The Journal of Sustainable Development Law and Policy

ISSN: 2467-8406 (Print) 2467-8392 (Online) Journal homepage: https://www.ajol.info/index.php/jsdlp

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To cite this article: Akinwumi Ogunranti (2022). Normative Role of the ECOWAS Court of Justice in Transnational Cooperate Accountability. The Journal of Sustainable Development, Law and Policy. Vol. 13:2, 52-82, DOI: 10.4314/jsdlp.v13i2.3

To link this article: DOI: 10.4314/jsdlp.v13i2.3

Published online: November 30, 2022.

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Citation:
Akinwumi Ogunranti (2022). Normative Role of the ECOWAS Court of Justice in Transnational Cooperate Accountability. Vol. 13:2.

Received: 30 August 2022
Final version received: 30 October 2022

ISSN: 2467-8406 (Print)
2467-8392 (Online)

ABSTRACT

There are growing cases and literature on the accountability of multinational corporations for their human rights abuses in developing countries and the overall implications of such violations for sustainable development. Courts in developed countries continue to declare corporate responsibility, using various approaches either under tort law or international human rights principles. These cases point to a growing corporate accountability norm that is changing the narrative that MNCs are not responsible for the actions of their subsidiaries in developing countries. This article examines how the Community Court of Justice of the Economic Community of West African States (ECCJ) can, through creative and purposeful interpretation of international guidance instruments, influence the obligatory implications of corporate responsibility in international human rights law. In doing this, it argues that the ECCJ must reconsider its stance on the status of State-owned Enterprises before the court.

Keywords: Corporate responsibility, sustainable development, MNCs, ECOWAS, Strategic litigation.

1. INTRODUCTION

Over the years, there have been growing cases and literature on the accountability of multinational corporations (MNCs) for their human rights abuses in developing countries and the overall implications of such violations for sustainable development.[1] Courts in developed countries, including Canada,[2] the United Kingdom,[3] the Netherlands,[4] and the United States,[5] have entertained cases seeking to hold MNCs accountable. These cases point to a growing corporate accountability norm that is changing the narrative that MNCs are not responsible for the actions of their subsidiaries in developing countries, either under tort law or customary international law. Considering recent legislative and judicial efforts in different countries, there are few discussions on how courts in Africa can play a complementary role in developing a corporate accountability norm.

This article examines how sub-regional human rights institutions in Africa, through creative interpretations, can promote a corporate accountability norm. Specifically, it examines the Community Court of Justice of the Economic Community of West African States (ECCJ) in terms of its unique position as a norm entrepreneur in the West African sub-region. It proposes that through creative and purposeful interpretation of international guidance instruments, the ECCJ can influence the obligatory implications of corporate responsibility in international law. In doing this, it argues that the ECCJ must

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1 See Damilola Olawuyi, 'Corporate Accountability for the Natural Environ ment and Climate Change', in Ilias Bantekas and MA Stein (eds), Cam bridge Companion to Business and Human Rights (Cambridge University Press 2021).

2 Nevsun v Araya [2020] 5 SCC, online: <www.canlii.org/en/ca/scc/ doc/2020/2020s cc5/ 2020scc5.html>.

3 Vedanta v Lungowe [2019] UKSC 20.

4 Vereniging Milieudefensie v Royal Dutch Shell PLC(RDS)Case No: ECLI:NL:RBDHA :2021:5339,online:<https://uitspraken.rechtspraak.nl/inziendocument? id=ECLI:NL:RB DHA:2021:5339&showbutton=true&keyword =shell>; Fidelis Ayoro Oguru v Shell Petroleum NV (2021) ECLI:NL:GH DHA: 2021:132, on line:<https://uits praken. rechtspraak.nl/inziendocument ?id=ECLI:NL:GHDHA:2021:132>.

5 Nestle Inc US v John Doe, et al,S.Ct 593 (2021) online:<https://ballotpedia .org/Nestl %C3%A9_USA_v._Doe_I#>. For an analysis of the decision, see Desiree LeClercq, "Nestle United States, Inc. v. Doe. 141 S. Ct. 1931" (2021) 115:4 American Journal of International Law 694.

reconsider its stance on the status of State-owned Enterprises before the court.

The pursuit of this theme in the rest of this article proceeds as follows: section 2 situates this article within the existing literature. In doing this, it identifies a unique litigation strategy that can be explored by litigants before the ECCJ. Section 3 examines ECCJ's special design features and normative structures that lend themselves to the proposal in this article. It identifies the ECCJ's characteristics, including its accessibility to private individuals and its expansive human rights mandate that distinguishes it from other sub-regional courts in Africa. Section 4 describes the case of SERAP v Nigeria & Ors as a tale of a missed opportunity for the ECCJ in 2010 to promote the obligatory implications of corporate accountability in Africa.[6] It argues that the ECCJ's reluctance to hold SOEs responsible as a matter of international human rights law, despite arguments before it, underutilizes its normative influence as a court. Section 5 explores how the ECCJ can actively contribute to promoting corporate accountability—through holding SOEs responsible for human rights abuses, and for this to serve as a catalyst for MNCs to be held accountable in their home states for such misconduct, an outcome that may be founded on mandatory human rights due diligence legislation, the doctrine of negligence, or international human rights principles. The ECCJ's willingness to take this initiative would be a green light for litigants, human rights advocates, NGOs, and litigators, to harness its potential to pursue cases in the court.

2. THE CAPACITY OF AFRICAN HUMAN RIGHTS SYSTEMS TO INFLUENCE CORPORATE ACCOUNTABILITY AND SUSTAINABLE DEVELOPMENT IN AFRICA: CONCEPTUAL CLARIFICATION

Scholars have examined the capacity of African human rights systems to influence corporate accountability in Africa. For example, Joe Oloka-Onyango and Olufemi Amao argue that the African

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[6] SERAP v Nigeria, Ruling, Suit No: ECW/CCJ/APP/08/09 and RUL. No: ECW /CCJ/APP/07/10 (ECOWAS, Dec. 10, 2010), online: World Court<www .world courts. com/ecowasccj/eng/decisions/2010.12.10_SERAP_v_Nigeria.htm>.

Commission on Human Rights could pronounce the responsibility of MNCs in international law.[8] It is noteworthy that the African Commission is not a court; it is a body established to receive complaints from individuals and states on issues, including human rights abuses.[9] Oloka-Onyango and Amao contend that the Commission could have exercised its power to pronounce on MNCs' liability in Social and Economic Rights Action Centre (SERAC) & Another v Nigeria, a similar case to the ECCJ's decision that will be the focus of this article.[10] Like Oloka-Onyango and Amao, this article examines the status of non-state actors in international law. First, it admits that it may be difficult to hold MNCs liable under international law because MNCs do not have a concrete presence under international law.[11] It then examines whether non-state actors like State-owned enterprises (SOEs) should have the same status as MNCs. This article argues that SOEs are entities that have obligations to protect human rights in international law. Therefore, they should be amenable to international law's jurisdiction. This argument is examined in detail in section 5 below.

In a collection of essays edited by James Thou Gathii, some African scholars, including Karen Alter, Laurence Helfer, Solomon Eboborah, Obiora Okafor, and Olabisi Akinkugbe examine how human rights claimants, activists, lawyers, and civil societies harness the normative powers of African regional courts in advancing causes relating to human rights, the environment, the rule of law, and opposition to

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[8] Joe Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globa lization: International Mechanisms, Non-State Actors, and the Struggle for People"s Rights in Africa" (2003) 18:4 American University International Law Review 851; Olufemi Amao, "The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for the Control of Multinational Corporations" (2008) 12:5 The International Journal of Human Rights 761.

[9] African (Banjul) Charter on Human and Peoples" Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (entered into force 21 October 1986). Article 30 of the Charter establishes the African Commission on Hu man and Peoples" Rights. Article 45 of the Charter spells out the Comm ission"s functions.

[10] The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR <www.achpr. org/communication/decisions /155.96/> [SERAC].

[11] There is a debate on whether MNCs are subject to international human rights law. See generally Oliver De Schutter, ed, Transnational Corporations and Hu man Rights (London: Harts Publishing, 2006).

authoritarian governments.[12] They argue that these courts are advantageous to litigants because they give credibility to their causes and help them to communicate and advance their agenda of social, political, or legal change by engaging governments in a forum that they do not control.[13] The social relevance of these courts to promote norms, especially the ECCJ, is the anchor upon which the analysis in this article hinges.

Obiora Okafor, using a constructivist theory, examines the influence of international human rights institutions on peacebuilding in Africa states.[14] He identified how human rights NGOs, which he described as an example of a local popular force, can harness the normative influence of international human rights institutions like the African System on Human and People's Rights. He argues that the importance of human rights institutions should not be based on how their decisions are complied with—a compliance-focused and positivistic approach.[15] Rather, they should be assessed based on their influence to contribute to the domestic social justice struggles that rage within states. Although Okafor focuses on the work of local popular forces within states, this article looks beyond states to focus on regional human rights institutions. Like Okafor, this article does not use a positivistic lens to examine the possible contributions of the ECCJ to corporate accountability.

Effoduh also interprets the decisions of the ECCJ through a constructivist lens.[16] He examines the normative role of the ECCJ in advancing the justiciability of environmental and socio-economic rights in Africa. In doing so, he chose three landmark cases of the ECCJ—SERAP v. Nigeria& Anor (2010); SERAP v. Nigeria & 8 Ors

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[12] See generally James Gathii, ed, The Performance of Africa"s International Courts (Oxford, UK: Oxford University Press, 2020).

[13] See e.g., Obiora Okafor & Okechukwu Effoduh, "Sovereign Hurdles, Brainy Relays, and "Flipped Strategic Social Constructivism" in James Gathii, ed, The Performance of Africa"s International Courts (Oxford, UK: Oxford University Press, 2020) 106.

[14] Obiora Okafor, "The African System on Human and Peoples" Rights, Quasi-Constructivism, and the Possibility of Peacebuilding within African States" (2004) 8:4 International Journal of Human Rights 1.

[15] For an analysis of the compliance problems associated with enforcing ECCJ"s judgment, see Eghosa Ekhator, "International Environmental Governance: A Case for Sub-regional Judiciaries in Africa" in Michael Addaney & Ademola Jegede (eds) Human Rights and the Environment under African Union Law (Palgrave Macmillan 2020) 209 at 220-223.

[16] Okechukwu Effudoh, The Ecowas Court, Activist Forces, and The Pursuit of Environmental and Socioeconomic Justice in Nigeria (LLM Paper: York University, 2017) [unpublished].

(2012); and SERAP & 10 Ors v. Nigeria & 4 Ors (2014)—to tease out the normative influence of the court. Effoduh's (constructive) methodology is similar to how this article examines ECCJ decisions. However, this article is different in that while Effoduh focuses on the normative contributions of the ECCJ, this article looks at the potential normative contribution of the court in future cases.

Essentially, this article contributes to the literature on the role of African sub-regional courts, albeit in the business and human rights (BHR) context. Drawing from Ayodeji Perrin's conclusion that African regional courts have the potential to 'dispense distinctly African Jurisprudence over African claims,'[17] this article examines the current role of the ECCJ in the quest for corporate accountability in Africa. It classifies the court's role as conservative because of its reluctance to affirm corporate responsibility in international law when it had the chance to do so in 2010. However, considering the normative history of the court, it argues that the ECCJ is not fulfilling its potential to promote corporate accountability. Consequently, this article examines how the court could contribute to this effort through interpretational approaches to disputes instituted in the court.

The ECCJ is chosen for this examination due to its strikingly capacious jurisdiction and access to justice rules. There is no other African sub-regional court that has a similar expansive jurisdiction and authority as the EECJ.[18] Except for the East African Court of Justice,[19] African sub-regional courts only allow state-state claims.[20] Even if individuals are allowed to file claims, their access is restricted. For example, Article 5 of the Protocol Establishing an African Court on Human and Peoples' Rights limits parties who can file a claim before the court to the

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[17] Ayodeji Perrin, "African Jurisprudence for Africa"s Problems: Human Rights Norm Diffusion and Norm Generation Through Africa"s Regional Interna tional Courts" (2015) 109 ASIL Proceedings 32.

[18] Karen Alter, Laurence Helfer & Jacqueline McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 American Journal of International Law 737 at 378.

[19] Treaty for the Establishment of the East African Community, 30 November 1999, 2144, UNTS 255 (entered into force 7 July 2000), art 30. The analysis of the jurisdiction of this court is outside the scope of this article. However, Gathii notes that the court"s human rights jurisdiction is growing. See James Guo Gathii, "Variation in the Use of Sub-regional Integration Courts Between Busi ness and Human Rights Actors: The Case of East African Court of Justice" (2016) 79 Law and Contemporary Problem 37.

[20] See Rahina Zarma, Regional Economic Community Courts and the Advance ment of Environmental Protection and Socio-economic Justice in Africa: Three Case Studies (Ph.D. Dissertation, Osgoode Hall Law School, 2021) [unpublished] at 188.

African Commission, state parties, and African intergovernmental organizations.[21] Individuals and relevant NGOs with observer status with the Commission can only be given access if the state concerned makes a declaration accepting the competence of the court to receive such cases. Similarly, Articles 33 and 49 of the Protocol Establishing the Southern African Development Community Tribunal (SADC) limits access to states.[22] Non-state actors' lack of access limits the potential of these courts to contribute to the jurisprudence in BHR claims.

3. BACKGROUND AND JURISDICTIONAL SCOPE OF THE ECCJ

Gender inequality is a social problem that affects women all over the world and serves as a barrier to human development. The United Nations is committed to achieving gender equality and empowering all women and girls and hence, the sustainable development goals which aim to do so by 2030.[23] Women's rights are part of the fundamental human rights that are recognized in international human rights and treaties. Nigeria, a member state of the United Nations has adopted a number of international instruments for the promotion and protection of women's rights. However, these rights are yet to take full force. The 1999 constitution clearly prohibits discrimination based on sex and recognises the equal rights of women when it comes to obligations and opportunities before the law.[24] The National Policy on Women of 2000 also launched specific guidelines for promoting gender equality in all

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[21] Protocol to the African Charter on Human and Peoples" Rights on the Esta blishment of an African Court on Human and Peoples" Rights, Art 3 (10 June 1998), OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004), online: ACHPR<www.achpr.org/legalinstruments/detail? id=45>.

[22] Protocol on the Tribunal in the Southern African Development Community, 18 August 2014, online: IJR Centre< https://ijrcenter.org/wp-content/ uploads/20 16 /11/New-SADC-Tribunal-Protocol-Signed.pdf>.

[23] O.C Okongwu, 'Are Laws the Appropriate Solution: The Need to Adopt Non -Policy Measures in Aid of the Implementation of Sex Discrimination Laws in Nigeria' [2021] 21(1) International Journal of Discrimination and the Law <https://doi. org/10. 11 77/1 3582 291 20978915> 26.46

[24] See the Constitution of the Federal Republic of Nigeria 1999 as amended to 2018; UN Women, <https://constitutions.unwomen.org/en/countries/africa/nigeria? Pro vision category = b 2 1 e 8a4 f9 df 246 429 c f4e8746437e5 ac>

sectors of the economy.[25] However, despite years of these legal provisions, women continue to be victims of discrimination in society. One of the reasons for this is the underrepresentation of women in parliaments and general decision-making processes. Women constitute about half of Nigeria's current population but occupy less than ten percent of political positions.[26] The report from the National Bureau of Statistics[27] shows that the literacy level of women stands at 59.3% compared to the 70.9% of men in positions of power and decision making. Similarly, in the National Assembly, women are underrepresented with 5.8%, 29.4% in federal courts and 15.4% as professors in universities.[28]

The Economic Community of West African States (ECOWAS) is a sub-regional community of 15 states.[29] ECOWAS was founded by West African states in 1975 under the ECOWAS Treaty signed in Abuja, Nigeria.[30] The treaty aims to secure the economic interest and integration of member states.[31] In 1991, ECOWAS member states adopted a Community Protocol which did not enter into force until November 1996.[32] The Protocol created a permanent and physical ECOWAS Court (the ECCJ) that maintains jurisdiction over cases relating to the interpretation and application of ECOWAS legal instruments.[33] The ECCJ entertains disputes between member states inter se or one or more member states and ECOWAS' institutions.[34] It also hears cases instituted by a member state on behalf of its nationals against another member state or an ECOWAS institution.[35] Although the court has a permanent status, member states did not grant access to

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[25] United Nations, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>

[26] Bolanle Oluwakemi Eniola, 'Gender Parity in Parliament: A Panacea for the Promotion and Protection of Women's Rights in Nigeria' [2018] <https://doi .org /10 .3389/ fsoc. 2018. 00034>

[27] Ibid, (O.C Okongwu) emphasis on percentage/rates

[28] See Ibid. p.28

[29] ECOWAS, online: <www.ecowas.int/about-ecowas/basic-information/>.

[30] Treaty of the Economic Community of West African States, May 28, 1975, 1010 UNTS 17, 14 ILM 1200.

[31] See Kofi Oteng Kufuor, The Institutional Transformation of the Economic Community of West African States (Abington, United Kingdom: Routledge Press, 2006) at 1.

[32] Protocol A/P1/7/91 on the Community Court of Justice, Arts. 3(1), 4(1), (6 July 1991) provided for a court comprising seven independent judges, each of whom serves for a five-year term that is renewable once.

[33] Protocol A/P1/7/91, ibid.

[34] Ibid, Art. 9(2), (3).

[35] Protocol A/P1/7/91, ibid.

private individuals to present claims before it, despite repeated proposals from interest and civil society groups.[36] Therefore, between 1991 and 2002, the ECCJ was established to resolve only economic disputes among member states.[37]

A culmination of events, starting from 2004, led to private individuals' access to the ECCJ and the expansion of the court's jurisdiction to human rights issues. The first of such events is the case of Afolabi v Nigeria where the ECCJ declined to entertain a private individual's request to present a claim arising from Nigeria's non-compliance with ECOWAS free movement rules.[38] Afolabi, a Nigerian trader, had entered a contract to purchase goods in Benin. Afolabi could not complete the transaction because Nigeria unilaterally closed the border between the two countries. He filed a suit with the ECOWAS Court, claiming that the border closure violated the right to free movement of persons and goods. Nigeria challenged the jurisdiction of the court and Afolabi's standing because, according to Article 9(3) of the 1991 Protocol, only states could present claims on behalf of their citizens. The court upheld Nigeria's preliminary objection.

The dismissal of Afolabi's case disclosed a flaw regarding the implementation of the ECOWAS economic agenda. It became apparent that 'governments had little incentive to challenge barriers to regional integration, and private traders had no judicial mechanism for doing so.'[39] On 19 January 2005, barely nine months after the dismissal of Afolabi's case, ECOWAS member states adopted a Supplementary Protocol that amended the 1991 Protocol—Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9, and 30 of Protocol(A/P.1/7/91).[40] The Supplementary Protocol gave distinctive and broad authority to the ECCJ, a feature that most sub-regional

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36 Alter, Helfer & McAllister, supra note 16 at 747.

37 Ibid at 748.

38 Afolabi v Nigeria, Case No. ECW/CCJ/APP/01/03, Judgment (Apr 27, 2004), reprinted in 2004–2009 Community Court of Justice, ECOWAS Law Report1 (2011).

39 Alter, Helfer & McAllister, supra note 16 at 750.

40 Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol(A/P.1/7/91) Relating to the Community Court of Jus tice and Article 4 Paragraph 1 of the English Version of the Said Protocol, (19 January 2005) [2005 Supplementary Protocol], online: <http://prod.courte cowas.org/wp-content/uploads /2018/11/Supplementary_Protocol_ASP.10105_ ENG.pdf>.

courts in Africa lack.[41] Article 9 (4) of the Supplementary Protocol extends the jurisdiction of the ECCJ to human rights cases. It provides that '[t]he Court has jurisdiction to determine case[s] of violation of human rights that occur in any Member State.'[42] Also, Article 10 (d) of the Supplementary Protocol grants standing to individuals and corporate bodies to seek relief for violations of their human rights before the ECCJ.

The ECCJ's expansive mandate on human rights and individuals' access to the court potentially set it up to shape the normative potential of the corporate accountability norm. The ECCJ has delivered judgments on human rights issues, including slavery, wrongful imprisonment, and torture.[43] It has also offered remedies, including declarations, damages, and injunctions.[44] The next section examines the ECCJ's position in a BHR claim in 2010. As earlier noted, it argues that the Court missed an opportunity to adopt a creative approach to corporate accountability and that, hopefully, it may fare better at the next chance.

4. THE ECCJ—A MISSED OPPORTUNITY

In 2010, the ECCJ had the opportunity to consider arguments on the "Protect, Respect and Remedy" framework[45] in the case of The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President of the Federal Republic of Nigeria and others.[46] The defendants, alongside Nigeria, are a Nigerian SOE, the Nigerian National Petroleum Corporation (NNPC), and six subsidiaries of MNCs—Shell Petroleum Development Company

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41 See Lucyline Nkatha Murungi & Jacqui Gallinetti, "The Role of Sub-Regional Courts in the African Human Rights System" (2010) 7:13 Sur Journal of International Law 119 at 132.

42 2005 Supplementary Protocol, supra note 32 at art. 9(4).

43 See ECCJ"s Judgments, online:<http://prod.courtecowas.org/decisions-3/>.

44 Ibid.

45 For reference to the framework, see Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Cor porations and other Business Enterprises, John Ruggie UN Doc A/HRC/8/5 (7 April 2008), online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G081286.pdf ?OpenElement>. For the relationship between the framework and the UNGPs, see chapter 1.

46 SERAP v Nigeria, supra note 5.

(SPDC), Elf Petroleum Nigeria Ltd, Agip Nigeria Plc, Chevron Oil Nigeria Plc, Total Nigeria Plc, and ExxonMobil Corporation.[47] The plaintiffs claimed damages arising from abuse of their rights and for adverse social and environmental impacts of the operations of the MNCs. They alleged that the defendants individually and/or jointly violated international law and, therefore, sought an order compelling them to pay damages to the victims.[48]

The third defendant, SPDC, filed a preliminary objection challenging the ECCJ's jurisdiction to entertain issues relating to the responsibility and liability of corporations in international law. In response, the plaintiffs, finding support in the UN 'Protect, Respect and Remedy' framework, argued that the defendant corporations failed to conduct human rights due diligence.[49] The plaintiff argued that if the MNCs carried out human rights due diligence as required under pillar II of the 'Protect, Respect and Remedy' framework, they would have discharged their responsibility to respect human rights.

The ECCJ ruled that corporate accountability has an unsettled status in international law, notwithstanding initiatives in that legal realm to promote corporate accountability. Particularly, the ECCJ referred to the nomination of the SRSG, John Ruggie, and the 'Protect, Respect and Remedy' framework as 'one of the greatest reference[s] on the accountability of multinationals for human rights violation in the world.'[50] However, the court held that it lacked jurisdiction to declare the liability and responsibility of the corporate defendants. It reasoned that 'the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before international courts.'[51] The court held that, in any event, only member states can be sued for their alleged violation of human rights.[52]

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47 Ibid.

48 Ibid. A striking feature of the plaintiffs" claim is their petition for joint allocation of responsibility among the defendants.

49 Plaintif"s Brief of Argument, ibid. They argue that "[m]ultinational corporations like the third defendant have obligations under international law not to be complicit in human rights violations. Multinational corporations must not perform any wrongful act that would cause human rights harms; must be aware of their role not to provide assistance or any support that would contribute to human rights violations; and must not knowingly and substantially assist in the violation of human rights."

50 SERAP v Nigeria, supra note 5 at para 68.

51 SERAP v Nigeria, supra note 5 at para 69. It is not clear which "process of codification" the ECCJ referred to. The court may have taken this position from one of the SRSG"s

The ECCJ's decision is quintessentially traditional regarding corporate accountability in international law.[53] It held that the Nigerian government is responsible for failure to regulate oil companies whose oil extraction activities polluted Niger Delta's clean water and environment. It, therefore, ordered the government to '(1) [t]ake all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger Delta; (2) [t]ake all measures that are necessary to prevent the occurrence of damage to the environment; and (3) take all measures to hold the perpetrators of the environmental damage accountable.'[54] These declarations are restatements of Nigeria's obligations under international human rights treaties to protect human rights. In sum, the ECCJ re-iterated that states are the duty bearers and enforcers of human rights obligations. This holding did not expand the frontiers of a corporate accountability norm.

It is pertinent to ask whether, if presented with the same facts in 2022 as in SERAP, the ECCJ would come to a different conclusion regarding corporate accountability in international law. Simultaneously, it is important to ask whether the ECCJ should assume jurisdiction over corporations owned and controlled by states—SOEs. In the following section, it is argued that considering the normative history of the ECCJ, the court's response may be different. Proceeding from this premise, this article proposes that in order to advance corporate responsibility and sustainable development, the ECCJ should take a different approach from its previous decision by considering the liability of SOEs in international law—if the ECCJ finds SOEs liable, it may indirectly establish the liability of other corporations with whom SOEs have relationships through supply chain contracts (SPCs), joint venture agreements (JVAs), Investment Agreements (IAs), and Production Sharing Contracts (PSCs). The argument is based, in part, on the guidance instrument on the attribution of SOEs' conduct to states in international law— the Draft

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report to the UN Human Rights Council. See United Nations General Assembly. Report of the Special Representative of the Secre tary-General (SRSG) on the issue of human rights and transnational corpo rations and other business enterprises, U.N. Doc. A/HRC/4/035, (February 9, 2007), online: business and Human Rights Resource Centre <https://media .business-humanrights.org/media/documents/files/media/bhr/files/SRSG -report-Human-Rights-Council-19-Feb-2007.pdf>.

52 SERAP v Nigeria, supra note 5 at para 71.

53 Ibid.

54 Ibid para 121.

Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[55]

4.1. Corporate Accountability: The Prospect of ECCJ's Contribution

A question that follows from the growing recognition of the corporate accountability norm is whether, if the ECCJ is presented with another opportunity like SERAP, it would still conclude that, as a matter of international law, corporate accountability has not reached a stage for its recognition as a rule of that legal regime. From the growing normativity of the corporate accountability norm, it will not be difficult for the ECCJ to make a pronouncement on MNCs' responsibility, even if it is just a reference to the role of MNCs as the Inter-American Court of Human Rights did in The Kaliña and Lokono People v. Suriname.[56] However, the court would still have to determine whether it has jurisdiction over MNCs and SOEs to make such pronouncements. This article contends that although the court may decline jurisdiction over MNCs, it should not do so for SOEs. The ECCJ should revisit its position on the jurisdiction of non-state actors, especially SOEs, in the business and human rights context.

The court's position has been that only member states who are signatories to the ECOWAS treaty can be sued before the court. For example, in Nancy Bohn-Doe v Liberia, the plaintiff sued Liberia together with the Central Bank and the Attorney General of Liberia.[57] The court struck out the latter two defendants because they are not 'principal subjects of international law.'[58] The court noted that since the Central Bank and Attorney General are not signatories to the African Charter on Human and Peoples' Rights nor the Universal Declaration of Human Rights, they cannot be defendants in the ECCJ,

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[55] UN International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission at the fifty third Session A/56/10 2001 (23 April-June and 2 July-10 August 2001), online: United Nations<https://legal.un.org/ilc/texts/instruments/english /comm entaries/9_6_2001.pdf> [ARSI WA].

[56] The Kaliña and Lokono People v Suriname, IACtHR Series C No. 309, Judgment on Merits, Reparations and Costs, 25, November 2015, online: <www.lexology.com /library /detail.aspx?g=7ec1f0fb-405e-4e1d-b7c9-94add0 86884a> (The court noted that "business ses must respect the human rights of mem bers of specific groups or populations, including indigenous and tribal peoples, and pay special attention when such rights are violated").

[57] Nancy Bohn-Doe v Liberia (judgment No. ECW/CCJ/JUD/12/19).

[58] Ibid.

not even as a nominal party. This decision flows from the Court's holdings in a line of cases, including Peter David v Ambassador Ralph Uwechue[59] and Tandja v Djibo and another,[60] that only states can be sued for alleged human rights violations.[61]

The ECCJ's blanket prohibition of non-state actors because they are not 'principal subjects' of international law narrows the mandate and normative influence of the court. Over the years, the court has maintained a reputation as a human rights promoter by delivering landmark judgments shaping human rights jurisprudence in West Africa and beyond.[62] The case of Hadijatou Mani Koroua v Niger is an example of a situation where the court engaged its human rights jurisdiction.[63] The court held that the state of Niger violated its international obligations to protect Hadijatou Mani from slavery. The case is significant on three levels. It was the first time that a case on slavery was brought and won at the international level.[64] Second, it was the first case to expose and condemn the practice of slavery in Niger, which is widespread and yet unacknowledged.[65] Third, the court reached this decision by relying on international law principles and applying decisions from other courts, including the European Court of Human Rights (ECtHR). The decision of the court was historic[66] and it shows that the ECCJ is not shy to exercise its human rights mandate. Beyond Hadijatou's case, the ECCJ became a promoter of an anti-slavery norm. The decision influenced legislation, domestic court

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59 Peter David v Ambassador Ralph Uwechue (ECw/CCJ/RUL/03/10).

60 Tandja v Djibo & Anor, Unreported Suit no ECW/CCJ/05/10.

61 This position has been critiqued as one that narrows the ECCJ"s economic and human rights mandate. See generally Enyinna Nwauche, "The ECOWAS Community Court of Justice and the Horizontal Application of Human Rights" (2013) 13African Human Rights Law Journal 30.

62 See Segnonna Adjolohoun, "The Ecowas Court as a Human Rights Promoter? Assessing Five Years" Impact of the Koraou Slavery Judgment" (2013) 31:3 Netherlands Quarterly of Human Rights 342.

63 Hadijatou Mani Kouraou v The Republic of Niger, Case No ECW/CCJ/JUD/06/08 (27 October 2008) para 45, online: <www.globalhealthrights.org/wp-content/uploads /2013/ 10/Koraou-Niger-2008-Eng.pdf>. This case was followed by the recent ECCJ decision in Fodi Mohammed v Niger, suit no ECW/CCJ/APP/27/19,online:< https:// ihrda. uwazi .io/en/entity/pcaiwdusd5?page=5>.

64 Helen Duffy, "Human Rights Cases in Sub-regional African Courts: Towards Justice for Victims or Just More Fragmentation?" in Van den Herik and Stahn, eds, The Diver sification and Fragmentation of International Criminal Law (Netherlands, Brill Publishing, 2012) 163.

65 Ibid.

66 Helen Duffy, "Hadijatou Mani Koroua v Niger: Slavery Unveiled by the ECOWAS Court" (200) 9:1 Human Rights Review 151.

decisions, and government policies in African counties, including Niger, Mali, and Mauritania.[67] This shows the normative character and strength of ECCJ decisions.

The reputation of the ECCJ necessitates examining whether the court should revisit its position on non-state actors in the BHR context. Events after Afolabi's case show that the ECCJ is responsive to the need to promote human rights in Africa. Arguments made before the ECCJ in Afolabi are similar to the ones made in this article for SOEs because they invite the court to reconsider the role of traditional non-state actors before the court. Therefore, an invitation to reconsider its stance on SOEs to promote human rights in Africa aligns with the jurisdictional history of the court. This examination could be a step toward promoting corporate accountability in Africa.

The next section examines how SOEs may be classified to determine their responsibility before sub-regional courts like the ECCJ. It examines the International Law Commission's work in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) to draw practical guidance from the requirements for attributing the actions of SOEs to states. It then draws larger conclusions based on the analysis from ARSIWA for possible guidance on future cases like SERAP before the ECCJ or any regional court in Africa.

5. ATTRIBUTING HUMAN RIGHTS ABUSE RESPONSIBILITY: INTERNATIONAL LAW GUIDANCE

It is important to define SOEs because this is the context in which the analysis in this section proceeds. It is difficult to define SOEs because there is no universally accepted definition for these entities. However, within the BHR context, this chapter, consistent with the UNGPs Working Group,[68] adopts a working definition of SOEs developed by

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[67] Ibid at 364-367.

[68] See the UNGPs Working Group Report, online: United Nations<www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE_report-HRC32.pdf>.

the Organization for Economic Co-operation and Development (OECD) to mean:

> [a]ny corporate entity recognized by national law as an enterprise, and in which the State exercises ownership, should be considered as a state-owned enterprise. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as state-owned enterprises if their purpose and activities, or parts of their activities, are of a largely economic nature.[69]

In international law, the attribution of human rights responsibility to SOEs is usually not clear-cut. This is because the establishment of SOEs, usually by legislation, does not automatically generate state responsibility.[70] In some human rights cases, it is not always clear whether to determine that the conduct of SOEs can be attributed directly to states. Resolving this dilemma demands identifying the criteria to determine the extent of SOEs' liability. Doing so would ensure that decisions on SOE liability are not capricious or arbitrary but are paired with applicable legal factors. This article discusses the relevance of an international instrument, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), in determining the status of non-state actors. To be clear, this section answers whether a non-state actor's (SOEs) conduct can be attributed to the state as an agent that receives instructions or is controlled by the state. If the question is answered positively, then it is argued that SOEs have obligations in international law, which should make them amenable to the ECCJ's jurisdiction.

5.1. Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)

The International Law Commission adopted ARSIWA at its fifty-third session in 2001.[71] The purpose of the Draft Articles is to provide guidance regarding the responsibility of states in international law. At its 85th Plenary meeting in 2001, the United Nations took note of the

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[69] OECD, Guidelines on Corporate Governance of State-Owned Enterprises (Paris: OECD, 2015) at 14.

[70] Judith Schönsteiner, "Attribution of State Responsibility for Actions or Omissions of State-owned Enterprises in Human Rights Matters" (2019) 40:4 University of Pennsyl vania Journal of International Law 895 at 903.

[71] ARSIWA, supra note 47.

Draft Articles and commended the International Law Commission's efforts.[72] Although ARSIWA has not been adopted to the status of Convention, it is nevertheless considered to represent an accurate codification of the customary international law on state responsibility.[73]Therefore, notwithstanding some debates on the status of ARSIWA,[74] its non-elevation to the status of a Covenant does not detract from its influence in international law.[75]

Article 1 of ARSIWA states that "every international wrongful act entails the international responsibility of that State." This provision is broad because it means that state responsibility could arise for any acts or omissions that may be contrary to their obligations under international law, including human rights violations. However, the attribution of the conduct of individuals and corporations to the state, giving rise to state responsibility is the focus of this article. Since ARSIWA contains a "logic similar to that of vicarious liability in domestic law,"[76] it is important to examine the logic behind states' liability through the actions or omissions of SOEs.

Articles 5 and 8 of ARSIWA provide some of the criteria to be met in order to attribute non-state actors' conduct to states.[77] Article 5 provides that the conduct of any person or entity that does not qualify as a state organ (under Article 4) can be attributed to a state if the entity or person is empowered by the laws of the state to exercise elements of governmental authority. However, for this Article to be triggered, the entity or person must be acting in a governmental

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[72] United Nations, Resolution adopted by the General Assembly on the Report of the Sixth Committee (A/56/589 and Corr.1), A/RES/56/83 (28 January 2002), online: <www.refworld.org/pdfid/3da44ad10.pdf>.

[73] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (International Court of Justice, Judgment, ICJ Reports 2007) at 168, online:<www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.

[74] See Sara L Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Karin Buhman, Mette Morsing, & Lynn Roseberry, eds, Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives (Palgrave Macmillan, 2011) 25.

[75] Indeed, Caron argues that ARSIWA could be more influential as an ILC text than a mul tilateral treaty. See David D Caron, "The ILC Articles on State Res ponsibility: The Para doxical Relationship between Form and Authority" (2002) 96 American Journal of International Law 857 at 857.

[76] Eric Posner & Alan Sykes, "An Economic Analysis of State and Individual Respon sibility under International Law" (2007) 9 American Law & Economics Review 72 at 72.

[77] Ibid.

capacity.[78] The commentary to Article 5 clarifies that "parastatal entities" that exercise elements of governmental authority will qualify as an SOE, as well as former state corporations that have been privatized but retain certain public or regulatory functions.[79] In effect, Article 5 is not based on the status of the government agency but the exercise of a government authority.[80] The commentary also defines the term 'entity' to include public corporations, semi-public entities, public agencies of various kinds, and private companies, provided the private company is empowered by the law of the state to exercise functions of a public character normally exercised by state organs.[81] The condition that private companies should exercise public functions similar to a state organ is unclear because Article 5 does not define the scope of the government authority required for the attribution of an SOE conduct to the state. However, the commentary clarifies that matters that could be considered to determine the scope include: (1) the way powers are conferred on an entity; (2) the purposes for which the powers are to be exercised; and (3) the extent to which the entity is accountable to the government for their exercise.[82]

Article 8 offers a more remote attribution of private actors conduct to the state. It provides that an individual's actions may still be attributed to the state where the person, though not formally employed by the state, is acting for, or under the instruction of the state.[83] The most important test for analysis under Article 8 is whether the government has an 'effective control' over SOEs.[84] Therefore, Article 8 is triggered where there is a form of state control, notwithstanding that the person or group of persons that are acting was not commissioned for state

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78 Ibid. It states that "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

79 Ibid at 43.

80 See Robert McCorquodale & Penelope Simons, "Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law" (2007) 70:4 The Modern Law Review 598 at 607.

81 ARSIWA, supra note 63 at 43.

82 Ibid.

83 Ibid at 47.

84 This is commonly referred to as the Nicaragua test of effective control. See Military and Paramilitary Activities (Nicar. v. U.S.), Merits, 1986 I. Court of Justice 14 at 115, cited with approval in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 2006 International Court of Justice 91 at 399.

purposes.[85] An example is where states' instructions to paramilitary groups or supernumerary police result in human rights abuse.[86] Such conduct may be attributed to the state under Article 8. It is not clear whether corporations can fall under Article 8 since it only refers to 'persons.' However, it is arguable that the definition of 'persons' in international law may include corporations who enjoy legal personality.[87] Indeed, the African Human Rights Commission defines the category of persons included in ARSIWA to mean

> individuals, organisations, institutions and other bodies acting outside the State and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[88]

A combined interpretation of Articles 5 and 8 shows that for states to be responsible for an SOE's conduct, the plaintiff must show that the state has exercised authority or showed effective structural control over the SOE.[89] Elements of structural control are non-exhaustive. They include factors such as states' voting rights in the SOE, the right to nominate or withdraw leading executives, and reporting and accountability obligations of state officials.[90] As Schönsteiner argues, it is also important to consider whether the SOE is carrying out states' obligation to fulfil human rights. [91] For example, SOEs' provision of clean water, health, and environmental protection are indicators of

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85 See Seck, supra note 66 at 44.

86 See Caroline Kaeb, "Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks" (2008) 6:2 Northwestern Journal of International Human Rights 327. See also Amnesty International, A Criminal Enterprise? Shell"s Involvement in Human Rights Violations in Nigeria in the 1990s (Amnesty International Brief, 2017), online: Amnesty International<www.amnesty.org/ download/Documents/AFR447393 2017ENGLISH.PDF>.

87 See generally Roland Portmann, Legal Personality in International Law (Cam bridge, UK: Cambridge University Press, 2010).

88 See Zimbabwe Human Rights NGO Forum v Zimbabwe, Communication 245/ 02, Annexure 3 to the African Commission on Human and Peoples" Rights, 21st Activity Report (July– December 2006) at Par 136, online: ACHPR <www.achpr.org/ public/Document/file/English/achpr39_245_02_eng.pdf>.

89 See Schönsteiner, supra note 62 at 910; Jonas Dereje, Staatsnahe Unternehmen. Die Zure chnungsproblematik im Internationalen Investitionsrecht und weiteren Bereichen des Völkerrechts (Baden-Baden: Nomos, 2015) at 405.

90 Dereje, ibid at 410-412.

91 Schönsteiner, supra note 62 at 936.

government control. This argument may be extended to say that SOEs that perform human rights risk management oversight functions in an industry whose activities can harm the public may be an SOE because they fulfil the state's obligation to protect human rights.[92] In sum, state control of the SOEs is the most important factor by which to determine whether an SOE's conduct is attributable to the state.

International human rights jurisprudence arising from the European Court of Human Rights (ECtHR) further clarifies the provisions of ARSIWA. For example, in the Islamic Republic of Iran Shipping vs Turkey, the court considered the meaning of 'non-governmental organization' as stated in Article 34 of the European Convention on Human Rights.[93] It held that when considering whether an SOE's conduct can be attributed to a state, the court will assess: (1) SOE's legal status and the rights that the status gives to the SOEs; (2) nature of the SOE's activity and the context in which it is carried out; and (3) degree of the SOE's independence from political authorities.[94] The court also stated that SOEs carrying out commercial activities and who are subjected to the ordinary laws of the state will not meet the requirement of state attribution. Similarly, SOEs that do not exercise government powers do not meet the requirements of state attribution.[95] Also, a corporation that does not enjoy a monopoly in producing public services will not meet the requirement of state attribution.[96] In another decision, the ECtHR held that the non-applicability of insolvency laws to SOEs suggests attribution of state responsibility.[97] Also, the court noted in Mykhaylenky v Ukraine that where the SOE operates in a strictly regulated sector, such as nuclear energy, the

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[92] See generally Mikko Rajavuori "How Should States Own? Heinisch v. Ger many and the Emergence of Human Rights-Sensitive State Ownership Function" (2015) 26:3 The European Journal of International Law 727.

[93] Article 34 provides that "[t]he Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto…"

[94] Islamic Republic of Iran Shipping vs Turkey [2008] ECtHR Application no 40998/98, at para 79, online:<https://cdn.istanbul.edu.tr/FileHandler2.ashx?f= case-of-islamic-republic-of-iran-shipping-lines-v.-turkey.pdf>.

[95] Ibid at para 80. See also Österreichischer Rundfunk v Austria [2006] Application no 35841/02, online:<https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX: 62006CJ0195&from=en>.

[96] Ibid.

[97] Luganskvugillya v Ukraine [2009] Appl no 23938/05.

ECtHR may attribute the SOE's actions to the state.[98] These cases show that the purpose of a company, together with its relationship with the state, plays an important role in the State-SOE attribution process.

The next sub-section examines what it would look like if the ECCJ conducts an ARSIWA analysis before concluding that it does not have jurisdiction over non-state actors, like the NNPC.[99] The court did not make this analysis in SERAP before declining jurisdiction over NNPC. Therefore, this article asks whether the court can find NNPC's conduct attributable to Nigeria in the SERAP case. To this end, the characteristics of NNPC are examined against the criteria set out in ARSIWA, and it is argued that Nigeria has effective control of the NNPC.

5.2. NNPC—A State-owned Enterprise?

At the time ECCJ decided the SERAP case, NNPC was established by an Act of the National Assembly—Nigerian National Petroleum Corporation Act (NNPC Act).[100] The Corporation has the attributes of a company, which include the power to own moveable and immovable properties, the ability to enter contracts or partnerships with any company, firm, or person, and to purchase and acquire property.[101] The NNPC is headed by a Board of Directors which consists of a Chairman and other appointed members. The Chairman is a Minister in the Nigerian government, known as the Minister of Petroleum Resources.[102] Similarly, the director of the Corporation is appointed by the Nigerian Council of Ministers.[103] NNPC's establishment through an Act of the National Assembly means that the mode of appointment of the leading executives could not be changed without a resolution passed by the National Assembly and assented to by the President of Nigeria. Also, the Nigerian government controlled the budget and finances of the NNPC.[104] In effect, NNPC does not

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98 Mykhaylenky v Ukraine [2004] Appl. Nos 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02, and 42814/02.

99 Ibid at 258.

100 Nigerian National Petroleum Corporation Act, Chapter 320, Laws of the Federal Republic of Nigeria1999 [NNPC Act].

101 Ibid, s 6(1) (c)

102 Ibid, s 1(3).

103 Ibid, s 3(1). The Nigerian Council of Ministers comprises the President together with his Cabinet members.

104 NNPC Act, s 7(5).

have operational and financial autonomy as its budgets, loans, and expenditures must be approved by the government.[105]

The Long Title of the NNPC Act also indicates its special status and the government's control over it. The Long Title states that the '...Corporation [is] empowered to engage in all commercial activities relating to the petroleum industry and to enforce all regulatory measures relating to the general control of the petroleum sector through its petroleum inspectorate department.'[106] Section 5 of the Act enumerates the Corporation's duties to include: '(1) exploring and prospecting for, working, winning or otherwise acquiring, possessing and disposing of petroleum; and (2) doing anything required for giving effect to agreements entered into by the Federal Government [of Nigeria] to secure participation by the Government or the Corporation in activities connected with petroleum.'[107] Section 5(i) of the Act gives NNPC the omnibus power to perform any activity that is necessary or expedient to give full effect to the provisions of the Act. These characteristics demonstrate Nigeria's ownership and control of the NNPC. Therefore, it is not difficult to conclude that NNPC was an SOE in 2010 when the ECCJ decided on SERAP.

However, in September 2021, the NNPC Act was repealed by the Petroleum Industry Act (PIA).[108] Part V of the legislation privatized the NNPC by converting the Corporation to a limited liability company. Section 53 (1) of the PIA provides that within 6 months of the Act coming into force, NNPC is to be commercialized and registered as Nigerian National Petroleum Company Limited (NNPC Limited)—a limited liability company under the Company and Allied Matters Act, 2020.[109] However, the government will still maintain shares in the company, which will be held in trust by the ministries of finance and petroleum on behalf of the government.[110] Also, the government will continue to control the appointment of key members

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105 Ibid, s 8.

106 Ibid, Long Title.

107 Ibid, s 5.

108 Petroleum Industry Act, 2021 [PIA Act], online:<www.petroleumindustry bill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Indus try-Act-2021.pdf>.

109 Company and Allied Matters Act, 2020, online:<https://r6a8n4n6.stackpath cdn.com/wp-content/uploads/2020/08/Companies-and-Allied-Matters-Act-20 20-1-1.pdf>. As of the time of writing this article, the company is yet to be incorporated.

110 PIA Act, supra note 120 at s 53. At the time of writing this article, the number of shares that Nigeria will take up in the company is unknown because (to the author's knowledge) the company is yet to be incorporated.

of the board of directors. Members of the Board, including the Chairman, Chief Financial Officer, Chief Executive Officer, are appointed and removed by the president of Nigeria.[111] Some of the objectives of the company include acting as a national oil company and managing the production sharing contracts in the petroleum industry.[112] Going by the new legislation, the PIA Act shows that NNPC Limited is an SOE in charge of the government's policies regarding the production, marketing, and distribution of petroleum products. Therefore, NNPC Limited's functions will still meet the requirements under Articles 5 and 8 of ARSIWA, as the company's purposes are to further the state's objectives and policies in the petroleum industry. Also, the PIA Act shows that the federal government of Nigeria effectively controls the appointment and withdrawal of the company's leading executives. As Article 5 of ARSIWA points out, the privatization of NNPC does not detract from its SOE status.

Altogether, the characteristics of the NNPC Limited justify attributing its conduct to Nigeria. These features can be summarized as follows: (1) state control of the company through its Board of Directors appointed by the president; (2) Nigeria nominates and (can) withdraw leading executives of the company; (3) the company is established by a statute, and (4) the company is saddled with the responsibility to maintain regulatory standards in the petroleum industry. The characteristics of NNPC and the (prospective) NNPC limited show that Nigeria still maintains ownership and exercises a degree of control in both entities. Notwithstanding the privatization of NNPC, the control and management of the new company largely remain the same under the NNPC Act. The point is that, viewed from the previous legislation or the new one, companies like the NNPC that perform public functions, whether privatized or not, can attain the status of an SOE.

The concomitant question is that if NNPC is viewed as an SOE, what is the status of an SOE in international human rights law? The next sub-section takes up this task and examines the possibility of suing companies like NNPC before the ECCJ.

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111 Ibid, s 59.
112 Ibid, s 64.

5.3. What is the Status of SOEs in International Human Rights Law?

There is debate on the status of SOEs in international law. Scholars use different approaches to justify the amenability of SOEs to international human rights law.[113] An approach that is relevant to the analysis of ARSIWA discussed above is one that looks at the purpose of the SOE—a purpose-centric approach.[114] Mihaela Barnes argues that SOEs are "sui generis" participants in international law because states confer this status on them, which makes them "limited" subjects of international law.[115] Barnes asserts that although SOEs have a corporate status, they are owned and controlled by the states. First, she acknowledges that SOEs operate both in the public and private domains.[116] However, although SOEs are created by domestic law and carry out commercial activities, they belong to the public domain because they are purposed to fulfil the public interest. Also, she argues that usually, the purpose of an SOE is to keep the proprietary interest in the company with the public or regulate an industry by creating a monopoly with the SOE—elements that point to the public purpose of the company.[117] In effect, Barnes suggests a false dichotomy between the public and private functions of an SOE. Therefore, when SOEs are seen in the light of their public function, SOEs have a duty to respect human rights in international law."[118]

If SOEs have a duty to respect human rights as sui generis participants in international law, why should they not be amenable to the ECCJ jurisdiction, even as a nominal party? The argument is that due to the

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[113] See Raymond Vernon, "The International Aspects of State-Owned Enterprises" (1979) 10:3 Journal of International Business Studies 7; Giulio Alvaro Cortesi, "ICSID Jurisdiction with Regard to State Owned Enterprises—Moving Toward an Approach Based on General International Law" (2017) 16The Law and Practice of International Courts and Tribunals 108; Ming Du, "The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?" (2022) 20:4 Chinese Journal of International Law 785.

[114] Mihaela Barnes, State-owned Entities and Human Rights: The Role of International Law (Cambridge, UK: Cambridge University Press, 2021).

[115] Ibid at 54.

[116] Ibid at 69. Bilchitz describes the public and private domains as follows: "[a SOE is] an entity created through law with the goal of achieving social benefits (its "public dimension"); yet the entity itself is successful only insofar as it retains an ability to express individual self-interest and autonomy in conducting business in the best way possible to ensure satisfactory profits (its "private dimension")." See David Bilchitz, "Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law (2016) 23:1 Indiana Journal of Global Legal Studies 143 at 166.

[117] Barnes, supra note 106 at 88.

[118] Ibid at 50.

relationship between states and SOEs, SOEs are duty bearers in international law. This status should make them subject to international law and, consequently, the ECCJ jurisdiction. Recognizing the relationship between SOEs and states, the United Nations Global Compact warns that "State-owned enterprises should be aware that because they are part of the State, they may have direct responsibilities under international human rights law."[119] In effect, the criteria to determine whether SOEs are subject to the jurisdiction of sub-regional courts like the ECCJ is whether they have a duty in international human rights law and not whether they are signatories to international instruments.

Indeed, some soft laws recognize SOEs' duty to respect human rights under international law.[120] For example, Principle 14 of the United Nations Guiding Principles on Business and Human Rights (UNGPS) provides that the responsibility to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership, and structure. Larry Backer interprets the SOEs' responsibility to respect human rights under the UNGPs to include duty to protect human rights.[121] Similarly, Sara Seck contends that "...international law imposes on SOEs an enhanced, rather than diminished, responsibility to respect human rights."[122] Therefore, flowing from these interpretations, SOEs, like NNPC, should have a duty under international law to respect and protect human rights. Failure to discharge these functions would mean they can be sued in international or regional courts. Indeed, Xili Ma notes that focusing on the SOE-state attribution could be a "golden opportunity" to renew

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[119] UN Global Compact, Principle Two: Human Rights, online:<www.unglobal compact .org/what-is-gc/mission/principles/principle-2>.

[120] See generally Schönsteiner supra note 62.

[121] Larry Catá Backer, "The Human Rights Obligations of State-Owned Enterprises (SOEs): Emerging Conceptual Structures and Principles in National and International Law and Policy" (2017) 50:4 Vanderbilt Journal of Trans national law 827 at 844-845. ("SOEs occupy a dual place within the UNGP. They are to some extent an instrumentality of the state and thus potentially subject to the state duty to protect. At the same time they function as commercial ventures and are thus subject to the less legalized provisions of the corporate responsibility to respect").

[122] Sara Seck, "Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty" (2017) 26:2 Transnational & Contemporary Problems 383 at 404. See also Schönsteiner, supra note 1308 at 895.

the opportunity to rethink corporate accountability in international law.[123]

Viewed then, in light of the SERAP case, it is only reasonable that when SOEs whose actions are being impugned are before the court, the court should have the power to make specific declarations regarding their responsibility and liability. Had the ECCJ assumed jurisdiction to determine that it was liable, this finding would indirectly hold Nigeria responsible for the failure to protect the human rights violated. This is because '[w]here a business enterprise is controlled by the state, an abuse of human rights by the business enterprise may entail a violation of the state's own international law obligations.'[124] As well, declaring NNPC liable for environmental and human rights abuses may have direct and indirect implications for the home state liability of other corporations with which NNPC maintains business relationships through Supply chain Contracts (SPCs), Joint Venture Agreements (JVAs), and Production Sharing Contracts (PSCs).

The next sub-section further examines the legal implication of holding SOEs accountable in the ECCJ to foster the corporate accountability norm. It argues that when SOE's liability is established before the ECCJ, this may be a golden opportunity to hold MNCs liable in their home states.

5.4. Legal Implications of the ECCJ's Jurisdiction over SOEs

To operate in a foreign jurisdiction, MNCs usually maintain relationships with SOEs through SPCs, JVAs, IAs, and PSCs. For example, in Nigeria, Shell Nigeria operates mainly through the Shell Petroleum Development Company (SPDC), the largest oil-producing venture in Nigeria. SPDC is 100% Shell-owned, but operates a joint venture consisting of the Nigerian National Petroleum Corporation (55%), Shell (30%), Elf (10%), and Agip (5%).[125]Also, Shell Nigeria

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[123] Xili Ma, "Advancing Direct Corporate Accountability in International Human Rights Law: The Role of State-Owned Enterprises" (2019) 14:2 Frontiers of Law in China 233.

[124] Ramute Remezaite "The Application of The UN "Protect, Respect and Remedy" Framework to State-Owned Enterprises: The Case of the State Oil Company SOCAR in Azerbaijan" in Bard Andreasen & Vo Khanh Vinh, eds, Duties Across Borders: Advancing Human Rights in Transnational Business (Cambridge, UK: Cambridge Press, 2016) 302 at 316.

[125] NNPC, Joint Operating Agreement, online: NNPC<www.nnpcgroup.com /NNPC-Business/Upstream-Ventures/Pages/Joint-OperatingAgreement.aspx>.

Exploration and Production Company (SNEPCo) operates in deep-water acreage off-shore and in frontier areas onshore under production-sharing contracts agreed with the Nigerian Government.[126] Similarly, the Nigeria Liquefied Natural Gas (NLNG) project operates as another joint venture, consisting of NNPC (49%), Shell (25.6%), Elf (15%), and Eni (10.4%).[127]

Therefore, if the ECCJ holds NNPC liable together with Nigeria for failure to perform regulatory functions in its relationship with MNCs, it indirectly indicts MNCs involved in its oil exploration activities.[128] For example, Amnesty International, in its 2013 Report, accused Shell of not operating according to international standards in the Ogoni region of Nigeria.[129] Indeed, the plaintiffs in SERAP claimed jointly and severally against Nigeria and MNCs, because Shell and other corporate defendants aided and abetted the environmental pollution in the Niger Delta of Nigeria. Given this, the EECJ's declaration of NNPC's liability may indict the other corporate defendants involved in the joint venture relationship with NNPC. This indictment may necessitate the home countries of the MNCs to look into the involvement of those companies in the alleged human and environmental abuse in the host states.[130] The decision of the Nigerian High Court in Obong Effiong Archiang & Ors, alludes to the relationship between NNPC and MNCs. The trial judge concluded that

> It is a fundamental right of all persons and communities to clean and healthy environment. Legislations and agencies out in place to address issues of environmental degradation, including the 1st Defendant [NNPC] must be seen to make sure that the legislations are complied with by oil companies.

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[126] National Petroleum Investment Management Services, Production Sharing Contractors, online: NNPC<https://napims.nnpcgroup.com/our-services/Pages/Production-Sharing-Contractors.aspx>.

[127] NNPC, LNG Investment Management Services (LMIS), online: NNPC <https://nnpcgroup.com/GasAndPower/Pages/LIMS.aspx>.

[128] See Julia Ruth-Maria Wetzel, Human Rights in Transnational Business: Trans lating Human Rights Obligations into Compliance Processes (Luzern, Switzerland: Springer, 2015) at 15-16. See also Eghosa Ekhator, "Multinational Corporations, Accountability and Environmental Justice: The Move Towards Subregional Litigation in Africa" (2022) ZVglRWiss 121(forthcoming).

[129] See Amnesty International, Bad Information: Oil Spill Investigations in the Niger Delta (London, UK: Amnesty International Publications) at 44-45.

[130] See Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Netherlands International Law Review 91 at 103.

> [NNPC] should not only be interested in the profit it shares with the 2nd Defendant [Mobil].[131]

In terms of legislation, the ECCJ's decision may have legal implications for some states' human rights due diligence laws. This is because some mandatory human rights due diligence legislation prescribe MNCs' responsibility to respect human rights in their dealings abroad through SPCs, JVAs, and PSC.[132] For example, the French 'Duty of Vigilance' Law enacted by the French National Assembly on 27 March 2017 provides that corporations domiciled or doing business in France should perform due diligence functions to identify, mitigate, and remediate human rights, health, safety, and environmental risks arising from their operations or in their relationship with other companies.[133] The corporate relationships exist in the forms of parent-company relationships, supply-value chain contracts, or permanent business relationships between a company domiciled in France and another company outside of France. Therefore, the duty to conduct human rights due diligence can arise from a relationship where a company has leverage over another company, or where it maintains business relationships with other entities for the long term.[134] Failure to perform human rights due diligence in such relationships may establish a corporation's liability in civil cases before French courts.[135]

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[131] Obong Effiong Archiang & Ors v Nigerian National Petroleum Corporation, Mobil Producing Nigeria Unlimited, & Exxon Mobil Corporation (5959) Las Conilas Boulevard Irving Texas, United States of America (USA) Unreported Suit No FHC/ABJ/CS/54/12 at 147. (A copy of the judgment is on file with the author).

[132] See John Ruggie, Caroline Rees, & Rachel Davis "Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations" (2021) 0:0 Business and Human Rights Journal 1 at 11-17.

[133] See Art. L. 225-102-4.-I. Although with some nuances, similar provisions exist in other human rights due diligence legislation, including the Australian Modern Slavery Act 2018, online: <www.legislation.gov.au/Details/C2018A00 153>; the United Kingdom Modern Slavery Act 2015, online:<www. legislation.gov.uk /ukpga/2015/30/ contents /enacted>. See also OECD. Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Paris: OECD Publishing 2018); OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed (Paris: OECD Publishing, 2016), and ILO-IOE International Child Labour Guidance for Business (2015).

[134] See Olivier De Schutter, "Towards a Mandatory Due Diligence in Global Supply Chains" (June 2020) International Trade Union Confederation 1 at 27, online:<www. ituccsi.org/IMG/pdf/de_schutte_mandatory_due_diligence.pdf>

[135] See Elsa Savourey & Stéphane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption" (2021) 6:1 Business and Human Rights Journal 141 at 150. See also Almut Schilling-Vaca flor, "Putting the French Duty of Vigilance Law in Context: Towards Cor porate Accountability for Human Rights Violations in the Global South?" (2021) 22 Human Rights Review 109.

In February 2022, the European Commission adopted a proposal that will mandate companies to conduct environmental and human rights due diligence within their value chains.[136] The proposal will be submitted to EU Parliament and the European Council for approval. Once approved, each EU Member State would have two years to adopt a national law incorporating the Directive. Article 2(8) of the proposed EU Directive states that '[u]ndertakings shall carry out value chain due diligence, which is proportionate and commensurate to their specific circumstances, particularly their sector of activity, the size and length of their supply chain, the size of the undertaking, its capacity, resources and leverage.'[137] Also, the proposed EU Directive instructs member states to enact legislation that requires corporations to 'identify, assess, prevent, cease, mitigate, monitor, report, address and remedy potential and/or actual adverse impacts on human rights, the environment and good governance in their value chain.'[138] Although the scope of each member states' legislation is unknown at the time of publication of this article, the member states' legislation may ground the civil liability of parent companies in relationships with subsidiaries and in value chain relationships with business partners.

If the liability of MNCs is extended to business relationships as suggested by the legislation discussed above, it will not be difficult for the ECCJ's decisions to influence corporate liability in home countries. For example, if the ECCJ in SERAP finds NNPC liable, the judgement will indirectly touch on the liability of MNCs with which NNPC has business relationships through BITs, JVAs, or PSCs. It will also touch on the role of MNCs as shareholders in some NNPC production arrangements. The indictment could raise issues of collusion, aiding or abetting human rights or environmental abuse.[139] Therefore, the ECCJ's declaration of an SOE's liability could contribute to the pursuit of a cause of action regarding which plaintiffs can approach MNCs' home countries to demand accountability for the part that the MNCs played in

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136 See European Parliament Procedure, online: <https://oeil.secure.europarl.euro pa.eu/oeil/popups/printficheglobal.pdf?id=716220&l=en>.

137 Ibid.

138 Ibid, art 1(1).

139 See Markos Karavias, "Shared Responsibility and Multinational Enterprises" (2015) 62 Netherlands International Law Review 91 at 102.

the business relationship with SOEs.[140] Indeed, it has been noted that '…in cases of harmful outcomes resulting from the actions of multiple wrongdoers, one should look beyond the jurisdictional limitations to possible interactions between international and national dispute settlement bodies called upon to adjudicate 'shared responsibility' cases arising from the same factual patterns.'[141]

In sum, the ECCJ's jurisdiction over SOEs will position the court as a norm entrepreneur. It has been noted that '…a European human rights due diligence instrument cannot replace effective protection of human rights by the countries of the Global South themselves. All efforts to impose human rights due diligence obligations on companies must therefore be complemented by measures that bring these countries on board.'[142] ECCJ's judicial creativity via purposeful interpretation of ARSIWA and learning from practices from other regional courts on state attribution will greatly promote the corporate accountability norm and aid legislative developments in African and other countries to consolidate the norm's internalization process.

6. CONCLUSION

This article examined the possible normative influence of the ECCJ in the business and human rights context. Its concern was to ask how the ECCJ can promote a corporate accountability norm alongside growing national legislation and case law that recognize corporate accountability. It was argued that considering the expansive jurisdiction of the ECCJ on human rights, the court has the potential to be a norm entrepreneur for this cause. The ECCJ held in 2010 that it does not have jurisdiction over corporations, or the power to declare corporate responsibility to respect human rights in international law. This article has argued that should a similar case come before the ECCJ in 2021, its decision should be different. This argument is anchored on two pivotal points. First, there is a growing number of decisions from

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[140] As well, it can serve as a cause of action in host states. See Richard Frimpong Oppong, "The Higher Court of Ghana Declines to Enforce an ECOWAS Court Judgment" (2017) 25:1 African Journal of International & Comparative Law 127.

[141] Karavias, supra note 141 at 107.

[142] Giesela Ruhl, "Towards a German Supply Chain Act? Comments from a Choice of Law and a Comparative Perspective" (2021) European Yearbook of International Economic Law 1 at 18.

national courts that declare corporate accountability in international law. Second, though the ECCJ declined jurisdiction over NNPC, an SOE, ARSIWA, and jurisprudence from the ECtHR and IACHR show that courts cannot turn a blind eye to the relationship between states and SOEs. Therefore, if the ECCJ conducts a control analysis of the relationship between states and SOEs, it would have reason to assume jurisdiction over NNPC in a case like SERAP. Holding SOEs accountable for human rights and environmental abuse may have legal implications for corporations with which the SOEs maintain business relationships. The growing mandatory HRDD legislation in the EU suggests that a cause of action could arise from MNCs' relationships with corporations abroad. Therefore, MNCs' relationship with SOEs in Africa could cause MNCs' conduct to be questioned in their home states.

This article concluded that the ECCJ could play a pivotal normative role in affirming the accountability of corporations by acknowledging and declaring their liability of SOEs as arising from their business relations or supply chain arrangements. African courts cannot continue to rely on developed states to hold corporations responsible for human rights abuses within their jurisdictions. Sub-regional courts, like the ECCJ, must play their part when called upon to do so, to hold these entities accountable for their violations of human rights rules and principles of acceptable conduct in their business undertakings. Undoubtedly, these rules and principles are, quite clearly, established in international and transnational law, including the evolving corporate accountability norm.