evidence of a threat by the villagers and concluded that the Mobile Police had displayed ‘a reckless disregard for lives and property’, yet the perpetrators were never brought to justice.³³

Second, in the well-known *Ogoni Case*,³⁴ a Communication brought before the African Commission on Human and Peoples’ Rights, the public security forces that perpetrated the human rights violations in Ogoniland under the umbrella of military Joint Task Force were aided, funded and mobilized by Shell Petroleum Development Co. Ltd.³⁵ The scale of destruction and devastation of Ogoniland by the activities of these security forces remain unprecedented in the country.

Finally, the confrontation between Chevron Nigeria and Ugborodo community in the Niger Delta also highlights the use of disproportionate force by public security forces providing surveillance over the facilities and locations of oil companies in response to lawful demands for the provision of social amenities by host communities. On 4 February 2005, soldiers from the Nigerian Joint Task Force (JTF) fired at protesters from

³³ A fuller analysis of this incident and its human rights implications are examined in, A. Nsirimovu, 1994, *The Massacre of an Oil Producing Community: The Umuechem Tragedy Revisited*, Port-Harcourt: Institute of Human Rights and Humanitarian Law.

³⁴ *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, (2001) AHRLR 60 (ACHPR2001) (15th Annual Activity Report). The facts of this case have been detailed earlier in this work. For an analysis of other incidents of government security brutality at the invitation of oil companies in Nigeria, see, B. Manby, 1999, ‘The Role and Responsibility of Oil Multinationals in Nigeria’, 53(1) *Journal of International Affairs*, pp.281-301 at 292-298.

³⁵ Although the company tried to deny this, there was abundant evidence of her role in this connection. See, I. Okonta, and O. Douglas, 2003, note 4, pp.126-143.

Ugborodo, a small community of the Itsekiri ethnic group, who had entered Chevron Nigeria's Escravos oil terminal on the Delta State coast. One demonstrator was shot and later died from his injuries, and at least 30 others were injured, some of them seriously, by blows from rifle butts and other weapons. Chevron Nigeria, which operates the terminal, said that 11 employees and security officers received minor injuries. The protest was over a Memorandum of Understanding signed between Ugborodo community representatives and Chevron Nigeria in 2002. The protesters said that Chevron Nigeria had not provided the jobs and development projects they were promised. The company denied involvement in this confrontation stating that responsibility for the protection of its facilities rests with the state security forces whose actions it could not control in any way. It admitted however, that like other oil companies operating in Nigeria, it provides the state security forces with allowances in line with the industry practice, and interacts regularly with the JTF.³⁶

These are by no means isolated cases of brutality of public security forces acting on behalf of transnational corporations on defenceless unarmed community indigenes, but they have rather become the price paid by oil-bearing communities in Nigeria which host oil prospecting companies.³⁷ It is a measure of the low value that these corporations accord to human rights in Nigeria that they ignore international best practices in respect of human rights in their relationship with host communities in the country. With this baggage of direct involvement or complicity in human rights abuses in their quest to exploit the investment opportunities in Nigeria, can the very recent approaches of these corporations in relation to human rights signal the turning of a new leaf? This is discussed in the next subsection.

³⁶It is this apparent government support structure that makes oil companies in Nigeria indistinguishable from the instruments of the State in the eyes of ordinary Nigerians. This is buttressed by the fact that state officials only visit some communities when oil companies' workers are either held hostage or there is disagreement between the companies and host communities.

³⁷ Human Rights Watch, 1999, note 3, pp.78-92 which chronicles some of the travails of oil-bearing communities in the Niger Delta of Nigeria. Indeed, this seems to be part of the 'resource curse' that has become a symptomatic feature of Nigeria as an oil producing country which can perhaps be reversed if the rules relating to property rights and the exercise of such rights are changed in favour of the people as a collectivity. L. Wenar, 2008, note 16, pp.16-32.

6.2.3 Transnational Corporations as human rights advocates in Nigeria?

The events that took place in Ogoniland involving Nigerian security forces in collaboration with Shell Petroleum Development Company Ltd which culminated in the unlawful execution of the minority rights activist, Ken Saro-Wiwa on 10 November 1995,³⁸ did not only internationalize the grave human rights abuses in Nigeria, it greatly put the transnational corporations in the spotlight in respect of human rights violations in the country.³⁹ In response to this international outcry and scrutiny, transnational corporations in Nigeria have recently adopted a number of measures to clean-up their image and demonstrate their commitment and respect for human rights. The corporations, especially those in the oil and gas industry, have taken steps to integrate human rights awareness and practices in their operations, while some of them have also become parties to other voluntary mechanisms designed to actualize that commitment.⁴⁰

It is on this score that the Shell Group⁴¹ signed up to the Voluntary Principles on Security and Human Rights (VPSHR) in 2000. The Voluntary Principles, which is a security initiative adopted by a group of governments, extractive companies and human rights NGOs, provides practical guidance to companies on how to maintain the safety and security of their operations with respect to human rights and fundamental freedoms of the people in surrounding communities.⁴² The company also organized a workshop on the Voluntary Principles for senior government security officers and is currently taking steps to engage the National Human Rights Commission for the Nigerian government to adopt

³⁸ He was convicted along with eight others by a hastily constituted Special Tribunal under the Civil Disturbances Decree which had no provision for a right of appeal. The procedures of the Special Tribunal blatantly violated international standards of due process as noted in a Report of a fact-finding team appointed by the United Nations Secretary General. See Annex to UN Document A/50/960.

³⁹ For an analysis of the various dimensions of the Ogoni confrontation, see, S. Cayford, 1996, 'The Ogoni Uprising: Oil, human rights, and a democratic alternative in Nigeria', 43(2) *Africa Today*, pp. 183-199; E.E. Osaghae, 1995, 'The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State', 94(376) *African Affairs*, pp.325-344; C. E. Welch, Jr., 1995, 'The Ogoni and Self Determination: Increasing Violence in Nigeria', 33(4) *Journal of Modern African Studies*, pp.635-650; C.I. Obi, 1997, 'Globalisation and Local Resistance: The case of the Ogoni versus Shell', 2(1) *New Political Economy*, pp.137-149.

⁴⁰ The transnational corporations in the oil and gas industry include Shell Petroleum Development Company of Nigeria Limited and its sister Shell companies in Nigeria, Chevron, Total Fina Elf, NAOC, Exxon-Mobil, Conoil, Pan Ocean Oil Corporation.

⁴¹ Shell Worldwide, of which Shell Petroleum Development Company Ltd is one of its subsidiary companies.

⁴² Preamble to the Voluntary Principles available at www.voluntaryprinciples.org/principles/introduction accessed 28 June 2011.

and ratify the Voluntary Principles and make it a binding instrument. In 2006, it trained over 500 of its employees on basic principles of human rights and conflict resolution and created a crop of staff known as 'Human Rights Champions' whose duty *inter alia* is to carry on with the crusade for embedding human rights in the operations of the company.⁴³

On its part, Chevron Nigeria commenced training of its Senior Managers and Supervisors on human rights through the use of internal and external expertise. About 1,200 of its employees have already been trained and the training is scheduled to continue for the next three years.⁴⁴ It is significant to observe that like Shell, Chevron is also a signatory to the Voluntary Principles on Security and Human Rights. It has, however, gone further by adopting the Global Sullivan Principles⁴⁵ which is another mechanism that seeks to guide the way companies work with communities. One commendable aspect of Chevron's approach to this matter is that it has included the Voluntary Principles as part of the materials given to local business units having a contractual relationship with it and they are made accountable for implementing the Principles in accordance with local laws and conditions.⁴⁶ Exxon-Mobil is also a signatory to the Voluntary Principles and it has equally taken some steps to create awareness of human rights among its staff.

These measures however invite some critical comments. First, it is depressing that of all the transnational companies operating in Nigeria, only three have so far adopted the Voluntary Principles.⁴⁷ This emphasizes the fundamental defect of voluntary mechanisms for the protection of human rights as the companies are free to decide whether, and when to adopt such codes.⁴⁸ It also accounts for the extremely low level of adherence to the Voluntary Principles by the oil companies operating in Nigeria since it is not a mandatory

⁴³ Shell Sustainability Report, 2009, p. 21. Over 1600 of its staff have been trained between 2007 and 2008 and the programme is still on-going. It has even gone further by creating the position of Human Rights Advisor as a demonstration of its commitment to the promotion of human rights, and this writer was the inaugural occupant of that position between June 2007 and September 2008.

⁴⁴ In late 2009 the company expressly adopted a Human Rights Policy which became operational in 2010 and it hopes to achieve full implementation in 2013 as indicated in the newsletter www.chevron.com/globalissues/humanrights/ accessed 22 July 2010.

⁴⁵ The Global Sullivan Principles which were unveiled in 1999 by Rev. Sullivan and the then Secretary General of the United Nations, Kofi Annan, seeks to increase the active participation of corporations in the advancement of human rights and social justice.

⁴⁶ See note 44 above.

⁴⁷ These are Shell Petroleum Development Company Ltd, Chevron, and Exxon-Mobil Nigeria Ltd.

⁴⁸ These and other inadequacies of the Voluntary Principles and similar codes for the regulation of transnational corporations are examined in G. Mantilla, 2009, 'Emerging International Human Rights Norms for Transnational Corporations', 15 *Global Governance*, pp.279-298 at 283-285.

requirement. Second, while awareness training for staff of oil companies may be an important starting point, ensuring the integration of human rights norms in all their production and operational processes ought to have been the main focus of such measures. Additionally, their recent measures do not embody human rights impact assessment mechanisms to monitor the degree of compliance with identified human rights standards in their operational processes, nor do they emphasize the involvement of indigenes of their host communities in the formulation, choice, monitoring and implementation of development projects earmarked for such communities in line with the requirements of the United Nations Declaration on the Rights of Indigenous Peoples.⁴⁹

Above all, as presently framed, these image-cleaning measures can hardly make any meaningful impact in addressing the enormous human rights challenges thrown up by the operations of transnational corporations in Nigeria. This is because the measures are merely focused on the liberal, hegemonic conception of human rights, trying to educate their staff on how such rights can be accommodated within the framework of their operations. They have, sadly, not paid any attention to the ways and means of contributing to the realization of social and economic rights, which are the rights that have immediate resonance and relevance to the ordinary Nigerian, but correspondingly, those frequently violated by these corporations.

In the end, the approach buttresses our earlier argument that hegemonic forces often appropriate the language and practice of human rights as a legitimacy-conferring mechanism in support of their policies and actions. In this particular case, the human rights training is tailored to showcase the companies' adherence to human rights norms in their operations while ignoring the crucial issues relating to social and economic rights of people in their host communities. This is why the underlying economic values driving such policies and practices have to be challenged; and human rights NGOs and other progressive forces in Nigeria have taken some steps in this direction.

⁴⁹ See Articles 18 and 23 of the Declaration. The Declaration was adopted by the General Assembly on 13 November 2007 at the 107th Plenary Meeting of the Assembly. The involvement of indigenes of host communities apart from exhibiting a bottom-up approach to community development, rather than the top-down approach, would minimize the spate of protests and conflicts between these corporations and their host communities.

6.3 *Challenging economic globalization through human rights activism in Nigeria*

6.3.1 Theoretical Framework

It must be mentioned that at the theoretical level the extent to which rights-based strategies can contribute to the struggle for social change has been questioned. This critique which is anchored on what has been described as the ‘myth of rights’ argues against the linkage of litigation, rights, and remedies with social change.⁵⁰ An important component of this critique questions the utility of constitutional instruments and treaties containing human rights provisions. Some writers have criticized the constitutionalization or institutionalization of human rights as measures that do not necessarily translate to the advancement of such rights, especially socio-economic rights.⁵¹ It has also been contended that legal activism is an elitist top-down project because most of the actions are initiated and controlled by elites who hardly have any enduring relationship with the victimized groups and often lack genuine commitment to those causes and ideologies beyond rhetorical posturing.⁵²

Accepting the cogency of these criticisms equally impels us to fashion new strategies embracing more inclusive and effective constitutional mechanisms that can be used in challenging the relations of power which undermine the realization of human rights. Whether the solution can be found in the construction of ‘a new rights regime’ which takes cognizance of the critical importance of developmental issues that have meaning to the vast majority of the people in the Global South,⁵³ or the adoption of ‘strategies of rupture’ to resist the existing order of capital domination,⁵⁴ the point remains that rights-based strategies are crucial mechanisms (though not exclusive) for realizing the goals of progressive social movements. Such legal strategies and actions will be more effective as

⁵⁰ For an analysis of the debate on the ‘myth of rights’, see A. Hunt, 1990, ‘Rights and Social Movements: Counter-Hegemonic Strategies’, 17(3) *Journal of Law and Society*, pp.309-328, at 309.

⁵¹ According to Ran Hirschl, ‘the constitutionalization of rights has proven virtually futile in mitigating, let alone reversing, wide-ranging social and economic processes of deregulation, privatization, reduced social spending, and the removal of “market rigidities.”’ R. Hirschl, 2004, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge: Harvard University Press, p.151.

⁵² I.G. Shivji, 1999, ‘Constructing a New Rights Regime: Promises, Problems and Prospects’, 8(2) *Social and Legal Studies*, pp.253-276, at 273.

⁵³ Ibid., pp.266-271; G.W. Anderson, 2011, ‘Human Rights and the Global South: Transformation from Below?’ T. Campbell, et al, eds. *The Legal Protection of Human Rights: Sceptical Essays*, Oxford: Oxford University Press, pp.347-364 at 363-364.

⁵⁴ E. Christodoulidis, 2009, ‘Strategies of Rupture’, 20(1) *Law and Critique*, pp.3-26 at 22-25.

emancipatory tools when combined with cosmopolitan struggles involving a broader segment of the society, including the oppressed and marginalized.⁵⁵ This will ensure that the legal actions are not limited to the victim/perpetrator relationship but seek to address systemic harm within the broader context of the underlying social and economic values.

Broadening the scope of legal actions in this manner brings into focus the role of social mass movements in catalyzing change in the global and local contexts. By serving as the mouthpiece and platform of resistance to the policies and actions of government and global capital inimical to the protection of social and economic rights, social mass movements can be very useful vessels for challenging economic globalization.⁵⁶ In such struggles, adequate recognition and attention must be given to the class-based political economy often used by hegemonic forces to undermine the effectiveness of the struggles. In the context of Nigeria therefore, the point has been made that:

Popular resistance to the current gridlock will succeed only if the dominated classes come to terms with the class-based political economy...and radicalise the struggle for political democracy and the construction of an autochthonous Nigerian state. The theoretical framework is constituted by a combination of structure and agency.⁵⁷

The extent to which the two approaches outlined above, namely; legal actions predicated on human rights and social movement protests have been deployed and their effectiveness, if any, in challenging the dynamics of globalization in Nigeria will be examined in the following sub-sections.

⁵⁵ This encompasses what has been described as ‘uncivil civil society’, B. de Sousa Santos, 2002, *Toward a new Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed., London: Butterworths LexisNexis, p.469.

⁵⁶ D. Hubbard, 2008, ‘Re-imagining Workers Human Rights: Transformative Organizing for a Socially Aware Global Economy’, 5 *Hastings Race and Poverty Law Journal*, pp.1-56 at 3 outlining a ‘strategy to re-imagine workers’ rights activism to foster systemic transformation of the global political economy’, so that economic human rights discourse can be reclaimed by workers and communities through grass roots struggles for agency and power.

⁵⁷ A. Amuwo, 2010, ‘Between elite protectionism and popular resistance: The political economy of Nigeria’s fractured state since juridical independence’, 28(4) *Journal of Contemporary African Studies*, pp.423-442 at 425.

6.3.2 The African Charter on Human and Peoples' Rights: An enabling instrument for legal actions

One prominent avenue through which economic globalization has been challenged in Nigeria is through human rights activism on the enforcement of social and economic rights. Although the country's 1999 Constitution does not contain any *express* provision on the enforceability of social and economic rights,⁵⁸ human rights NGOs sought to use such rights as a banner for challenging the policies and actions of the Nigerian government and transnational corporations. This was achieved through recourse to the African Charter on Human and Peoples' Rights which has been adopted into Nigerian law by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁵⁹ It must be mentioned that state parties to the African Charter recognize all the rights, duties and freedoms enshrined in the Charter and undertake to 'adopt legislative or other measures to give effect to them',⁶⁰ while the Charter makes no distinction between civil and political rights, and economic, social and cultural rights.

However, for the Charter to be deployed to actualize this goal, one major obstacle had to be cleared; namely, the status of the Charter within the Nigerian legal system. Indeed, this was the central question in the case of *General Sani Abacha & 3 Others vs. Chief Gani Fawehinmi*.⁶¹ The Respondent, a Legal Practitioner, author, publisher, human rights activist, pro-democracy campaigner and the National Co-ordinator of the National Conscience Party was arrested on 30 January 1996 at about 5.15am by a horde of Police and State Security Officers of the appellants who were armed with guns. He was taken away to the Lagos State office of the State Security Service where he was detained for

⁵⁸ Indeed, S.6 (6) (c) of the Constitution stipulates that the provisions of Chapter 2 of the Constitution on the Fundamental objectives and Directive Principles of State Policy enunciating social, economic and cultural rights are not justiciable in any court of law.

⁵⁹ The enabling enactment was effected in 1983 and is now contained in Cap A9, Laws of the Federation of Nigeria, 2004. It was made pursuant to the provisions of S.12 of the Constitution which states that for any treaty entered into by Nigeria to have the force of law in the country it must have been enacted into law by an Act of the National Assembly.

⁶⁰ Article 1 of the African Charter on Human and Peoples' Rights, S. Ibe, 2010, 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities', 10 *African Human Rights Law Journal*, pp.197-211 at 199.

⁶¹ [2000] 6 NWLR Pt 660, p.228. This case has had a significant impact on the struggle for the protection of human rights in Nigeria as subsequent cases have relied heavily on it, especially as the Supreme Court is the highest court in the country's judicial system.

about a week and denied access to anybody. Thereafter, he was secretly transferred to Bauchi Prison and detained thereat.

In an application for the enforcement of his rights, the Respondent sought a declaration that his arrest constituted a violation of his fundamental rights guaranteed under sections 31, 32 and 38 of the 1979 Constitution and Articles 4, 5, 6 and 12 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 1990 and therefore illegal and unconstitutional. The central question for determination was the extent of applicability of the African Charter on Human and Peoples' Rights in Nigeria especially in light of other decrees by the military government that curtailed the human rights of Nigerians.

The Supreme Court of Nigeria held that where an international treaty entered into by the country is enacted into law by the National Assembly, as was the case with the African Charter on Human and Peoples' Rights which is incorporated into the Nigerian domestic law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, it becomes binding and Nigerian courts must give effect to it like all other laws falling within the judicial powers of the courts. In the course of his judgement, Uwaifo, Justice of the Supreme Court made the following pertinent observation:⁶²

It seems to me that where we have a treaty like the African Charter on Human and Peoples' Rights and similar treaties applicable to Nigeria, we must be prepared to stand on the side of civilized societies the world over in the way we consider and apply them, particularly when we have adopted them as part of our laws. To my mind, this remains a valid attitude whether in military or civilian government. This will necessarily extract from the judiciary, so much so in a military regime, its will and resourcefulness to play its role in the defence of liberty and justice. The judiciary must not be seen as assisting those who step on liberty and justice to effectively press them down.

Justice Uwaifo went further to state that Nigerian courts cannot afford to be immune from the progressive movement world-wide according treaties a special place in the domestic laws of states and that the prevailing attitude is to give special consideration to treaties adopted by any state as part of its domestic laws vis-à-vis other domestic laws.⁶³

⁶² Note 61, p.342.

⁶³ Ibid, pp.342-343.

Moreover, the court underscored the point that the individual rights contained in the articles of the African Charter on Human and Peoples' Rights are justiciable in Nigerian courts and that individuals can seek to protect such rights from being violated, and if violated, to seek appropriate remedies in the national courts.⁶⁴

It must be acknowledged that the position taken by the court on the enforceability of the African Charter in the municipal realm was made relatively easier because of two factors. First, the African Charter had not only been assented to by Nigeria, but it had actually been enacted into law by the National Assembly as earlier mentioned in compliance with the provisions of S.12 (1) of the 1979 Constitution. Indeed, S.1 of the Act provides that 'the provisions of the Charter shall have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'. Having thus been enacted into law by the National Assembly, the central question became the status of the treaty, now a Nigerian law, vis-à-vis other statutes in the country.⁶⁵ It leaves open the problematic of what the attitude of the courts would have been if the Charter had not been so enacted into Nigerian law even after being signed by the Nigerian authorities.

The dictum of Justice Uwaifo on the need for Nigeria to comply with international norms and standards would suggest that under these circumstances, the courts could still go ahead and apply the provisions of the treaty. It is arguable that the court could still have had recourse to the Charter as an indication of the concretisation of customary international law applicable to the African continent.⁶⁶ Moreover, it is a trite principle of international law that a state cannot rely on the inadequacy of its domestic law as a

⁶⁴ See also the decision of the Supreme Court in the earlier case of *Ogugu vs. The State*, [1994] 9NWLR Pt.366, p.1 at 26-27 where Bello, Chief Justice of Nigeria had observed in relation to the enforcement of the African Charter within the domestic realm as follows:

Since the Charter has become part of our domestic laws, the enforcement of its provisions like all our other laws fall within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto... It is apparent... that the human and peoples' rights of the African Charter are enforceable by the several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court'.

⁶⁵ In this particular case, the statute in question was the State Security (Detention of Persons) Decree.

⁶⁶ See for instance, *Ibidapo v. Lufthansa Airlines* [1997] 4 NWLR Pt 498, p.124; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2WLR 356. E. Egede, 2007, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria', 51(2) *Journal of African Law*, pp.249-284 at 276-278.

justification for failure to fulfil the provisions of a treaty.⁶⁷ It could thus be argued that since the African Charter on Human and Peoples' Rights had been signed by Nigeria and is then in force, the fact that Nigeria has not taken the necessary action to domesticate the same in its national jurisdiction would not prevent the country from its obligations under the treaty.

Secondly, the rights enforced in this case under the Charter were also rights embodied in Chapter 4 of the 1979 Constitution as amended.⁶⁸ Again, it would have been interesting to see the position of the Supreme Court if such rights were the social and economic rights such as right to health and right to education which are said to be non-justiciable under the Nigerian Constitution.

Nonetheless, this decision acknowledging the enforceability of the African Charter within the Nigerian legal system opened a vista of opportunities for human rights activism in the country, with far-reaching implications for the African human rights system. It was thus deployed to great use in the *Economic and Social Rights case*⁶⁹ where the African Commission on Human and Peoples' Rights held that the Nigerian government was in breach of its obligations under the African Charter by aligning with Shell Petroleum Development Co. Ltd to violate the social and economic rights of the Ogoni people. This ruling which remains an important reference point in human rights activism in the country demonstrates how the interaction between national and regional mechanisms for human rights protection can be deployed to challenge the role of the state and transnational corporations in the globalization process and prevent the marginalization of social and economic rights.

Similarly, in *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission*,⁷⁰ the interaction between national, sub-regional and regional mechanisms for human rights protection was manifested when the ECOWAS Court of Justice held that

⁶⁷ See Article 27 of the Vienna Convention on the Law of Treaties, 1969.

⁶⁸ This point was also alluded to by Ogundare, JSC when he stated at p.289 as follows: 'The Charter gives to citizens of member states of the Organisation of African Unity [now AU] rights and obligations, which rights and obligations are to be enforced by our courts, if they must have any meaning. *It is interesting to note that the rights and obligations contained in the Charter are not new to Nigeria as most of these rights and obligations are already enshrined in our Constitution. See Chapter IV of the 1979 and 1999 Constitutions*'. (Emphasis added).

⁶⁹ Note 5.

⁷⁰ Note 6.

the right to education is an enforceable one against the Nigerian government under the African Charter on Human and Peoples' Rights. The plaintiff, a non-governmental organization registered under the laws of the Federal Republic of Nigeria, had filed an application against the defendants alleging violation of the right to quality education, right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to social and economic development guaranteed by Articles 1, 2, 17, 21, and 22 of the African Charter on Human and Peoples' Rights. Before the Court could go into the merits of the application, the second defendant filed a motion challenging the jurisdiction of the court to entertain the action. They contended *inter alia* that the educational objective of the Federal Republic of Nigeria as provided for under Section 18(1) and (3) of Chapter 2 of the 1999 Constitution is non-justiciable, and so cannot be determined by the Court. The Court held that by virtue of the Supplementary Protocol of ECOWAS establishing the Court it clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in Member States of ECOWAS.⁷¹ The court went further to hold that it has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by Article 4(g) of the Revised Treaty of ECOWAS, and since the Plaintiff's claim is premised on Articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights, it had jurisdiction over the matter. On whether the right to education is justiciable, and thus sustainable in the present action, the Court held as follows:

‘It is trite law that this Court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and Article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this Court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold’.⁷²

⁷¹ It specifically referred to Article 9(4) of the Protocol which stipulates in part that ‘the Court has jurisdiction to determine cases of violation of human rights that occur in any Member State’. Member States of ECOWAS include, Republic of Benin, Burkina Faso, Republic of Cape Verde, Cote D'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

⁷² Note 6, paragraph 19.

The Court also re-emphasised its position on the justiciability of the right to education in Nigeria through the African Charter on Human and Peoples' Rights in its final judgment in the matter.⁷³ Taken together, these decisions not only have far-reaching implications on the enforcement of social and economic rights in Nigeria, but demonstrate lucidly how the interaction between national, sub-regional and regional mechanisms can be an effective instrument in the quest to challenge processes of economic globalization inimical to human rights, especially when deployed in conjunction with other social movement actions.

6.4 Challenge through social movement actions

6.4.1 Nigerian Labour Congress-inspired struggles

6.4.1.1 Background

A number of social movement actions have been undertaken in Nigeria over the years to challenge government policies premised on the demands of economic globalization which entail the marginalization of social and economic rights. One of these struggles was the mass protests and demonstrations organized by the Nigerian Labour Congress (NLC) against the increases in the pump price of petroleum products in Nigeria.⁷⁴ It may be mentioned that the down-turn in the economic fortunes of Nigeria in the 1980s led to the implementation of an IMF-dictated structural adjustment programme which had devastating consequences for the great majority of Nigerians.⁷⁵ The implementation of this programme continued till the late 1990s, and it was in furtherance of such policies

⁷³ *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. The Federal Republic of Nigeria and another*, Judgment No. ECW/CCJ/JUD/07/10 delivered on 30th November 2010. Para.27. An analysis of the role of the Court in the determination of human rights issues in the sub-region is contained in S.T. Ebovrah, 2010, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice', 54(1) *Journal of African Law*, pp.1-25.

⁷⁴ O.C. Okafor, 2009, 'Irrigating the famished fields: The impact of the labour-led struggle on policy and action in Nigeria (1999-2007)', 27(2) *Journal of Contemporary African Studies*, pp.159-175, at 160. The Nigerian Labour Congress shall hereinafter be referred to simply as 'NLC' except where it is deemed necessary to still use the full appellation.

⁷⁵ J.O. Ihonvbere, 1993, note 2, pp.145-148. Although strong opposition to the full implementation of this package by the Nigerian labour movement and other progressive forces led to a revised version of the programme christened 'home-grown' SAP, the main components of the programme such as privatization, liberalization of imports etc. remained the same. See, A.O. Olukoshi, 1993, 'General Introduction: From Crisis to Adjustment in Nigeria', A.O. Olukoshi, ed. *The Politics of Structural Adjustment in Nigeria*, London: James Currey Ltd, pp.1-15 at 8.

that the Olusegun Obasanjo government which came to power in May 1999 made several attempts during its tenure to impose significant increases in the prices of petroleum products. Each of these attempts was stoutly resisted by the labour movement and other progressive forces with some measure of success.⁷⁶ The government was compelled to embark on these price increases because of the persistent pressure on it by the duo of IMF and World Bank insisting on the removal of government subsidy on these products as part of the deregulation and liberalization of the economy.⁷⁷ These measures were part of the tenets of economic globalization as formulated within the 'Washington Consensus' which attracted a global response from marginalized groups in several countries. The response of the Nigerian Labour Congress can thus be located within this global matrix of challenge to the dictates of economic globalization.

The NLC's involvement in the struggles to oppose these fuel price increases can be located within the context of its constitutional mandate which requires it, among others, to 'promote and defend trade union and human rights, the rule of law and democratic governance'.⁷⁸ This explains the central role of the labour movement in human rights activism over the years, particularly the struggle for the restoration of democracy in Nigeria during the dark days of the military governments.⁷⁹ Given that the NLC is essentially an organization embracing workers in the junior and intermediate cadres of the Nigerian workforce and the added fact that majority of Nigerians are poor and fall within this category, it is not surprising that the actions of NLC are easily seen as measures to prevent further deterioration of the basic living standards of the already impoverished Nigerians.⁸⁰ Consequently, the NLC has come to be seen as 'the voice of

⁷⁶ O.C. Okafor, 2009, note 74, pp.165-166.

⁷⁷ This was one of the major components of deregulation contained in the recommended structural adjustment programme.

⁷⁸ See Article 3 of the revised NLC Constitution, 1999.

⁷⁹ Indeed, labour leaders such as the fiery Adams Oshiomhole and Frank Kokori were among those who suffered frequent arrests and detentions during the struggle for the actualization of the mandate of Chief M.K.O. Abiola in the aftermath of the annulled 1993 elections in the country. The involvement of labour in such struggles is however not surprising since the labour movement had always played a crucial role in the social, economic and political development of Nigeria. J.O. Ihonvbere, 1997, 'Organized Labor and the Struggle for Democracy in Nigeria', 40(3) *African Studies Review*, pp.77-110 at 80.

⁸⁰ It has been estimated that over 70% of Nigerians live below the poverty line of less than \$1 a day. See, O.A. Orifowomo, 2011, 'The quest for poverty alleviation in Nigeria: The need for a rights-based approach', 17(1) *East African Journal of Peace and Human Rights*, pp.147-172 at 152-153.

the oppressed people', ⁸¹ and an important agent of the struggle for the realization of the social and economic rights of Nigerians. Moreover, the participation of its 40 affiliate member unions and human rights NGOs such as Civil Liberties Organization (CLO), Committee for the Defence of Human Rights (CDHR) and Campaign for Democracy (CD) in the strikes adds to its populist orientation, a feature that was instrumental for its success in the struggle against fuel price increases. Additionally, the central role of these petroleum products such as kerosene, diesel and petrol in the domestic and daily lives of ordinary Nigerians either for household cooking or powering automobiles means that any increase in their prices would have adverse effects on the availability of these products to the masses, and their standard of living.⁸² These factors also play an important role in compelling the government to alter its policies and actions on fuel prices.⁸³

6.4.1.2 Nature and impact of the Struggles

The NLC's protests over fuel price increases usually took the form of 'general strikes' and often involved all of its affiliate trade unions, and other groups as such as traders, transporters, human rights organizations, and students unions. It entailed 'stay-at-home' strikes or street demonstrations and protests, and because of the large number of groups involved, it often had the effect of crippling economic activities in the country. Using as a reference point, the period since the return of democracy from May 1999 to 2011, the first strike took place between 1-8 June 2000 consequent upon the announcement of a 50% increase in the price of petroleum products by the Managing Director of Nigerian National Petroleum Corporation (NNPC) the previous day.⁸⁴ The NLC in response, called a nation-wide general strike which paralysed economic activities in the country for nine days. It involved public sector workers, oil workers, transport workers and resulted in the disruption of domestic and international flights. The second strike action embarked upon from 30 June to 8 July 2003 to protest the government's refusal to rescind its latest 55%

⁸¹ History of the Nigerian Labour Congress, available at: www.nlcng.org/history.php accessed 4 July 2011.

⁸² G.O. Arishe, 2006, 'Price Adjustment of Petroleum Products and the Law: 1999-2003', 9(1) *University of Benin Law Journal*, pp.38-50 at 38-39.

⁸³ O.C. Okafor, 2009, note 74, p.160.

⁸⁴ On the legality of this announcement not having been made by the Minister of Petroleum who is the sole officer authorized to do so under the Petroleum Act, see G.O. Arishe, 2006, note 82, at pp.41-45.

fuel price hike equally had a devastating effect on the economy as it lasted eight days. The third mass action organized by the movement in September 2005 also lasted eight days. Finally, the mass action embarked upon by the NLC soon after the assumption of office by Alhaji Umaru Musa Yar Adua in May 2007 was no less devastating.

These strikes had a tremendous impact and succeeded either in preventing the government from implementing proposed increases in the prices of petroleum products or in making far-reaching concessions on such proposed increases. In some of these cases the government had to back down on the proposed increases and arrived at a negotiated settlement with the NLC. Thus in relation to the first strike on 1st June 2000 the government was compelled to reduce the price increase from N30 to N22 per litre, while in respect of the June 2003 strike it was forced to announce a partial rescission of that increase thus enabling the movement to call off the strike.⁸⁵ The 55% increase was eventually reduced to 31% that is N34 per litre. The September 2005 strike action led to a major concession from the government in the form of a 14-month freeze in the price of fuel from 1 October 2005 to 31 December 2006 with the President declaring that the moratorium would be on during this period whatever happens in the international oil market.⁸⁶ Finally, in respect of the June 2007 strike consequent upon the 15% increase in fuel prices announced by the departing government of Olusegun Obasanjo, the new government of Musa Yar Adua was forced to announce significant reductions in the prices. It reduced the increase from 15 to 7% and announced yet another freeze in the price of fuel for the period between 23 June 2007 and 22 June 2008.⁸⁷

Indeed, it is in consideration of the likely impact of an NLC-engineered strike action on the contentious minimum wage issue that the present government of Dr Goodluck Jonathan had to negotiate and arrive at a compromise with the movement to stave off the contemplated mass action on the issue. While the Labour Congress demanded a minimum monthly wage of N52, 000 (about £208), a steep rise from the present N7, 500 (£30), as a result of intense negotiations, a compromise figure of N18, 000 (£72) has now

⁸⁵ O.C. Okafor, 2009, note 74, p.165.

⁸⁶ Ibid., p.166.

⁸⁷ Ibid.

been agreed upon and the President on 23 March 2011 assented to the Bill on this as passed by the National Assembly.⁸⁸

However, the strike actions that were embarked upon in January 2002 and October 2004 did not result in any significant concessions from the government as the government obtained an injunction against the first which had to be suspended, while the strike action in October 2004 was declared illegal by a federal high court in Abuja.⁸⁹

It can therefore be said that the strike actions of the Nigerian Labour Congress succeeded in constraining to a significant extent, the actions of the government propelled by the pressures of powerful global economic forces represented by IMF and World Bank through insistence on removal of government subsidy on petroleum products. The movement's struggles thus ensured that the increases in the price of petroleum products were, in the words of Obiora Okafor, 'administered in markedly smaller doses',⁹⁰ which prevented much of an escalation in the depreciation of the living standards of ordinary Nigerians. The success of these protests and demonstrations should therefore be seen in the broader context of the struggle for the realization of social and economic rights in Nigeria, and the continuing challenge of hegemonic forces averse to the advancement of these rights.

However, the fact that the actions were usually suspended or called off after some concessions had been made by the government following negotiations, coupled with their limited transnational connections, emphasize the limited achievements of the struggles, giving rise to the view that they are merely reformist measures within the existing neo-liberal economic framework.

⁸⁸ National Minimum Wage Act, 2011. The issue of implementation is however generating some discontent as the various state governments are unwilling to commence payment unless a new revenue sharing formula is put in place. They have now tied implementation to the removal of subsidy on petroleum products, an issue that is certainly very explosive in the country, and has already generated widespread condemnation of the Governors as a result of which they have now backpedaled. See *The Nation*, Sunday 17 July 2011 with the caption 'Minimum Wage: Governors bow to Labour's demand'.

⁸⁹ O.C. Okafor, 2009, note 74, p.166. An analysis of the legal tango that led to the scuttling of these strike actions through the injunctions obtained by the government is contained in O.C. Okafor, 2010, 'Between Elite Interests and Pro-Poor Resistance: The Nigerian Courts and Labour-Led Anti-Fuel Price Hike Struggles (1999-2007)', 54(1) *Journal of African Law*, pp.95-118.

⁹⁰ O.C. Okafor, 2009, note 74, p.167.

6.4.2 Women's Protests against oil corporations in Nigeria

6.4.2.1 Background and Nature of Protests

The wave of protests by women from the oil bearing⁹¹ Niger Delta region of Nigeria against the operations of two transnational oil corporations, Chevron/Texaco, and Shell Petroleum Development Company provides another instance of local resistance to the marginalization of social and economic rights by the activities of global capital working within the framework of neo-liberal globalization. The protests also demonstrate how the activities of social movements from below can have strategic global impact on the nature and form of other protest movements' world-wide. I highlight four of such protest actions carried out between July 2002 and July 2003.

First, on 8 July 2002 some 600 women occupied the Escravos export oil terminal and tank yard belonging to United States multinational oil giant, Chevron/Texaco after the company ignored their earlier correspondence outlining their grievances. One of their main complaints was that the operations of transnational oil corporations had reduced their once-rich subsistence economy to a polluted wasteland, and they could no longer carry on their traditional activities of farming and fishing. They therefore demanded a meeting with the government and the oil companies in order to establish a tripartite body (multinationals, state, and women) for the resolution of problems related to oil operations in the area. On the socio-economic condition of their community, they raised issues such as lack of employment opportunities for their husbands and children, lack of small scale income generating activities, basic health care facilities and educational institutions, the absence of potable drinking water and electricity in the Ugborodo communities, even though ChevronTexaco had been in operation in the area for about 30 years.⁹²

This ten-day takeover of the terminal by the Itsekiri women was particularly significant because the women decided to demonstrate the seriousness of their action by carrying out the protest half-naked in public, an action that has far-reaching social and

⁹¹ There has been some misconception in the use of terminology relating to oil-bearing communities in Nigeria, as they are frequently referred to as 'oil-producing' communities. However, since these communities do not 'produce' the oil, the proper terminology ought to be 'oil-bearing' communities, a phrase that is preferred and used in this work.

⁹² C. Ukeje, 2004, 'From Aba to Ugborodo: Gender identity and alternative discourse of social protest among women in the oil Delta of Nigeria', 32(4) *Oxford Development Studies*, pp.605-617, at 613. It is reported that the only Ugborodo community with electricity is Ogidigben, because the offices of the company are located there. *The Punch*, Lagos, 10 July 2002, p.9.

traditional implications in the country. They exposed their naked bodies especially their genitals to impose a curse on those involved in the operations of the companies; a curse widely believed to lead to unpleasant consequences.⁹³

The action of the women forced the company to invoke a *force majeure* clause in its contracts with exporters and also led to heavy losses in revenue for the company and the Nigerian government.⁹⁴ It is recognition of the enormity of the losses that prompted the company to seek a quick resolution of the impasse, which eventually came after negotiation with the women in the form of a Memorandum of Understanding signed by the parties. The Memorandum of Understanding (MOU) committed Chevron/Texaco to upgrading 15 members of the communities who are contract staff to permanent staff status; the employment of one person from each of the five Ugborodo villages every year; the building of one house each for their traditional rulers, provision of vital infrastructure; and the establishment of income generating schemes, among others.⁹⁵

The second protest, also in July and obviously inspired by the action of the Ugborodo (Itsekiri) women, took place even while the latter protest was still on. Over 1000 Ijaw women from Gbaramatu and Egbema Kingdoms organized similar actions, resulting in the forcible occupation of four Chevron/Texaco flow stations located at Abiteye, Makaraba-Otunana, Dibi and Olera Creeks. This action lasted 11 days and was concluded after the company representatives negotiated with the women and signed a Memorandum of Understanding (MOU) with them.⁹⁶ The third protest, on 8 August 2002 by over 4000 Warri women did not involve physical occupation of oil installations but the women gathered peacefully at the entrance to the Shell Western divisional office complex, sang protest songs and danced to prevent personnel and vehicular movements in and out of the premises. It later degenerated into violence when regular and mobile policemen used

⁹³ T.E. Turner, and L.S. Brownhill, 2004, 'Why Women are at War with Chevron: Nigerian Subsistence Struggles against the International Oil Industry', 39(1-2) *Journal of Asian and African Studies*, pp.63-93, at 67. As they put it: 'In much of Africa, women throw off their clothes in an ultimate protest to say 'this is where life comes from. I hereby revoke your life''. Nakedness by elderly women, in particular, is used in extreme and life-threatening situations... Many men subjected to this "social exclusion" believe they will actually die when exposed to such a serious threat'. p.71.

⁹⁴ C. Ukeje, 2004, note 92, p.612. Although there is conflict as to the actual monetary cost of the ten day closure of the Escravos loading facility, the daily loss by the Nigerian government is said to be in the region of \$7.8million while the company's loss was around \$2.5million.

⁹⁵ T.E. Turner, and L.S. Brownhill, 2004, note 93, p.67; I. Wamala, 2002, 'Nigerian Women Take on the Oil Companies', 56/57 *Women and Environments International Magazine*, pp.38-39 at 38.

⁹⁶ C. Ukeje, 2004, note 92, p. 606.

teargas and batons to disperse the women as a result of which several of them were injured and hospitalized.⁹⁷

Finally, on July 10, 2003, the day before the then President of the United States George Bush's arrival in Nigeria, women took over many petroleum companies' facilities in the Niger Delta including Amukpe, Sapele West, and Imogu-Rumuekpe. In the case of Amukpe flow station, some 80 unarmed peasant women, ranging in age between 25 to 60, drove oil workers out of the station, took possession of all vehicles, changed the facility's locks, installed their cooking equipment, made their infants and toddlers comfortable, and began 'running shifts' of several dozen women each. The women activists demanded that Shell keep promises made earlier, employ local people, provide domestic amenities including water and electricity, and remove a recently installed chain-link fence that impeded their agricultural product processing.⁹⁸ Similar strategies were employed in the Sapele West and Imogu-Rumuekpe demonstrations which were all called off after reaching some agreement with the oil companies involved.

6.4.2.2 Impacts of the Protests

In addition to inspiring these subsequent protests in Nigeria, the action of the Ugborodo women provoked women outside of the country to also deploy the power and curse of nakedness in the global anti-war mobilization – a form of globalized localism. This resulted in the multiplication of such nude protests around the world, including those against the Bush administration's then imminent attack on Iraq.⁹⁹ According to Terisa Turner and Leigh Brownhill:

By November 12, 2002, the movement against corporate globalization had expanded dramatically to oppose the impending U.S military attack on Iraq. Women in California were explicitly inspired by how the Nigerian women who captured Escravos had used the curse of nakedness to shame the men and win their cause. They introduced a new anti-war tactic ... With their naked bodies they wrote gigantic letters to spell 'Peace', photographs of which circulated the

⁹⁷ Ibid.

⁹⁸ T.E. Turner, and L.S. Brownhill, 2004, note 93, p.76.

⁹⁹ Ibid.

globe via the internet and print media to instigate still more nude demonstrators...'¹⁰⁰

The protest actions by the women is a classic form of globalization from below as the hitherto voiceless, subordinate and marginalized group, the Niger Delta women, rose up to challenge the actions of powerful transnational corporations backed by the Nigerian government. It has thus been said that the action of the women represents a 'much more fertile form of anti-imperial, transformational "globalization from below" in that in defending their subsistence life economy, they were able to deny strategic crude oil to globally dominate capital'.¹⁰¹ Although the demands of the women essentially focused on subsistence matters or 'bread and butter' issues, the manner of their protests and the national and international impact they generated greatly constrained the activities of transnational corporations from continuing to marginalize the social and economic rights of the people. The protests must thus be located within the broader context of the growing struggles by social movements in the country to challenge the dehumanizing activities and impact of international capital working in collaboration with the Nigerian government. As Cyril Obi has aptly noted in relation to the Ogoni crisis, these protests and conflicts are critical manifestations of the interaction between globalization and local resistance.¹⁰² In other words, they represent the clash between globalization from above and globalization from below.¹⁰³

Finally, an important historical parallel between the Ugborodo women's protest and the dehumanization carried out during the slave trade era may be mentioned here. The site of the multi-million dollar oil terminal was named 'Escravos' by the Portuguese, not the natives, and used to be the final 'loading' point for slaves destined for the Americas.¹⁰⁴ Accordingly, as Charles Ukeje has pithily observed, 'if Escravos represented slave capitalism in the early colonial epoch, today it represents an infrastructure of

¹⁰⁰ Ibid, p.71. According to them, in what can be described as a circulation of struggles, 'between July 2002 and February 2003, the number of women engaged in naked protests grew from a few thousand in the Niger Delta to several hundred thousand worldwide'. p.72.

¹⁰¹ T.E. Turner, and L.S. Brownhill, 2004, note 93, p.65.

¹⁰² C. Obi, 1997, note 39, pp.138-139.

¹⁰³ B. de Sousa Santos, 2002, note 55, p.182; R. Falk, 2001, 'Resisting "Globalization from Above" through "Globalization from Below"', B.K. Gills, ed. *Globalization and the Politics of Resistance*, Hampshire: Palgrave, pp.46-56.

¹⁰⁴ C. Ukeje, 2004, note 92, p.613. Significantly, the protesting women resisted being referred to as Escravos women but preferred Ugborodo which is their community's ancestral Benin name.

exploitation by the alliance between oil multinationals and the Nigerian State'.¹⁰⁵ The action of the women was therefore to challenge this exploitation and marginalization.

However, the long-term impact and effectiveness of protest movements such as those under consideration here has been questioned, especially when they only result in agreements with transnational corporations in Nigeria notorious for not adhering to agreed terms with oil bearing communities. On this score, it may be recalled that the non-implementation of the 2002 MOU between Chevron/Texaco and Ugborodo women was the subject of the subsequent demonstration by the community in 2005 earlier mentioned in this work.¹⁰⁶ This suggests the need for more radical counter-hegemonic pressures on these global economic forces, a task which the misguided Movement for the Emancipation of the Niger Delta (MEND) sought, but sadly failed to accomplish, through their indiscriminate kidnappings and attacks which alienated the people from their struggle.

6.5 Conclusion

An attempt has been made in this chapter to contextualize the impact of human rights norms on economic globalization within the Nigerian environment through the deployment of legal actions and protest movements for the actualization of social and economic rights. The country's engagement with the globalization process has entailed her adoption of the tenets of neo-liberal economic policies of liberalization, privatization, deregulation, and the 'opening-up' of the economic space by offering incentives to foreign investors to invest in the country. The government thus enacted the Nigerian Investment Promotion Commission Act containing far-reaching provisions designed to achieve this objective, including the Hull formula on payment of compensation in cases of nationalization or expropriation. The inclusion of such provisions in the NIPC Act ostensibly in deference to the demands of economic globalization and the race to attract foreign investment, has facilitated the activities of transnational corporations which have relied on them to continue to violate human rights in the country. This stems from the fact that the economic liberalization measures were not accompanied by corresponding

¹⁰⁵ Ibid.

¹⁰⁶ See subsection 6.2.2.

regulations for transnational corporations on the respect for, and protection of human rights.

Notwithstanding such deep commitment to the neo-liberal economic project by the Nigerian government, committed human rights NGOs and other social movements have increasingly deployed legal actions and mass protests as a means of constraining the deleterious effects of economic globalization on human rights in the country. In this connection, cases such as *Economic and Social Rights Case*,¹⁰⁷ and *SERAP v. Federal Republic of Nigeria & another*¹⁰⁸ open up new spaces and possibilities for a counter-hegemonic response to the neo-liberal economic policies of the Nigerian government. The protests by the Nigerian Labour Congress against persistent fuel price increases in the country and the concessions made by the government during such protests also demonstrate the vitality of social mass movements in challenging and constraining governments' economic policies derived from the tenets of neo-liberal economic globalization. Similarly, the wave of protests by women from the Niger Delta region of Nigeria against the marginalization of their social and economic rights by transnational oil corporations in the country and the national and international impacts these had, equally epitomizes the challenge of 'globalization from above' through 'globalization from below'. Although their outcomes are largely reformist in nature, these measures must be seen as incipient strategies of a counter-hegemonic challenge to neo-liberal economic globalization with tremendous potential to alter the nature and context of the traditional relationship between globalization and human rights in Africa. The next chapter will seek to explore the prospects of these incipient counter-hegemonic pressures in relation to Kenya.

¹⁰⁷ Note 5.

¹⁰⁸ Note 6.

7 Chapter 7: Globalization and human rights in Africa: Focus on Kenya

7.1 Introduction

This chapter seeks to further the inquiry pursued in the last two chapters on the case studies of the mutual impact between globalization and human rights in Africa with a focus on Kenya. The central and strategic position of Kenya as the largest and most dynamic economy in East Africa, a position predicated on her relative political and economic stability over the years, makes the country a suitable testing ground for appraising the relationship between globalization and human rights in Africa. Although this stability seemed to have concealed its sharp ethnic and political cleavages as well as long-standing structural problems, developments in the country naturally have a domino effect on other countries in the sub-region.¹

Against this background, it is intended to advance and buttress in this chapter, three key arguments that have relevance to the relationship between globalization and human rights. First, I will argue that the provisions in the new 2010 Kenyan Constitution making social and economic rights enforceable in the country are not only remarkable, but evidence the impact of globalization in facilitating the migration of constitutional ideas relating to human rights.² Second, it will be shown that the challenge by the Endorois people of the action of the Kenyan government in displacing them from their traditional homeland in order to make way for a Game Reserve, a tourism-inspired project, represents the deployment of the right of indigenous peoples to constrain state actions and measures informed by the requirements of globalization. Finally, using the struggle for workers' rights and their human rights at Del Monte Kenya Limited, a transnational corporation as a case study, it will be demonstrated how the violations of these rights exacerbated by the processes of economic globalization, were effectively challenged by a

¹ Thus the 2007 post-election violence in the country seriously affected its neighbouring East and Central African countries such as Uganda, Tanzania, Ethiopia, Southern Sudan, Rwanda, Burundi, and Democratic Republic of Congo as their routes for vital supplies such as oil, essential commodities and access to communications were disrupted.

² S. Choudhry, 2006, 'Migration as a new metaphor in comparative constitutional law', S. Choudhry, ed. *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press, pp.1-35 at 20-22.

coalition of national and international activism leading to significant concessions and enhanced recognition of these rights by the corporation.

I conclude the chapter by positing that the Kenyan situation further buttresses the mutual impact between globalization and human rights, and provides a useful platform for progressive forces to build and sustain the pressure on hegemonic forces intent on maintaining the neo-liberal economic policies that continue to marginalize the human rights of people in Africa.

7.2 *Globalization and the constitutionalization of human rights in Kenya*

The constitutionalization of human rights, in particular social and economic rights, under the Kenyan Constitution, 2010 amply demonstrates the impact of political globalization on human rights. It may be mentioned that one of the major fall-outs of the 2007 post-election crisis in the country was the eventual adoption of a new constitution in August 2010.³ This constitution in several respects epitomizes the growing realization of the imperative of having adequate constitutional safeguards for human rights. It is informed by the understanding that when certain rights and freedoms are included in written constitutions, they are invariably given a higher legal status and become central to the political discourse in that society.⁴ Although it must be admitted that mere constitutional guarantees of human rights cannot successfully ensure the protection of such rights, the constitutional entrenchment gives visibility and prominence to the affected rights thus facilitating activism for their enforcement. It is recognition of this prevailing opinion that propelled the drafters of the 2010 Constitution to make specific provisions for the enforceability of social and economic rights. They did not have to search far as the South

³ The post-election violence led to the death of over 1,100 persons and the displacement of about 350,000 others. It was eventually resolved with the adoption of a power-sharing arrangement between the two combatants, incumbent President Mwai Kibaki, and Raila Odinga, who now occupies the position of Prime Minister. The arrangement was given legal backing with the enactment of the National Accord and Reconciliation Act, 2008. M. Rutten and S. Owuor, 2009, 'Weapons of mass destruction: Land, ethnicity and the 2007 elections in Kenya', 27(3) *Journal of Contemporary African Studies*, pp.305-324 at 305.

⁴ C.R. Kumar, 2003, 'Moving Beyond Constitutionalization and Judicial Protection of Human Rights: Building on the Hong Kong Experience of Civil Society Empowerment', 26 *Loyola Los Angeles International and Comparative Law Review*, pp.281-314 at 285.

African Constitution, 1996 provided a ready inspirational source for them.⁵ The imprint of the South African Constitution is thus manifest in the Kenyan Constitution.⁶ According to Howard Varney, the similarities between the constitutions of Kenya and South Africa stem from the fact that both constitutions were adopted after many years of turbulence and through processes that were largely consultative and participatory.⁷ Whilst this is not a comparative study, and limiting ourselves to the provisions on social and economic rights, the similarities between the two constitutions are so striking that it is necessary to highlight a few of them to underscore the impact of globalization in facilitating the inclusion and adoption of those provisions. For example, the Kenyan Constitution provides in Article 43 (1) that:

Every person has the right –

- a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b) to accessible and adequate housing, and to reasonable standards of sanitation;
- c) to be free from hunger, and to have adequate food of acceptable quality;
- d) to clean and safe water in adequate quantities;
- e) to social security; and
- f) to education.

⁵ The South African Constitution was in turn strongly influenced by the Canadian Charter of Rights and Freedoms with liberal borrowings from Germany and United States of America. D.M. Davis, 2003, 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience', 1(2) *International Journal of Constitutional Law*, pp.181-195 at 187.

⁶ It must be acknowledged, however, that the Kenyan Constitution also contains some provisions attentive to the peculiar circumstances of the country, especially in trying to deal with the long-standing issues of land and ethnic imbalance. For instance, Article 40(1) provides for the right to acquire and own property of any description and 'in any part of Kenya', a provision that seeks to address the denial of access to land in some areas based on ethnic considerations. On the centrality of land issues in Kenya and its role in the post-election crisis, see, P. Kamari-Mbote and K. Kindiki, 2008, 'Trouble in Eden: How and Why Unresolved Land Issues Landed "Peace-full Kenya" in Trouble in 2008', 35 *Forum for Development Studies*, pp.169-193; M. Rutten and S. Owuor, 2009, note 3, at pp.306-315.

⁷ H. Varney, 2011, 'Breathing life into the new Constitution: A new constitutional approach to law and policy in Kenya; lessons from South Africa', *ICTJ Briefing*, February, p.4. Two other important points of similarities may also be mentioned here. First, Chapter 4 of the Constitution devoted to the protection of human rights has the title 'The Bill of Rights' similar to Chapter 2 of the South African Constitution. Second, Article 59(1) of the Kenyan Constitution 2010 provides for the establishment of the Kenyan National Human Rights and Equality Commission specifically mandated *inter alia*; to promote respect for human rights and develop a culture of human rights in the country. This also parallels the Commission for Gender Equality and the Human Rights Commission of South Africa.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.⁸

It hardly needs to be mentioned that these provisions are almost verbatim with the equivalent provisions of the South African Constitution which formed the basis of decisions such as *Soobramoney v. Minister of Health, Kwazulu-Natal*,⁹ *Minister of Health and Others (No.2) v. Treatment Action Campaign and Others*,¹⁰ and *Government of the Republic of South Africa and Others v. Grootboom*¹¹ discussed in Chapter 5. Moreover, the challenges that arose from the decisions in the above cases were also taken into account in formulating the approach the courts should adopt in enforcing these social and economic rights. This explains the provision in Article 20 (5) of the Constitution that: ‘In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles –

- a) it is the responsibility of the State to show that the resources are not available;
- b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- c) the court, or tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion’.

Finally, the provisions relating to the implementation of rights and fundamental freedoms under the Constitution also parallel the South African provisions. Article 21 of the Constitution provides as follows:

‘(1) It is a fundamental duty of the State and every State organ to observe, respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

⁸ Article 43(1) and (2) of the Constitution; contrast with S.26 and S.27 (3) of the South African Constitution.

⁹ 1998 (1) SA 765 (CC).

¹⁰ 2002 (5) SA 721 (CC).

¹¹ 2001 (1) SA 46 (CC).

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms’.

The significance and novelty of the Bill of Rights in the new Kenyan Constitution can be seen from two main standpoints. First, the previous constitutions of the country since independence in December 1963 did not contain provisions on socio-economic rights thus neglecting the material welfare of the individual which is crucial to human life and dignity. Indeed, those rights were not even mentioned as directive principles of state policy.¹² The previous Constitutions essentially guaranteed only traditional civil and political rights.¹³ Second, the new Constitution not only provides for these socio-economic rights but expressly makes them justiciable. Not surprisingly, the new Constitution has been described as ‘one of the most progressive constitutions in the world today’.¹⁴

While the constitutional provisions signal a new beginning for Kenya in terms of the enhanced recognition of human rights, especially social and economic rights, it is important to underscore the fact that the provisions need to be given flesh through progressive and people-centred interpretation and application to make these rights meaningful. As Howard Varney put it:

If respected, the Constitution, and the measures taken to implement it, will form an historic bridge between an iniquitous, oppressive past and a future based on social justice and economic development. It will lay the foundations for a democratic and open society in which every person is equally protected by the

¹² A.W. Munene, 2002, ‘The bill of rights and constitutional order: A Kenyan perspective’, 2 *African Human Rights Law Journal*, pp.135-159 at 152.

¹³ Under the previous constitution, the bill of rights was contained in Chapter V of the Constitution of Kenya, Act 5 of 1969, and was entitled ‘Protection of Fundamental Rights and Freedoms of the Individual’. For a historical analysis of the Kenyan bill of rights under the previous constitution and its ineffectiveness in dealing with issues of human rights violations, see, Y. Ghai, 1999, ‘The Kenya Bill of Rights: Theory and Practice’, P. Alston, ed. *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford: Oxford University Press, pp.187-240 at 236-240.

¹⁴ H. Varney, 2011, note 7, p.9.

law. The new Constitution ought to free the potential of each and every Kenyan.¹⁵

Moreover, the fact that the constitutional provisions on social and economic rights are progressive and forward-looking like the South African Constitution raises an important issue concerning the possibility of those provisions being deployed to constrain the activities of the government and transnational capital within the framework of economic globalization. In other words, taking a cue from the South African situation of enhanced human rights activism, can these constitutional provisions be deployed by human rights NGOs and other social movements in Kenya to serve emancipatory purposes? The fact that Kenya has a virile civil society and high level of social movement activism notwithstanding the sometimes hostile operational environment,¹⁶ gives hope that these provisions will be utilized by progressive NGOs to actualize an emancipatory project. This is more so when it is realized that the Constitution underscores the centrality of the protection of human rights as one of the core values of the new constitutionalism in the country.

Finally, on the possibilities of the emergence of counter-hegemonic challenges, it may be said that the sudden eruption of protests and subsequent violence following announcement of the election results in late December 2007 is indicative of resistance from below, though evidently an unlawful way of showing their disappointment with, and resentment of, the manipulated electoral process.¹⁷ However, in the peculiar circumstances of Kenya, this grassroots resistance was manipulated by political jingoists and given the ethnic colouration that it manifested. Yet, such protests must be placed within the broader context of the growing awareness of the need for the respect of, and protection of, the civil and political rights of citizens which, if properly channelled and

¹⁵ Ibid. p.1. This is an important assignment that Kenyans must confront in the years ahead. J. M. Klopp, 2009, 'Kenya's Unfinished Agendas', 62(2) *Journal of International Affairs*, pp.143-158.

¹⁶ On the challenges and operational constraints of human rights and other NGOs in Kenya, see P. Kameri-Mbote, 2000, *The Operational Environment and Constraints for NGOs in Kenya: Strategies for Good Policy and Practice*, Geneva: International Environmental Law Research Centre, Working Paper No.2, pp.6-17; B.K. Murungi, 2009, 'To Whom, for What, and About What? The Legitimacy of Human Rights NGOs in Kenya', M. Mutua, ed. *Human Rights NGOs in East Africa: Political and Normative Tensions*, Pennsylvania: University of Pennsylvania Press, pp.37-49.

¹⁷ The elections were expected to usher in a new democratic dispensation in the country following the inability of the Mwai Kibaki government to effectively address some of the long-standing key issues of ethnic domination, land-grabbing, and corruption.

organized, can be an important bulwark against electoral malpractices in subsequent elections in the country and Africa in general.¹⁸

7.3 Globalization, and the Struggle for Land, Environmental and Cultural Rights in Kenya

One crucial area where the interaction between globalization and human rights is manifest in Kenya is in relation to the exercise of cultural rights by indigenous peoples contesting the activities of the government driven by the forces of globalization. In this particular situation, the globalization factor propelling the government's action is the tourism industry. It may be mentioned that tourism is an important foreign exchange earner in Kenya as the country is a favourite destination for foreign tourists because of its favourable weather conditions.¹⁹ In examining the connection between globalization and the resistance of people to it in Kenya, I will focus on the struggle of the Endorois people for the assertion of their land, cultural and environmental rights in response to the action of the government in displacing them from their ancestral homes in order to construct a Game Reserve without their consultation. When it is realized that 'indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual attachment of the community to its traditional lands',²⁰ then it becomes obvious why the Endorois persisted in this struggle which lasted almost 40 years. This becomes very critical when such rights are inseparable from the cultural life of the people.

This long struggle by the Endorois people for their rights against the actions of the government driven by the forces of globalization was eventually pursued through legal action at the African Commission on Human and Peoples' Rights in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf*

¹⁸ D. Branch and N. Cheeseman, 2009, 'Democratization, sequencing, and state failure in Africa: Lessons from Kenya', 108(430) *African Affairs*, pp.1-26, at 23-26; S. D. Mueller, 'Dying to win: Elections, political violence, and institutional decay in Kenya', 29(1) *Journal of Contemporary African Studies*, pp.99-117, at 102-106. As is now obvious, the protests eventually led to the adoption of a power-sharing arrangement and the adoption of a new Constitution for the country in August 2010.

¹⁹ It is in fact the second largest source of foreign exchange in the country, and there are several notable parks and tourist attractions in the country.

²⁰ G. Pentassuglia, 2011, 'Towards a Jurisprudential Articulation of Indigenous Land Rights', 22(1) *European Journal of International Law*, pp.165-202 at 167.

*of Endorois Welfare Council vs. Republic of Kenya.*²¹ In order to underscore the extent of marginalization of the Endorois people and the scope of the struggles to assert their rights, the facts of the case will be stated *in extenso*.

The complainants in the Communication alleged violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands; the failure to adequately compensate them for the loss of their property; the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture; as well as the overall process of development of the Endorois people. It alleged that the Government of Kenya forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

According to the Complainants, the Endorois are a community of approximately 60,000 people who, for centuries, have lived in the Lake Bogoria area. It is claimed that prior to the dispossession of the Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land, but that since 1978 they have been denied access to their land. They stated that the Endorois customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya, an action which dispossessed them of their land.

The Complainants also stated that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle and that Lake Bogoria is central to the Endorois religious and traditional practices. This is because the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving

²¹ Communication 276/2003. The decision was given during the 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11-25 November 2009 and was adopted by the African Union in February 2010.

Endorois from the whole region. It is further claimed that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake, while the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

The Complainants further alleged that parts of their ancestral land have been demarcated and sold by the Respondent State to third parties. In particular, the Complainants alleged that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. According to the Complainants, these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock.

The Complainants claimed that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. It was also their contention that the Endorois' health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria. The Complainants further stated that the Government's decision to include Endorois traditional land in the official Gazette as a Game Reserve, which in turn denied them access to the area, has jeopardized the community's pastoral enterprise and imperilled its cultural integrity.

In order to reclaim their ancestral land and safeguard their pastoral way of life, the Endorois had made several efforts and representations to the Kenyan government on the matter. These representations and actions eventually led to the institution of a civil action which was dismissed by the High Court on 19 April 2002. The Court held *inter alia* that it could not address the issue of the community's collective right to property, and that it was unnecessary for Kenyan law to address any special protection to a people's land based on historical occupation and cultural rights. This prompted the present complaint before the African Commission on Human and Peoples' Rights.

Under these circumstances, the Complainants contended that the actions of the Kenyan Government violated Articles 8, 14, 17, 21 and 22 of the African Charter on

Human and Peoples' Rights, and sought for restitution of their land and compensation for the loss suffered through loss of their property, and natural resources, and the freedom to practise their religion and culture.

On its part, the Kenyan government argued that the Applicants had not exhausted local remedies regarding the alleged violations and that the applicants should be asked to exhaust local remedies before approaching the African Commission. The Respondent also contended that the allegations that the Kenyan legal system has no adequate remedies to address the case of the Endorois are untrue and unsubstantiated. They contended that in matters of human rights the Kenyan High Court has been willing to apply international human rights instruments to protect the rights of the individual. Moreover, that the Kenyan legal system has a very comprehensive description of property rights, and provides for the protection of all forms of property in the Constitution. Finally, it contended that the complainants' land falls under the Trust Lands which are established under the Constitution of Kenya and administered under an Act of Parliament.

After refusing to reopen its earlier decision on the admissibility of the Communication as requested by the Kenyan Government,²² the Commission in its determination of the matter on the merits, came to the conclusion that the Kenyan Government was in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter and recommended that the Respondent State a) recognise rights of ownership to the Endorois and restitute Endorois ancestral land;

b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

c) Pay adequate compensation to the community for all the loss suffered.

The Commission elaborated a number of principles relating to the rights of indigenous peoples and how such rights ought to be respected and protected even in the process of development. In this connection, it stated that for 'any development or investment

²² It was the tardiness and un-cooperative attitude of the Respondent's officials that precluded them from presenting their argument against admissibility of the Communication in the first place. See paragraphs 57 and 60 of Report. It would perhaps have been tidier if the Commission had delivered a considered ruling on the preliminary issue of admissibility since the Kenyan High Court is not the highest court in the country. From the Commission's jurisprudence, however, the outcome would, arguably, not have been different as the local remedy could hardly be said to be 'available, effective and sufficient' to deal with the complaints of the Petitioners. See, *Dawda K. Jawara v. The Gambia*, Communications 147/95 and 149/96.

projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions'.²³ Accordingly, it declared that in this particular case, it was 'convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks of their cattle'.²⁴

On the violation of the cultural rights of the Endorois people, the Commission declared that by 'forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter'.²⁵

Similarly, the Commission declared that the Kenyan government violated the land rights of the Endorois people by her actions. According to the Commission:

'In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve'.²⁶

Finally, on the implications of the government's action on the land rights of the Endorois people and the attempt to justify same on the ground of public need, the Commission held as follows:

'The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land,

²³ Ibid., Para. 291. This is a clear reference to Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.

²⁴ Ibid., Para.290.

²⁵ Ibid., Para. 251.

²⁶ Ibid., Para.214.

rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to “the general interest of the community” or a “public need”.²⁷

This decision of the African Commission has been hailed as a powerful statement on the need for states to respect and protect the rights of indigenous peoples even as they strive to promote economic development of their countries.²⁸

For present purposes, this sustained and successful struggle by the Endorois people underscores four central issues relevant to the relationship between globalization and human rights. First, it shows that the assertion of a people’s rights through struggles and resistance to globalization do not necessarily have to take the form of modern struggles of civil society organizations such as trade unions or NGOs, but these can spring from traditional forms and structures. The sustained resistance of the people through the Endorois Welfare Council was what gave the struggle the visibility that prompted the two NGOs to support them in the challenge. This shows that constructed bipolarities such as the distinction between ‘civil society’ and ‘traditional’ society in the dominant discourse inhibits our understanding of the forms and ideologies of resistance of people to various forces that impinge on their lives and livelihoods and the emancipatory potential of such ‘traditional’ forms or ‘pockets of resistance’.²⁹

Second, the building of viable alliances between such ‘traditional’ protest movements or struggles with ‘modern’ non-governmental organizations can be a very healthy and fruitful engagement. The combined efforts of the Endorois Welfare Council with those of

²⁷ Ibid., Para.215.

²⁸ For instance, the Minority Rights Group International has described the decision as a ‘landmark’ which ‘creates a major legal precedent by recognizing, for the first time in Africa, indigenous peoples’ rights over traditionally owned land and their right to development’. Available at: www.minorityrights.org/9587/press-releases/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal.html. accessed 10 August 2011. The Forest Peoples Programme, United Kingdom, and Centre for Minority Rights Development, (CEMIRIDE), Kenya, have also made similar statements about the significance of the decision for the protection of indigenous peoples’ rights.

²⁹ I.G. Shivji, 2002, ‘Globalisation and Popular Resistance’, J. Semboja, et al, eds. *Local Perspectives on Globalisation: The African Case*, Dar es Salaam: Mkuki na Nyota Publishers, pp.101-118, at 110.

the Centre for Minority Rights Development in Kenya and the Minority Rights Group International in the United Kingdom proved to be very effective in the sustained campaigns and the litigation process at the African Commission on Human and Peoples' Rights. Third, the fact that the impact of globalization is not a one-sided phenomenon but diverse and affecting many aspects of people's lives, also enables people to defend and resist it in various organisational forms and through various ideological prisms.³⁰

Finally, the legal approach has proven to be an important mechanism for giving formal recognition to the rights of marginalized groups in societies such as indigenous peoples which had been the campaign by some human rights NGOs and social movements over the years.

A parallel can be drawn between the struggle of the Endorois people for the recognition and protection of their land and cultural rights and the struggle of the Maasai earlier on in their resistance to the action of the British in displacing them from their lands and giving same to settler populations during the colonization of the present day Kenya.³¹ Moreover, the travails and struggles of the Endorois people are in several respects akin to those of the Barabaig and the Maasai in Tanzania whose lands were also taken by agencies of the government supposedly for development projects without due consultation with the people. For instance, in the case of the Maasai, they were moved from their traditional homeland to the Ngorongoro plains by the Ngorongoro Conservation Area Authority in order to make way for the Serengeti National Park in the 1950s. According to Professor Issa Shivji, since then 'the Maasai have been resisting and fighting for their land rights and other human rights, their rights to participate in making conservation policies and generally for their rights to be part of the governance structures directly affecting them'.³² When these challenges are taken alongside similar problems of

³⁰ Ibid., p.114.

³¹ However, as James Gathii points out, this resistance against imperialism and colonialism was stifled through the subjective application of municipal and international legal rules to legitimize the action of the British Protectorate administration. J.T. Gathii, 2007, 'Imperialism, Colonialism, and International Law', 54(4) *Buffalo Law Review*, pp.1013-1066 at 1043-1054.

³² I.G. Shivji, 2002, note 29, p.113. The same problem is being faced by the Ogiek people in Kenya who have been fighting for the return to their homelands in the Mau forest since these were taken over by the government during the colonial era. P. Kameri-Mbote and J.A. Oduor, 2006, 'Following God's Constitution: The Gender Dimensions in the Ogiek Claim to Mau Forest Complex', A. Hellum, et al, *Paths are Made by Walking: Human Rights Interfacing Gendered Realities and Plural Legalities*, Harare: Weaver Press, pp.1-20; J. K. Sang, 2003, 'Kenya: The Ogiek in Mau Forest', J. Nelson and L. Hossack,

indigenous minority groups such as the Ogoni in Nigeria, and Bakassi in Cameroon, it becomes obvious that the actions of African governments have consistently been to marginalize such groups under the guise of development. This is because very often the exploitation of natural resources found in lands belonging to indigenous people yields profits for transnational corporations and local elites, mostly from the majority groups, but rarely 'trickles down' to the indigenous people. On the contrary, such 'projects' exacerbate their marginalization and poverty in addition to compromising their cultural integrity and security, thus prompting the following pertinent comment by Erica-Irene Daes, a member of the United Nations Working Group on Indigenous Populations. According to her:

To attract foreign investment and trade, many developing countries have opened to extractive industries, such as mining and logging, hitherto isolated parts of their territories which are often the last refuges of indigenous peoples and their cultural diversity. By such means, indigenous peoples are collectively sacrificed in order to increase the income of other citizens. Racism against indigenous peoples makes it relatively easy for national political and business leaders to contemplate such measures and to mobilize wider public support for them. If indigenous communities resist dispossession, racism makes it easier for politicians to justify the use of violence to crush the protesters'.³³

The Endorois decision by the African Commission on Human and Peoples' Rights should serve as an important catalyst to spur such marginalized groups to take their complaints to the Commission for determination and legitimize their resistance to predatory state actions propelled by processes of globalization. This leads to an examination of another form of resistance to the marginalization of the rights of workers by transnational corporations in the process of globalization.

eds., *Indigenous Peoples and Protected areas in Africa: From Principles to Practice*, Moreton-in-Marsh: Forest Peoples Programme, pp.111-138.

³³ Working Paper on Combating racism against indigenous peoples submitted by Mrs Erica-Irene A. Daes, Member of the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights. UN.Doc.A/CONF.189/PC.3/4, 20 July 2001, at para.4.

7.4 *Globalization, Marginalization of Workers' Rights and Resistance*

7.4.1 Theoretical Framework

It may be mentioned that one of the most pressing challenges in this period of globalization is the violation of workers' rights. Such violations are present not only in states and institutional agencies, but also in transnational corporations. Indeed, due to the diverse and transnational nature of their operations, transnational corporations have been the most culpable in the violation of workers' rights. This is because the logic of maximizing profits and minimizing losses exacerbated by neo-liberal economic globalization has compelled transnational corporations to implement policies and practices inimical to the rights of workers and their human rights.

According to Charles Sabel, et al,³⁴

The present wave of globalization has given rise to widespread abuses, including child labour, punishingly long work days, harsh discipline, hazardous work conditions, sexual predation, and suppression of the freedom to associate and organize. These forms of servitude recall outright slavery in some instances, and provoke moral outrage the world over whenever they come to light. There is broad agreement among the world's publics that labour markets must be reregulated to curb these abuses.

One of such abuses is the use and exploitation of cheap labour in developing countries in what has been described as the 'race to the bottom'.³⁵ The challenges posed by these developments have led to the emergence of two approaches in dealing with the issue of sweatshops. According to Raul Pangalangan, the first approach 'calls for the incorporation of social clauses into international trade agreements, making it possible to resist or halt the importation or preferential importation of products from "low-standard" countries', while the second 'bypasses state-based mechanisms altogether in favour of the

³⁴ Charles Sabel, Dara O'Rourke, and Archon Fung, *Ratcheting Labour Standards: Regulation for Continuous Improvement in the Global Workplace*, (2000), available at www.mit.edu/dorourke/www/PDF/RLS21.pdf, p.4.

³⁵ R.C. Pangalangan, 2001, 'Sweatshops and the International Labor Standards: Globalizing Markets, Localizing Norms', A. Brysk, ed., *Globalization and Human Rights*, California: University of California Press, pp.98-112 at 98; C.A. Rodriguez-Garavito, 2005, 'Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over Labor Rights in the Americas', B. de Sousa Santos and C.A. Rodriguez-Garavito, eds. *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge: Cambridge University Press, pp.64-91, at 64.

market, operating, for example, through social labelling, voluntary corporate codes of conduct, and NGO-led boycotts of “tainted” goods, thus enabling consumers to vote their consciences with their pocketbooks’.³⁶

While these normative versus non-normative approaches differ on the best ways of dealing with the problem, they agree on the inadequacy of existing national and international labour regulations and standards to sufficiently grapple with the challenges thrown up in this area by globalization.³⁷ Recourse has thus been had to the human rights framework to provide the necessary additional international standards for the protection of the rights of workers.³⁸ Accordingly, where domestic regulatory mechanisms are weak or have been deliberately compromised in order to attract or retain foreign investment, as is often the case in most developing countries, an objective set of internationally accepted human rights laws can be deployed to fill the gaps. However, this takes us to the continuing problematic of determining whether labour rights are human rights, and the extent to which human rights rules can be of assistance in the protection of workers’ rights, considering the enforcement challenges and the malleability of the human rights corpus itself.³⁹

Such theoretical arguments notwithstanding, labour activists and human rights NGOs have increasingly deployed human rights norms in advancing the rights of workers especially in responding to the dominant and marginalizing role of global capital.⁴⁰ Paradoxically, the domination of global capital has not only brought devastation to the overwhelming mass of humanity, and crucially, the working class, but it has in turn precipitated the emergence of a new mass movement across the world in resistance.⁴¹ This brings into focus the contradictory nature of globalization, because as it is marginalizing the rights of workers, it is also building resistance to its dictates. As Barry

³⁶ Ibid.

³⁷ D.M. Trubek, et al, 2000, ‘Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks’, 25(4) *Law and Social Inquiry*, pp.1187-1211, at 1192; D. O’Rourke, 2003, ‘Outsourcing Regulation: Analyzing Non-governmental Systems of Labor Standards and Monitoring’, 31(1) *The Policy Studies Journal*, pp.1-29 at 4-6.

³⁸ P. Alston, 2005, ‘Labour rights as human rights: The not so happy state of the art’, P. Alston, ed. *Labour Rights as Human Rights*, Oxford: Oxford University Press, pp.1-24, at 2-3.

³⁹ Ibid., p. 1.

⁴⁰ D. Hubbard, 2008, ‘Re-imagining Workers Human Rights: Transformative Organizing for a Socially Aware Global Economy’, 5 *Hastings Race and Poverty Law Journal*, pp.1-56.

⁴¹ This is evident in the anti-globalization protests such as those in Seattle, Washington, London etc. which has been given increasing visibility by the World Social Forum.

Gills points out, ‘the paradox of neo-liberal economic globalization is that it both weakens and simultaneously activates social forces of resistance’.⁴² The fact that globalization adversely affects the rights of people also makes it possible for people to think of alternative ways of reacting or responding to it. Indeed, it also carries with it some of the instruments that have been used against it. One of these instruments is the Internet which has facilitated networking by human rights activists the world over. Part of the strategies of resistance to economic globalization has been through forging international solidarity among human rights NGOs and other social movements.⁴³ In the specific context of Kenya, it is intended to show how a coalition of national and international NGOs and civil society organizations effectively deployed human rights norms in mobilizing resistance against marginalization of the rights of workers by a transnational corporation, Del Monte Kenya Limited.⁴⁴

7.4.2 Campaign against marginalization of workers’ rights at Del Monte Kenya Limited

7.4.2.1 – Background and Basis for the Campaign

Del Monte Kenya Limited is based in Thika, one of Kenya’s industrial towns with a population of over 200,000. The company has been in the region for over 35 years and employs about 5,500 workers in permanent, seasonal, and temporary positions.⁴⁵ It is a subsidiary of the transnational giant, Del Monte Corporation with branches in several countries and a strong presence in Italy.⁴⁶ It is essentially a fruits and vegetables company. The company owns a large pineapple plantation in Thika, Kenya covering an area of about 5,000 hectares (about seven square kilometres) patrolled by a large corps of

⁴² B.K. Gills, 2001, ‘Introduction: Globalization and the Politics of Resistance’, B.K. Gills, ed. *Globalization and the Politics of Resistance*, Hampshire: Palgrave, pp.3-11 at 3.

⁴³ B. de Sousa Santos, 2006, *The Rise of the Global Left: The World Social Forum and Beyond*, London: Zed Books, p.x.

⁴⁴ Apart from analysis of the relevant laws and other principles, the facts contained in this presentation are derived largely from a narration of the struggle as documented in W. Mutunga, et al, 2002, *Exposing the Soft Belly of the Multinational Beast: The Struggle for Workers Rights in Del Monte Kenya*, Nairobi: Kenya Human Rights Commission. The assistance of the Commission in making this document available to me in the course of this research is hereby acknowledged.

⁴⁵ Ibid, p.25.

⁴⁶ The Italian firm Cirio which had been a majority shareholder in Del Monte Corporation finally bought the Group in February 2001 hence its name is now Cirio Del Monte Corporation.

security guards. The farm labourers who work on the plantations take turns in a variety of jobs in order to guarantee a steady production the whole year round and women constitute sixty per cent of the work force.⁴⁷ About 300,000 tons of pineapples are harvested every year, and sent to the canning factory situated at the centre of the plantation. Here, the pineapples are washed, skinned, cored, canned and most of these are shipped to Europe, America, and Japan through the Mombasa Port.⁴⁸ On arrival, the cans are sent directly to the supermarket warehouses because the transformation process is already complete. Besides pineapple slices, the Thika factory also produce the juice obtained from squeezing the skin and the core of the pineapples and a significant percentage of these are also eventually sent to European and American markets.⁴⁹

In order to obtain increased yield and secure maximum profits, vast quantities of pesticides and fertilizers are used.⁵⁰ These include different kinds of weed killers, insecticides and fungicides. Although some of these chemicals contain substances injurious to health, Del Monte does not educate her workers on the dangerous nature of such pesticides nor are the workers provided suitable protective clothing.⁵¹ The company also engages in the payment of exploitative wages to its workers; no member of the three categories of workers receives wages sufficient to sustain the basic necessities of family life.⁵² For instance, the casual workers are paid 12 Kenyan shillings an hour (US15 cents), while the seasonal factory workers receive 34 Kenya shillings an hour (about US50 cents) and the seasonal plantation workers are paid 14 Kenya shillings for the same period.⁵³ It would seem that the payment of what has been described in another context as 'poverty wages' is a depressing feature of Kenya's liberalization policies in order to attract and retain foreign investment.⁵⁴

⁴⁷ W. Mutunga, et al, 2002, note 44, p. 13.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid, p.14.

⁵¹ Ibid.

⁵² Ibid, p.16.

⁵³ Indeed, in order to justify paying lower wages, the company assigns their workers tasks at a lower level than the appropriate levels for work carried out. Ibid, p.17.

⁵⁴ This is buttressed by the equally very low wages of workers at the Export Processing Zones in the country. See, W. Mutunga, 2004, *The Manufacture of Poverty: The Untold Story of EPZs in Kenya*, Nairobi: Kenya Human Rights Commission, pp.4-5.

Finally, on wages, there is enormous disparity in the wages and benefits structure between Kenyan workers and foreigners on equivalent positions in the company; a case of manifest discrimination against Kenyan workers.⁵⁵

There were also other serious violations of the workers' rights at the plantations and factory implicating their social and economic rights, such as the miserable working conditions, especially for the casual and seasonal workers, deplorable housing arrangements for the Kenyan staff, and lack of proper medical facilities for the seasonal and casual workers.⁵⁶ The company was also demoting workers from permanent to seasonal status and from seasonal to temporary status, in order to minimize personnel costs and maximize profits, a strategy that signifies its concern for profits over the welfare of workers.⁵⁷

It was against this background that a human rights NGO, Kenya Human Rights Commission mobilized a coalition of several civil society organizations to challenge this marginalization of workers' rights by the company. The coalition which came to be called the Solidarity Committee consisted of ten other NGOs working in various areas connected with human rights, environmental rights, and women's rights and they gave support to the leadership of Kenya Union of Commercial Food and Allied Workers at Del Monte Kenya Limited in the fight for their rights.⁵⁸ The Kenyan Human Rights Commission also secured the involvement of an activist Italian NGO, Centro Nuovo Modello di Sviluppo, in the struggle.⁵⁹ The CNMS is an influential Italian NGO for ethically-minded consumers, committed to the promotion of ethical consumption in the North which had worked on similar campaigns in Asia and other parts of the world.⁶⁰

⁵⁵ W. Mutunga, et al, 2002, note 44, p. 18.

⁵⁶ The non-provision of medical facilities for seasonal and casual workers was tragically illustrated in the death of one Peter Mutiso Komolo, a worker with the company on 4 August 1999. He was a 'seasonal' employee at the culture department of the company and was refused treatment at the company's clinic on the ground that he was not a permanent staff. He eventually died within the company's premises from an ailment which could have been easily treated at the clinic. Ibid, pp.5-6.

⁵⁷ For a criticism of such approaches by states in expressing preference for free markets over the welfare of their citizens, see, N. Chomsky, 1998, *Profit Over People: Neo-liberalism and Global Order*, New York: Seven Stories Press, pp.65-85.

⁵⁸ W. Mutunga, et al, 2002, note 44, p. 8.

⁵⁹ Centro Nuovo Modello di Sviluppo shall hereinafter be referred to simply as 'CNMS'. The involvement of CNMS in the struggle was facilitated through the role of an activist Italian Catholic priest in Nairobi, Kenya, Father Alex Zanotelli who had shown interest in the plight of the workers following the death of Peter Komolo.

⁶⁰ W. Mutunga, et al, 2002, note 44, p. 52.

After an assessment of the working conditions at the company and the measure(s) most likely to produce the desired changes, the coalition agreed on a boycott campaign of Del Monte's products in Italy and the European markets to force the company to improve the conditions of workers in its factory and plantations.⁶¹ This shows that it was the non-normative approach to dealing with the issue of violation of workers' rights outlined above that was adopted in this struggle.

7.4.2.2 Nature and Dimensions of the Campaign

The campaign was a two-pronged affair: one was directed towards Del Monte Corporation as the entity directly responsible for the working conditions at their Thika factory and plantations, and the other towards COOP Italia, an Italian supermarket chain which sold pineapples from the Thika plantation using their own COOP Italia trademark.⁶² It was crucial to target COOP Italia in the campaign because, in addition to being an important customer of Del Monte, it had obtained the Social Accountability 8000 certification which is a social quality certification granted to companies demonstrating respect for the fundamental rights of their workers and demanding the same respect from their suppliers.⁶³

The campaign was planned to start in Italy and then move to other parts of Europe.⁶⁴ Over 100,000 copies of campaign postcards were printed and distributed and the campaign commenced on 1 November 1999 with the help of the media and other groups that distributed the material to sensitive consumer groups all over Italy. A letter was also caused to be written by the consumers to the owner of the majority shares at Del Monte, Cingranotti, demanding immediate improvement in the areas of wages, freedom of trade

⁶¹ Ibid, p.19.

⁶² Ibid, p.22. It is reported that Del Monte Kenya Limited sells over US\$150million worth of its products per year in Italy through COOP Italia. Ibid., p.52.

⁶³ The Social Accountability 8000 shall hereinafter be referred to in its short form 'SA 8000'. This certification system has been created in order to define, control and monitor companies' compliance with some of the basic workers' rights. It is based on the principles of the International Labour Organization conventions such as freedom of association and collective bargaining, the payment of a wage which is adequate to the cost of living, the limit of working hours within 48 hours per week, a safe working environment, respect of the minimum age for employment, the absence of forced labour. Ibid., p.23; D. O'Rourke, 2003, note 37, pp. 14-15.

⁶⁴ W. Mutunga, et al, 2002, note 44, p. 52.

union activity, housing, training and the provision of protective devices for the plantation workers.⁶⁵

In the same vein, a postcard was sent to COOP Italia expressing the concern of consumers to the conditions under which its pineapples were being produced. The postcard states *inter alia*:

As a responsible consumer I was shocked to hear the terrible conditions of exploitation and pollution under which pineapples are produced in Kenya. Given that COOP [Italia] sells, under its own brand name, pineapples supplied by Del Monte I would ask you to exert pressure on this multinational to stop the abuses and to support the requests put forward by this campaign... I believe the above to be in line with the SA8000 certificate which COOP [Italia] has recently obtained.

I look forward to hearing from you.⁶⁶

The initial reaction of Del Monte was to deny these accusations levelled against it. COOP Italia in its own response requested an investigation of the allegations, and consequently engaged the services of an independent certification company Bureau Veritas Quality International (BVQI) to carry out the assignment. On its part, CNMS also engaged another certification firm, Societe Generale de Surveillance (SGS) for a parallel investigation.⁶⁷ Both exercises were carried out at the same time and this entailed visits to the factory and plantations of Del Monte in Kenya. By mid-December 1999 both reports were ready and they found abuses and violations by Del Monte Kenya Limited. The reports found, *inter alia*, that the company had not established a healthy and safe place of work and did not supply proper measures to prevent accidents and health damages, and that it makes or supports discriminatory actions in the employment of women subjecting them to a pregnancy test.⁶⁸

On the strength of this report, COOP Italia formally requested Del Monte to rectify those violations that did not adhere to SA 8000 standards. Consequently, on December 27, 1999 Del Monte Italia eventually admitted that the issues raised in the campaign were true and confirmed that they were committed to discussing remedial measures with the

⁶⁵ Ibid, p.24. Sergio Cragnotti is incidentally the owner of the popular Italian Serie A football club, Lazio, which brought the campaign into more prominence.

⁶⁶ W. Mutunga, et al, 2002, note 44, p. 24.

⁶⁷ Ibid, p.30.

⁶⁸ Ibid, p. 35.

parties involved in the campaign.⁶⁹ This admission did not, however, lead to immediate remedial actions at Del Monte Kenya and so the Solidarity Committee intensified its mobilization of the workers and public rallies and press conferences were held in Kenya in September 2000, which caused further panic within the leadership of the company.⁷⁰

It is important to mention that this campaign for the protection of workers' rights at Del Monte Kenya also entailed invocation of relevant articles of the International Covenant on Economic, Social and Cultural Rights,⁷¹ the International Covenant on Civil and Political Rights⁷² as well as the African Charter on Human and Peoples' Rights.⁷³ These included articles guaranteeing the enjoyment of just and favourable conditions of work, national and international freedom of association, the right of everyone to an adequate standard of living, the fundamental right of everyone to be free from hunger, and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁷⁴ The accountability requirements of the Social Accountability 8000 as well as the ILO Convention standards especially the 'core labour standards' were also invoked.⁷⁵

According to Willy Mutunga, et al:

‘The invocation of the human rights discourse, the international labour and other standards clearly placed the campaign against Del Monte Kenya Limited on a high moral ground. The invocation coupled with evidence of clear violations of not only the collective bargaining agreements but of these rights and standards placed the campaigners, the workers at Del Monte Kenya Limited and their supporters from the civil society, at an advantage’.⁷⁶

The human rights corpus thus provided the framework for advancement of the workers' rights against their marginalization by the transnational corporation. It broadened the perimeters of the struggle and put more force into it. This is against the backdrop of an emerging culture of human rights sensitivity on the part of transnational corporations,

⁶⁹ Ibid, p.38.

⁷⁰ Ibid, p.42.

⁷¹ The Covenant was adopted in 1966.

⁷² This Covenant was also adopted in 1966.

⁷³ The Charter was adopted in Nairobi in 1981.

⁷⁴ W. Mutunga, et al, 2002, note 44, p. 60.

⁷⁵ Ibid, p.61. The SA8000 accountability requirements are mostly similar to ILO convention standards.

⁷⁶ W. Mutunga, et al, 2002, note 44, p. 62.

even though such expressions of respect for human rights are largely rhetorical and self-serving.⁷⁷

7.4.3 Impacts of the Campaign and its implications for counter-hegemonic struggles

The campaign had significant impact on the company and its subsequent approach to issues of workers' rights in the company. First, the boycott campaign cost Del Monte significant loss of profits.⁷⁸ Second, the company was compelled to effect a change in the management and policies of its Kenyan subsidiary leading to the dismissal of the Managing Director and the appointment of a new one who immediately sought rapprochement with the Solidarity Committee. Several meetings were consequently held on the required improvements at the workplace and in relation to the rights of the workers. Accordingly on 21 December 2000 with the agreement of the parties, the boycott campaign was suspended to pave way for discussions on the required improvements at Del Monte Kenya Limited.⁷⁹ The meetings culminated in the signing of an improvement plan agreed to by all the campaign parties on 3 March 2001.

According to Willy Mutunga, et al, key concessions by Del Monte included the transformation of casual workers into seasonal ones; the building of new houses for the workers; training on the fundamental aspects of the workers' environment was to take place; the enjoyment of workers' rights was emphasised including the right to organise; increase of wages to meet the basic needs of workers was put on sound footing; and very important structures put in place to monitor the implementation of the agreement by the workers.⁸⁰

Considering the previous status of the workers' rights in the company, these concessions and agreements can be said to be hugely significant. It is a classic illustration of the tremendous benefits that can be derived through international solidarity in the resistance against global capital. In particular, it demonstrates that effective results can be

⁷⁷ In relation to Nigeria, the inadequacies of the recent strategies of transnational corporations in attempting to show concern for the protection of human rights have been explored in Chapter 6 sub-section 6.2.1.1 of this Thesis.

⁷⁸ W. Mutunga, et al, 2002, note 44, p. 46.

⁷⁹ Ibid, pp.47-48.

⁸⁰ Ibid, p.48.

achieved when consumers in the Global North and workers in the Global South become allies in the fight against the human rights violations by transnational corporations.⁸¹ On this score, constructed binaries such as the North-South divides become irrelevant when transnational activism is deployed to resist oppression by hegemonic forces such as transnational corporations.⁸²

7.5 Conclusion

An attempt has been made in this chapter to examine the mutual relationship between globalization and human rights from the Kenyan perspective. It has been shown that the special position of Kenya in East Africa places the responsibility on her to be a leading light in terms of respect for human rights in the region, but arising from its structural problems, it has been unable to live up to this billing. However, the 2007 post-election crisis necessitated a reappraisal of this situation resulting in the deployment of progressive constitutional ideas and norms from other jurisdictions to include, for the first time in the country's constitutional history, enforceable social and economic rights in the Constitution. The impact of human rights on processes of globalization as evidenced in the government's preference for Game Reserve against the rights of its people was effectively challenged by the Endorois community with the support of national and international human rights NGOs through the African Commission on Human and Peoples' Rights. A coalition of national and international human rights NGOs and civil society organizations also effectively deployed human rights norms to challenge the marginalization of the rights of workers by a multinational corporation, Del Monte Kenya Limited.

The success of the struggles in these two case studies demonstrate the crucial importance of alliances between national and international NGOs and social movements for effective counter-hegemonic challenge of globalization in order to place human rights and human welfare at the centre of development initiatives world-wide.

⁸¹ Ibid, p.2. For a historical dimension of the consumer-worker alliances in boycott campaigns and its class-structured dimensions, see, D. Frank, 2003, 'Where are the Workers in Consumer-Worker Alliances? Class Dynamics and the History of Consumer-Labor Campaigns', 31(3) *Politics and Society*, pp.363-379.

⁸² A. Bendana, 2006, *NGOs and Social Movements: A North/South Divide?* Geneva: United Nations Research Institute for Social Development, pp.14-17.

This case study has demonstrated the mutual impact between globalization and human rights as the assertion of the affected rights greatly constrained the full operation of the tenets of economic globalization and the further marginalization of human rights. Thus, human rights norms were not only used in an instrumental manner to actualize changes in the social and economic conditions, but also to advance particular human rights. The cumulative effect of this was to constrain some of the features of economic globalization and the recognition and enforcement of the affected rights.

Conclusion

‘Globalization’ and ‘human rights’ have become two of the most contested terms in contemporary academic and general discourse. Their salience, in their various ways, as organizing principles of social and economic relations in contemporary society has necessitated inquiry into the nature of the relationship between them. However, in discussing that relationship, current scholarship on the subject has concentrated almost exclusively on the impact of globalization on human rights, and a growing body of literature seems to be developing in this area.¹ It is based on this perspective that some writers have argued that the impact of globalization on human rights is positive while others contend that it is having a deleterious effect on human rights. A third category argues that whether the impact of globalization on human rights will be positive or negative depends on the context under consideration.²

This thesis has sought to demonstrate that these positions represent a uni-directional mode of analysis, and has rather argued for a focus on the mutual relationship between globalization and human rights. My contention is that we need to escape the prison of this uni-directional mode of thinking in this area and enter into a new realm that looks at the mutual impact as the defining moment of the relationship between globalization and human rights. This suggested mode of analysis has the merit of enabling us to assess, first, the nature of the mutual relationship, before determining whether the impact of globalization on human rights or that of human rights on globalization is positive or negative. Second, it will also enable us to interrogate the underlying values and interests that influence the relationship between them. All too often, analyses of the relationship between globalization and human rights have ignored the ideological, cultural, economic

¹ The following can be said to be indicative of this trend. R. McCorquodale and R. Fairbrother, 1999, ‘Globalization and Human Rights’, 21 *Human Rights Quarterly*, pp.735-766; A. Polis, ‘Human rights and globalization’, 3(3) *Journal of Human Rights*, pp.343-358; E.L. Ngugi, 2007, ‘The impact of Globalisation on the promotion and protection of human rights in Africa’, 1 *Malawi Law Journal*, pp.154-178; J. Oloka-Onyango and D. Udagama, ‘The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights’, *Preliminary Report Submitted to the Sub-Commission on the Promotion and Protection of Human Rights*, 15 June 2000, E/CN.4/Sub.2/2000/13; J. Oloka-Onyango and D. Udagama, ‘Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights’, *Progress Report Submitted to the Sub-Commission on the Promotion and Protection of Human Rights*, 2 August 2001, E/CN.4/Sub.2/2001/10.

² These positions have been critically examined in sub-section 1.5 of chapter 1.

and other values that underpin the relationship. Adopting this mutual impact approach invariably brings into focus the centrality of these values and interests. For instance, globalization is often cast as an economic, non-political, non-ideological phenomenon while human rights are seen as universal, non-political values. But a consideration of the mutual impact approach enables us to use these values and interests to interrogate the impact of the one on the other.

I have argued in this thesis that not only is globalization impacting on human rights (as is generally accepted), but that human rights norms are also impacting on the globalization process. In support of this argument, I have shown that human rights norms which were initially ignored by international economic institutions such as IMF, World Bank, and WTO, are now being adopted, and even promoted, by these institutions. However, this new approach by the institutions does not merit full celebration since these institutions have merely adopted the hegemonic version of human rights which focuses on formal constitutional provisions and not the counter-hegemonic form. My contention is that the international economic institutions studied have appropriated the language and practice of human rights to legitimize and justify their policies and programmes.

Considering that Africa is the central focus of this research, a further inquiry into the mutual impact between globalization and human rights and the possibility of adopting counter-hegemonic forms of human rights to challenge and make a more positive impact upon the globalization process have taken me to examine contemporary developments in a number of African states on this subject. This has revealed an emerging ensemble of practices embodying human rights norms and values challenging neo-liberal economic globalization. These practices have taken the form of legal actions, protests, campaigns and other forms of resistance either against government actions and programmes predicated on neo-liberal globalization, or against the activities of transnational capital represented by transnational corporations.

In South Africa, for instance, it was shown that the litigation on social and economic rights made justiciable in the South African Constitution has the potential to vitally challenge the neo-liberal economic order in force in the country acting within the dictates of economic globalization. This litigation has been promoted by human rights NGOs and other social movements in the country. In the case of Nigeria, the same process of

litigation using the social and economic rights provisions of the African Charter on Human and Peoples' Rights has sought to achieve similar results. However, I have also argued that for such litigation to be effective and bear positive results, they must be part of a broader project involving the active role of social mass movements embracing a large segment of the downtrodden masses in the society. On this score, I examined the impact of the struggles by Nigerian workers against the government's persistent increases in the prices of petroleum products in the country in order to conform with the prescriptions of international economic institutions through what Stephen Gill has aptly described as 'market civilization'.³ These mass actions or general strikes greatly constrained the actions of the Nigerian government steeped in the neo-liberal economic order to make concessions on the fuel price issue. Similarly, the wave of protests by Nigerian women in the Niger Delta against the operations of transnational corporations in their area demonstrates the vitality of actions from underprivileged and marginalized groups in society to challenge the neo-liberal economic order.

Although I have argued that the results of these actions are essentially reformist (in the one case, resulting in concessions and price reductions from government; and the other, an MOU committing the companies to carry out some welfare programmes), they nevertheless indicate the emergence of counter-hegemonic movements with capacity to challenge neo-liberal economic globalization. In the same vein, in Kenya, the almost 40 years struggle by the Endorois people against their displacement by the government in order to make way for the construction of a Game Reserve is indicative of the actions of people from below challenging the actions of the Kenyan government engineered by the forces of economic globalization from above. Additionally, the campaign of a coalition of national and international civil society organizations compelled a transnational corporation, Del Monte Kenya Limited to take positive actions on the human rights of its workers.

On the whole, these developments buttress my argument that not only has globalization been impacting on human rights, but that human rights norms are also having some impact on the globalization process. The point has also been made that the

³ S. Gill, 2003, *Power and Resistance in the New World Order*, Hampshire: Palgrave Macmillan, pp.117-118.

impact of human rights on the globalization process can be more pronounced and beneficial if the counter-hegemonic version of human rights is deployed for this purpose rather than the hegemonic version which has been appropriated by international economic institutions and governmental agencies. The counter-hegemonic version will spring from the struggles and realities of the ordinary masses predicated on their lived experiences and resistance to oppression and marginalization. This is one effective way of ensuring that human rights respond to the immense challenges posed by contemporary globalization and that international economic rules are predicated on social justice as the overarching goal.

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