

**Towards binding economic, social and cultural rights
obligations of non-state actors in international and domestic
law: A critical survey of emerging norms**

By

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18 May 2005

DECLARATION

I declare that TOWARDS BINDING ECONOMIC, SOCIAL AND CULTURAL RIGHTS OBLIGATIONS OF NON-STATE ACTORS IN INTERNATIONAL AND DOMESTIC LAW: A CRITICAL SURVEY OF EMERGING NORMS is my work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

DANWOOD MZIKENGE CHIRWA

18 May 2005

SIGNED.....



ABBREVIATIONS

ATCA	Alien Tort Claims Act
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	UN Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ECHR	European Convention for Protection of Human Rights and Fundamental Freedoms
EU	European Union
GA	General Assembly of the United Nations
HRC	Human Rights Committee
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDA	International Development Association
IFI	International Financial Institution
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
IOC	International Olympic Committee
MNC	Multinational Corporation
MNE	Multinational enterprise
NGO	Non-governmental organisation
NLM	National Liberation Movement
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice

SC	Security Council of the United Nations
TNC	Transnational corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTC	Centre on Transnational Corporations
UNCTAD	United National Centre for Trade
US	United States
USA	United States of America
USSR	Union of Socialist Soviet Republic
WTO	World Trade Organisation



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Chapter 1

INTRODUCTION

1 INTRODUCTION

The issue of private sector responsibility for human rights has gained currency in contemporary human rights discourse. In an era of globalisation, the market-oriented policies of liberalisation of markets, privatisation of state-owned enterprises, and promotion of foreign direct investment and deregulation of the private sector have been given prominence.¹ Key players in the global economy such as multinational corporations (MNCs), international financial institutions and multilateral institutions promote globalisation.² Their wide adoption by states has seen states ceding more powers and competencies to non-state actors than was the case previously.³ As a result, it has become increasingly clear that state action alone is not sufficient to

¹ Sub-Commission on the Promotion and Protection of Human Rights, *Economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights*, Progress Report submitted by J Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8 and Commission on Human Rights' decision 2000/102, UN ESCOR, 53rd session, Provisional Agenda Item 4, UN Doc E/CN.4/Sub.2/2001/10 (2001), para 4.

² Ibid.

³ Philip Alston 'The myopia of the handmaidens: International lawyers and globalization' (1997) 8 *European Journal of International Law* 435, 435; Michael W Reisman 'Designing and managing the future of the state' (1997) 8 *European Journal of International Law* 409 409 412; Serge Sur 'The state between fragmentation and globalization' (1997) 8 *European Journal of International Law* 421, 422. See also Rob Walker and Saul Mendlovitz 'Interrogating state sovereignty' in Rob Walker and Saul Mendlovitz (eds) *Contending sovereignties: redefining political community* (Boulder: Lynne Rienner, 1990) 1.

guarantee the enjoyment of human rights. For example, access to essential medicine is not only dependent on the policies and actions of the state but also on the decisions and policies of pharmaceutical corporations. Banks and other financial institutions play a critical role in ensuring access to housing. With increasing privatisation, access to such basic services as water, health, education and electricity is also dependent on the actions and policies of private service providers.⁴ Further, recent experience has demonstrated that non-state actors, like state actors, can and often do violate human rights.⁵ Feminist scholars have also contended, quite persuasively, that women's and children's rights are vulnerable to infringement in private relations. For these writers, the public-private divide in the application of human rights and international law operates as a facade for shielding infractions that occur in the private domain.⁶ These

⁴ See, eg, Patrick Bond, David McDonald and Greg Ruiters 'Water privatisation in southern Africa: The state of the debate' (2003) 4(4) *Economic and Social Rights Review* 10; Danwood M Chirwa 'Privatisation of water in southern Africa: A human rights perspective' (2004) 4(2) *African Human Rights Law Journal* 218; Danwood M Chirwa 'Water privatisation in South Africa and socio-economic rights' (2004) 8(2) *Law, Democracy and Development* (forthcoming); Adam McBeth 'Privatising human rights: What happens to the state's human rights duties when services are privatised' (2004) 5(1) *Melbourne Journal of International Law* 133.

⁵ MNCs, for instance, have been implicated in corruption and violations of trade union rights, International Labour Organisation's ('ILO') labour standards, environmental rights, the right to development, and civil and political rights. See section 3 below.

⁶ See, eg, Margaret Thornton 'The cartography of public and private' in Margaret Thornton (ed) *Public and private: Feminist legal debates* (Melbourne: Oxford University Press, 1995) 2, 9; Hilary Charlesworth 'Worlds apart: Public/private distinctions in international law' in Thornton, above this note, 243, 250–1; Celina Romany 'State responsibility goes private: A feminist critique of the public/private distinction in human rights law' in Rebecca Cook (ed) *Human rights of women: National and international perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 85–95.

revelations have reinforced arguments against the traditional view that human rights bind the state only and that non-state actors have no human rights obligations.⁷ The question of non-state actors constitutes a fundamental, if not radical, challenge to a key principle that has characterised the application of human rights as a bulwark against state interference. It is a major test for the future of human rights whose implementation has hitherto relied exclusively on the state as the principal duty-bearer.

Debate on the applicability of human rights to non-state actors has in the past few decades has seen the emergence of three types of norms and mechanisms aimed at these actors' activities. The first are voluntary guidelines and corporate codes of conduct adopted by and for the business sector. The key international voluntary guidelines are the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises adopted in 1976 as revised until 2000, the ILO Tripartite Declaration on International Investment and Multinational Enterprises and Social Policy adopted in 1977, and the United Nations (UN) Global Compact initiated by the UN Secretary General in 1999.⁸ NGOs, business associations, trade unions, and multinational corporations have also increasingly adopted corporate codes of conduct for internal purposes or as model codes for

⁷ For scholarship advancing these arguments, see, eg, Steven R Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 443; Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002); Danwood Mzikenge Chirwa 'Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution' (2003) 7 *Mediterranean Journal of Human Rights* 29; International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (Versoix, International Human Rights Policy, 2002).

⁸ These are discussed in chapter 5.

corporations.⁹ These voluntary norms have received some support from the business community and some states,¹⁰ who maintain that the protection of human rights remains exclusively the responsibility of states, and that private actors can only assist in their advancement through such voluntary mechanisms.¹¹ The second set of norms consists of those that seek to enforce the duties of non-state actors indirectly through the state. Both international and regional human rights bodies have been confronted with cases alleging state responsibility for violations of human rights committed in the private sphere.¹² The third set of norms seeks to hold private actors directly accountable for human rights at both domestic and international levels. Unlike the first two, the direct responsibility approach is arguably the least developed with the elaboration of the UN Norms on the Responsibilities of Transnational Corporations

⁹ See Rhys Jenkins *Corporate codes of conduct: Self-regulation in a global economy* (Technology, Business and Society Programme Paper No 2, 2001) 1-6.

¹⁰ Including the United States, the United Kingdom, Egypt, India and Saudi Arabia: Frances Williams, 'Company norms "must be on UN rights agenda"' *Financial Times* 8 April 2004, 9.

¹¹ See eg United States Council for International Business (USCIB) 'Talking points on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights"', available at <<http://209.238.219.111/USCIB-text-Talking-Points.htm>> (accessed: 30 May 2004).

¹² See eg Andrew Clapham 'The "drittwirkung" of the Convention' in Franz Matscher, R St John Macdonald and Herbert Petzold (eds) *The European system for the protection of human rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 163; Martin Scheinin 'State responsibility, good governance and indivisible human rights' in Hans-Otto Sano and Gudmundur Alfredsson (eds) *Human rights and good governance: Building bridges* (The Hague: Martinus Nijhoff Publishers, 2002) 29; Craig Scott 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, social and cultural rights: A textbook* (2nd revised ed), (Dordrecht: Martinus Nijhoff Publishers, 2001) 563.

and Other Business Enterprises with Regard to Human Rights (UN Norms)¹³ being arguably the most formidable step towards that objective.¹⁴

2 NATURE AND SCOPE OF INQUIRY

This study argues that the issue of non-state actors requires a comprehensive response that includes the recognition of both non-binding and binding human rights obligations of these actors. It examines critically the emerging norms on voluntary obligations, state responsibility, and direct responsibility of these actors with regard to human rights at both international and domestic levels. The central argument advanced is that the voluntary norms and the doctrine of state responsibility cannot adequately address the problem of non-state actors' responsibility for human rights

¹³ Sub-Commission on the Promotion and Protection of Human Rights, UN ESCOR, 55th session, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2. These norms were adopted by the Sub-Commission on 26 August 2003. On 20 April 2004, the UN Commission on Human Rights confirmed the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights; and requested the office of the High Commissioner for Human Rights to among other things 'compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights', 'to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organisations', and 'to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.'

¹⁴ See Amnesty International *The UN Human Rights Norms for Business: Towards legal accountability* (2004) 7, 14, available at < [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/\\$File/IOR4200204.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/IOR420022004ENGLISH/$File/IOR4200204.pdf)> (accessed: 30 March 2005).

unless these mechanisms are backed by binding and enforceable obligations of these actors. Such binding human rights obligations must be available within a domestic constitutional framework and there must be some (limited) form of direct accountability of these actors in relation to these obligations at the international level. Thus, this study will explore the limits of voluntary standards and the doctrine of state responsibility and answer two important questions: whether it is philosophically and conceptually possible to impose binding obligations on non-state actors in international and domestic constitutional law in relation to human rights generally and economic, social and cultural rights in particular, and if so which of those rights and to what extent would these actors be bound by these rights?

3 NON-STATE ACTORS AND HUMAN RIGHTS: A BRIEF HISTORICAL AND CONTEXTUAL BACKGROUND

3.1 The scope of non-state actors to be addressed

Multinational corporations ('MNCs') and other business enterprises are the main focus of this inquiry mainly because these actors arguably help to explain the problem of non-state actors with regard to the implementation of international human rights far easier than any other non-state actor. However, this study has a wider reach than just MNCs. Many other non-state actors such as international organisations, non-governmental organisations (NGOs), political parties, pressure groups and individuals are also the subjects of this inquiry. This is consistent with the central view advanced in this study that there is a need for a comprehensive recognition of binding human rights obligations of all non-state actors. This view does not mean that all non-state actors must have same obligations, but it does highlight the fact that some non-state

entities could be small in size and may not have an international character, but nevertheless have the potential to violate human rights.

The following sections define the key non-state actors discussed in this study. They also provide a brief contextual background to and a brief historical perspective of the regulation of these actors.

3.2 Multinational corporations and other business enterprises

As mentioned above, the central focus of this study is on MNCs. The term ‘MNC’ defies an easy definition. Some commentators use the terms ‘transnational corporation’ (TNC) or ‘multinational enterprise’ (MNE).¹⁵ This study does not distinguish between these terms and will use them interchangeably to refer broadly to any ‘economic entity operating in more than one country or a cluster of economic

while others stress control. According to one definition, an MNC refers to ‘all enterprises which control assets ... in two or more countries.’ See Kojo Yelapaala ‘Strategy and planning in global product distribution – beyond the distribution contract’ (1994) 25 *Law & Policy in International Business* 839. Other definitions emphasise several different criteria such as organisational structure and ownership. One such definition states that an MNE is ‘a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy’. See Detlev F Vagt ‘The multinational enterprise: A new challenge for transnational law’ (1970) 83 *Harvard Law Review* 739, 740. Some authors distinguish between MNEs and TNCs. For example Sison defines an MNE as an entity ‘composed of free-standing units replicated in different countries’, and a TNC as ‘consisting of vertically integrated units that produce goods and provide services in more than one country’. See David Weissbrodt & Muria Kruger ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights’ (2003) 97 *American Journal of International Law* 901, 908 [quoting Alejo José G Sison ‘When multinational corporations act as governments: The Mobil Corporation experience’ in Jörg Andriof & Malcolm McIntosh (eds)

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'.¹⁶ Much of the discussion around MNCs will also be of relevance to corporations generally.

Corporations and indeed MNCs are not new to human history. These entities are recorded to have first appeared in the 17th Century Europe.¹⁷ These corporations were created in the context of colonialism 'to promote trading activities or territorial acquisitions of their home countries in the Far East, Africa and the Americas'.¹⁸ As chartered companies, they were created for the sole benefit of the sovereign and the state.¹⁹ It has been thus noted that corporations during this period were kept under close control such that they could be dissolved automatically if they acted in violation of their charter contrary to public interest.²⁰ Among other things, limits were placed on the extent to which a corporation could grow.²¹ The shift way from corporations serving the interests of the public to serving the interests of stockholders

¹⁶ See article 1 of the UN Norms.

¹⁷ An example of an early MNC is the British East India Company. See Joel Bleifuss 'Know thine enemy: A brief history of corporations' *These Times Magazine* February 1998, available at <[http://www.third world traveler.com/ Corporations/KnowEnemy_ITT.html](http://www.thirdworldtraveler.com/Corporations/KnowEnemy_ITT.html)> (accessed: 30 March 2005).

¹⁸ Jed Greer & Kavaljit Singh 'A brief history of transnational corporations' *Corpwatch*, 2000, available at <[http://www.global policy.org/socecon/tncs/historytncs.htm](http://www.globalpolicy.org/socecon/tncs/historytncs.htm)> (accessed: 30 March 2005).

¹⁹ Ibid. Bleifuss, above n 17.

²⁰ Kalle Lasn 'Corporations are not people', available at <<http://onegoodmove.org/lgm/lgmarchive/000437.html>> (accessed: 30 March 2005).

²¹ Ibid.

did not occur until the late 19th Century.²² By this time corporations had been given legal personality. They were therefore able to challenge many state laws regulating them on the ground that they now existed separately from the state and were accountable to stockholders, not to the state.²³

Renewed interest in regulating corporations resurfaced in the 1960s-70s. This interest was rekindled by developing countries who were concerned about the increasing influence of MNCs over, and their interference with, domestic politics in the 1960s.²⁴ These countries called for the restructuring of the international economic order and for the international regulation and supervision of the activities of these corporations.²⁵ At the domestic level, many countries adopted binding regulatory



²² See Bleifuss (above n 17); Lasn, *ibid.*

²³ *Ibid.* See also The Stakeholder Alliance ‘A brief history of accountability’, available at <<http://www.stakeholderalliance.org/history.html>> (accessed 30 March 2005).

²⁴ See Désirée Abrahams *Regulating corporations: A resource guide* (Geneva: UNRISD, 2004) 2. An oft-cited scandal that highlighted this problem was the revelation that a US company had been complicit in attempts to oust the democratically elected government in Chile and Guatemala. See Rhys Jenkins, above n 9, 3 fn 1; David P Forsythe *Human rights in international relations* (Cambridge: Cambridge University Press, 2000) 197, 201. See also Peter Hansen & Victoria Aranda ‘An emerging international framework for transnational corporations’ (1990/1991) 14 *Fordham International Law Journal* 881, 885.

²⁵ Hansen & Aranda, *ibid.*

frameworks for corporations²⁶ and also used threat of state ownership of enterprises as a principal means of restricting the activities and growth of private enterprises.²⁷

At the international level, the demands of developing countries did not result in the adoption of binding human rights obligations for corporations. Rather, the responses of the international community focussed on establishing voluntary standards aimed at preventing TNCs from interfering with the internal politics of host countries, and limiting their adverse effects on national economic objectives.²⁸ The International Chamber of Commerce (ICC) became the first business organisation to adopt voluntary guidelines – the Guidelines for International Investment in 1972. For its part, the UN established the Centre on Transnational Corporations (UNCTC) in 1974 with a mandate to draft a UN Code of Conduct for TNCs. The Code was supposed to be non-binding contrary to what developing countries had wanted.²⁹ However, the Code did not see the light of the day due to the lack of consensus by states and the Centre itself was closed down in 1992.³⁰ Parallel efforts aimed at adopting an

²⁶ Jenkins, above n 9, 2.

²⁷ Ibid. Mark Baker has averred that ‘During the mid-1970s the threat of expropriation and nationalisation was greatest’. See Mark B Baker ‘Private codes of conduct: Should the fox guard the henhouse?’ (1993) 24 *University of Miami Inter-American Law Review* 399, 431.

²⁸ Barbara A Frey ‘The legal and ethical responsibilities of transnational corporations in the protection of international human rights’ (1997) *Minnesota Journal of Global Trade* 153, 158.

²⁹ Ariande K Sacharoff ‘Multinationals in host countries: Can they be held liable under the Alien Tort Claims Act for human rights violations?’ (1998) 23 *Brooklyn Journal of International Law* 927.

³⁰ Ruth Mayne ‘Regulating TNCs: The role of voluntary and government approaches’ in Sol Picciotto & Ruth Mayne (eds) *Regulating international business: Beyond liberalisation* (London: MacMillan Press Ltd, 1999) 235, 240. According to David Forsythe, the failure to adopt the Code was ‘due to

international framework for regulating corporations were made by the OECD and the ILO. As noted above, the former adopted the OECD Guidelines for Multinational Enterprises in 1976 while the latter adopted the Tripartite Declaration in 1977.

The pressure for binding corporate regulation declined in the 1980s. According to Rhys Jenkins, the phenomenon of economic globalisation, which was beginning to gain ground at this time, was responsible for this decline.³¹ He writes that, during this period, governments exhibited a tendency to adopt market-oriented principles of liberalisation, privatisation of public enterprises, promotion of foreign investment, and deregulation. These principles demanded that restrictions on foreign investment be removed thereby allowing more participation of the private sector in service delivery than was the case before. Thus, the focus shifted way from regulation to facilitating the smooth operation of a free global market and attracting foreign investment.³² This shift saw the proliferation of self-regulatory and voluntary standards in the 1990s.³³ Interestingly, NGOs, too, relaxed their advocacy strategies from agitating for binding norms to supporting non-binding and voluntary standards.³⁴ According to Ruth Mayne, this change in approach was motivated by ‘the failure of governments to protect labour rights in the past, and the growing

blocking action by capital exporting states whose primary concern was to protect the freedom of “their” corporations to make profits’. See Forsythe, above n 24, 201.

³¹ Jenkins, above n 9, 3 – 4. See also Abrahams, above n 24, 2 – 3.

³² Ibid.

³³ See Dwight W Justice ‘The new codes of conduct and the social partners’ <<http://www.somo.nl/monitoring/related/justice-d-w.htm>> (accessed: 30 May 2000).

³⁴ Mayne, above n 30, 239.

hostility of governments and business to statutory forms of regulation'.³⁵ It had also become clear after the failure of governments to agree on the UN Code of Conduct for TNCs that binding international standards for corporations would not be developed in the near future.³⁶

It is the modern era, starting from the 1980s, that is widely accredited with the rise of corporations. It has been noted that while there were about 7 000 parent TNCs in 1970, these entities totalled about 60 000 by the year 2001 controlling over 800 000 foreign subsidiaries.³⁷ Furthermore, it has been observed that the global sales of these corporations have since the 1990s far exceeded worldwide trade exports.³⁸ There is

³⁵ Ibid 239.

³⁶ Ibid.

³⁷ See Jagers, above n 7, 5 – 6 (quoting United Nations Centre for Trade (UNCTAD) *World Investment Report: Promoting linkages* (New York & Geneva: United Nations, 2001). UNCTAD's 2004 report demonstrates that the size of the international production activities of the top 100 TNCs continued to grow. See UNCTAD *World investment report: The shift towards services* (New York & Geneva, 2004) 11.

³⁸ In 2000 Bergman noted that:

There are 40,000 transnational companies, with over 250, 000 foreign affiliates. They employ 70 million people worldwide, produce 25% of all manufactured goods and account for two thirds of world trade. They dominate the new globalized economy. In addition they can shift production around the globe with ease and bypass national governments.

See David Bergman 'Corporations and ESCR rights' in *Circle of rights: Economic, social and cultural rights activism, a training resource* (International Human Rights Internship Programme, 2000) available at < <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm> > (accessed: 30 March 2005).

also evidence to the effect that 51% of the world's 100 wealthiest entities are owned by corporations³⁹ and that a mere 200 of them control a quarter of the world's productive assets.⁴⁰ With this kind of financial power, not only do MNCs influence domestic political affairs of states, particularly those in the less industrialised world, they also influence international politics, international and domestic policies on health, the environment, technology, agriculture, subsidies and other sectors of life.⁴¹ These actors have also been implicated in violations of human rights such as abuse of the right of employees, environmental pollution, supporting repressive governments, undermining human welfare through limiting access to land or food, and influencing policies and laws on agriculture, technology, employment, health, employment and subsidies.⁴²

³⁹ Ibid.

⁴⁰ *The Economist*, 27 March 1993, 5 – 6; T Clarke 'Mechanisms of corporate rule' in J Mender & E Goldsmith (eds) *The case against the global economy* (San Francisco, California: Sierra Club Books, 1996) 297, 298.

⁴¹ Report of the Secretary General on 'The realisation of economic, social and cultural rights: The impact of the activities and working methods of transnational corporations on the full enjoyment of all human rights, in particular economic, social and cultural rights and the right to development, bearing in mind existing international guidelines, rules and standards relating to the subject matter', E/CN.4/Sub.2/1996/12, 2 July 1996. See also Jägers, above n 7, 8-10; Maria Sanchez-Moreno & Tracy Higgins 'No recourse: Transnational corporations and the protection of economic, social and cultural rights in Bolivia' (2004) 27 *Fordham International Law Journal* 1663.

⁴² See, eg, Diane Orentlicher & Timothy Gelatt 'Public law, private actors: The impact of human rights on business investors in China' (1993) 14 *Northwest Journal of International Law and Business* 1, 66; Andrew Clapham 'Categories of corporate complicity in human rights abuses' (2001), available at <www.business-humanrights.org/Clapham-Jerbi-paper.htm> (accessed: 30 January 2005); Lucinda Saunders 'Rich and rare are the gems they war: Holding De Beers accountable for trading conflict

It is therefore not surprising that the quest for a legally binding framework for these actors have since the dawn of the new millennium been resuscitated. NGOs around the globe are now agitating for such a framework. For example, at the 60th session of the UN Commission on Human Rights held on 15 March-23 April 2004, about 200 organisations supported the UN Norms as an important step towards strengthening international legal accountability of TNCs.⁴³ However, resistance to such a goal is still strong.

3.3 International organisations

As mentioned earlier, this study also has implications for international organisations. In this study, an ‘international organisation’ means an entity that exists independently of its members, has powers and functions exercisable on the international plane, and its membership is composed of states.⁴⁴ This definition includes such international bodies as the UN, regional economic bodies such as the OECD and European Union (EU), and international financial institutions (IFIs) such

diamonds’ (2001) 24 *Fordham International Law Journal* 1402; Sigrun I Skogly ‘Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria’ (1997) 15(1) *Netherlands Quarterly of Human Rights* 47.

⁴³ See ‘Statement of support for the UN Human Rights Norms for Business’, delivered at the 60th Session of the Commission on Human Rights, 15 March – 23 April 2004, Geneva, available at <<http://www.escr-net.org/EngGeneral/unnorms2.asp>> (accessed: 30 May 2004).

⁴⁴ PR Menon ‘The legal personality of international organisations (1992) 4 *Sri Lanka Journal of International Law* 79, 81; Henry G Schermers *International institutional law: Functioning and legal order* (Vol II) (Leiden: AW Sijthoff, 1972) 623; Henry G Schermers *International institutional law: Structure* (Vol I) (Leiden: AW Sijthoff, 1972) 5 – 11; AS Muller *International organisations and their host states: Aspects of their legal relationship* (The Hague: Kluwer Law International, 1995) 75 – 76.

as the World Bank⁴⁵ and the International Monetary Fund (IMF). Because of their composition, it is therefore difficult to classify them simply as non-state entities. However, and as will be shown below, international organisations raise similar accountability problems with regard to human rights to those posed by other non-state actors. Thus, while they will not be the main focus of this study, the arguments advanced herein are directly and indirectly relevant to these actors as well.

According to Amerasinghe, international organisations are a development of the late 19th Century.⁴⁶ The establishment of NGOs led to the development of international organisations.⁴⁷ The latter, arose from the inadequacies of ad hoc conferences which were convened occasionally to solve multilateral issues.⁴⁸ At first, the scope of these organisations was limited to administrative activities not political activities.⁴⁹ The creation of the League of Nations (later replaced by the UN) extended the scope of the work of international organisations to the political sphere.⁵⁰ Since then, the work of international organisations has become as diverse as these

⁴⁵ World Bank here includes the International Bank for Reconstruction and Development, and the International Development Association.

⁴⁶ CF Amerasinghe *Principles of institutional law of international organisations*, 4th ed, (Cambridge: Cambridge University Press, 1996) 1. See also DW Bowett *The law of international institutions* (London: Stevens & Sons, 1982) 4.

⁴⁷ Amerasinghe, *ibid.*

⁴⁸ *Ibid.*, 2.

⁴⁹ Bowett, above n 46, 4.

⁵⁰ Amerasinghe, above n 46, 5.

organisations have become exceedingly numerous especially since the Second World War.⁵¹

International organisations have no doubt have contributed immensely to the creation of peaceful relations between states, conduct of international intercourse, the evolution and implementation of international law, and the promotion of living standards of people worldwide.⁵² However, they have also raised diverse concerns relating to human rights. These concerns have arisen in the context of these actors' growing influence on international and domestic policies on the economy and trade, donor conditionality, peace and security.⁵³

To begin with, some international organisations have been implicated in such human rights violations as rape, looting and violence during peace-keeping missions and while dispensing humanitarian assistance.⁵⁴

In the field of international economics and trade, certain international organisations such as the IMF, the World Bank, the WTO, and international business associations play very critical roles in promoting principles governing this field. Some of the

⁵¹ Ibid. See also Niels Blokker 'Proliferation of international organization: An exploratory introduction' in Niels M Blokker & Henry G Schermers (eds) *Proliferation of international organizations: Legal issues* (The Hague: Kluwer Law International, 2001) 1.

⁵² Ibid, 6-8.

⁵³ See eg Anne Orford 'Locating the international: Military and monetary interventions after the Cold War' (1997) 38 *Harvard International Law Journal* 443.

⁵⁴ See eg Brian D Tittmore 'Belligerents in blue helmets: Applying international humanitarian law to United Nations peace operations' (1997) 33 *Stanford Journal of International Law* 61, 96-97. See also Elizabeth Abraham 'The sins of the saviour: Holding the United Nations accountable to international human rights standards for executive order detentions in its mission in Kosovo' (2003) 52 *American University Law Review* 1291.

policies promoted are not consistent with human rights standards and goals.⁵⁵ For example, the World Bank and the IMF introduced the so-called 'structural adjustment programmes' (SAPs) in the 1980s.⁵⁶ It is widely held that these programmes caused untold hardship for developing countries regarding the provision of basic services to their people and that they also exacerbated poverty.⁵⁷ The IMF replaced these programmes with the Poverty Reduction and Growth Facility (PRGF) at the beginning of the new millennium. While the new policy states clearly that it is intended to alleviate poverty, the UN Independent Expert on the Effects of Structural

⁵⁵ Chris Jochnick 'The human rights challenge to global poverty', available at <<http://www.cesr.org/text%20files/actors.PDF>> (accessed: 30 march 2005).

⁵⁶ These programmes consisted of reforms 'aimed at stabilizing developing countries' external and internal balances and promoting their growth by devaluation, producer price increases, trade liberalization, privatization, and supporting institutional changes.' They also required cuts to social spending. They were introduced as part of donor conditionality for developing countries. See Anthony Anghie 'Time present and time past: Globalisation, international institutions and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243 fn 20.

⁵⁷ Diana E Moller 'Intervention, coercion or justifiable need? A legal analysis of structural adjustment lending in Costa Rica' (1995) 2 *Southwestern Journal of Law and Trade Americas* 483; Daniel D Bradlow 'The World Bank, the IMF and human rights' (1996) 6 *Transnational Law and Contemporary Problems* 47; Anghie, above n 56, 249; Sigrun I Skogly 'Structural adjustment and development: Human rights – An agenda for change' (1993) 15 *Human Rights Quarterly* 751. Enrique Carrasco and Ayhan M Kose 'Income distribution and the Bretton-Woods Institutions: Promoting an enabling environment for social development' (1996) 6 *Transnational Law & Contemporary Problems* 1; Joe Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa' (1995) 26 *California Western International Law Journal* 1, 20 – 29; Bharati Sadasivam 'The impact of structural adjustment on women: A governance and human rights agenda' (1997) 19 *Human*

Adjustment Programmes has observed that these policies remain stringent and are destined to produce unsatisfactory results.⁵⁸ Likewise, the WTO's practices, rules and policies on trade especially those relating to the patenting of medicines, plant forms and life forms have been criticised on the ground that they often limit access to medicines by poor people especially from developing countries, endanger food security, and amounts to economic plunder.⁵⁹

Some international organisations also undertake activities that are 'ultra-hazardous' and can have severe consequences for the enjoyment of human rights. Examples include activities involving nuclear energy. Such activities can result in loss of life or threaten the health of large numbers of people.⁶⁰

⁵⁸ The Independent Expert has further noted that, although supposed to be country driven, the development of the programme was neither participatory nor transparent. See Fantu Cheru *Economic, social and cultural rights: The Highly Indebted Poor Countries (HIPIC) Initiative: A human rights assessment of the Poverty Reduction Strategy Papers (PSRP)* Report submitted by the Independent Expert on the Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of all Human Rights particularly Economic, Social and Cultural Rights, E/CN.4/2001/56, 18 January 2001.

⁵⁹ See, eg, Laurence R Helfer 'Human rights and intellectual property: Conflict or coexistence?' (2003) 5 *Minnesota Intellectual Property Review* 47; Kara H Ching 'Indigenous self-determination in an age of genetic patenting: Recognizing an emerging human rights norm' (1997) 66 *Fordham Law Review* 687; David Weissbrodt & Kell Schoff 'Human rights approach to intellectual property protection: The genesis and application of sub-commission resolution 2000/7' (2003) 5 *Minnesota Intellectual Property Review* 1; Audrey R Chapman 'The human rights implications of intellectual property protection' (2002) 5 *Journal of International Economic Law* 861; PANOS *Patents, pills and public health: Can TRIPS deliver?* (London: The Panos Institute, 2002).

⁶⁰ Moshe Hirsch *The responsibility of international organisations towards third parties: Some basic principles* (Dordrecht: Martinus Nijhoff Publishers, 1995) 6.

However, no binding international regime has existed for holding international organisations accountable for human rights.⁶¹ In fact these actors have always maintained that they are not bound by international human rights standards. This is even the case with the UN.⁶² International organisations have for long denied that they are bound by human rights by relying on the functional necessity doctrine, which states that an international organisation can only bear those obligations specifically given to them by states in the founding treaty subject to the function of the common interests of states, but not general obligations from international law.⁶³

⁶¹ Ibid 17 – 52.

⁶² See above n 54.



⁶³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* 8 July 1996, General List No 23, available at < <http://www.icj-cij.org/icjwww/icasess/ianw/ianwframe.htm>> (accessed: 30 January 2005), para 25. According to the former General Counsel of the World Bank, Ibrahim Shihata:

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 protection and promotion of all human rights, or is limited to the rights which have an economic or social character as opposed to a political character.

See Ibrahim F Shihata 'Human rights, development, and international financial institutions' (1992) 8 *American University Journal of International Law and Policy* 27, 28. Daniel Bradlow has observed that while the IMF and the World Bank are now taking into account human rights in their operations, these institutions consider human rights issues as a matter of discretion rather than obligation. See generally Bradlow, above n 57.

Thus, the only means of accountability available are through states (either member states or hosts states)⁶⁴ and self-regulatory mechanisms adopted by some of the international organisations themselves.⁶⁵

In 2000, the International Law Commission (ILC) embarked on the elaboration of some rules governing the responsibility of international organisations.⁶⁶ Some of the provisions of the Draft Articles on the Responsibility of International Organisations were adopted provisionally in 2003. These Articles, if adopted, will clarify the position of these actors with regard to their responsibility for international law. However, it is still not clear whether these rules will also apply to human rights.

⁶⁴ See generally Muller, above n 44; Mahmoud H Arsanjani 'Claims against international organisations: Quis custodiet ipsos custodes' (1981) 7(2) *The Yale Journal of World Public Order* 131.

⁶⁵ See Arsanjani, *ibid.* Many international organisations have adopted administrative tribunals to deal with internal labour issues. For example, the UN has over time developed various administrative and quasi-judicial mechanisms. The World Bank has established an Inspection Panel (discussed in chapter 5 in this study). These mechanisms are voluntary and not subject to appeal to independent bodies. See Paul C Szasz 'The proliferation of administrative tribunals' in Blokker & Schermers (eds), above n 51, 241; Michael Singer 'Jurisdictional immunity of international organisations: Human rights and functional necessity concerns' (1995) 36 *Virginia Journal of International Law* 53; Sabine Schlemmer-Schulte 'The World Bank Inspection Panel: A model for other international organisations?' in Blokker & Schermers (eds), above n 51, 483.

⁶⁶ See Report of the ILC on work of its 56th Session, 29-49, available at <www.un.org/law/ilc/> (accessed: 30 September 2004). The first reading of Draft Articles 4-7 was adopted at the ILC's 56th session held in May 2004. See Report of the ILC on its work of its 55th Session, 94-135, available at <www.un.org/law/ilc/> (accessed on 30 September 2004).

3.4 NGOs

The original meaning of an NGO is that it is ‘a private international organisation that serves as a mechanism for cooperation among private national groups in international affairs.’⁶⁷ Such an entity could be formed by a government or by an intergovernmental agreement, and have both global and local membership.⁶⁸ In this sense, an NGO is distinguishable from an international organisation in that the former is constituted by non-state actors. This study will maintain this distinction although it is argued that both these actors must be bound by human rights. However, where the context allows, the use of NGOs will also refer to non-profit making organisations whose interests are of a purely domestic or municipal character.

The development of NGOs not only predates international organisations but it has also been argued that the former actually led to the development of the latter.⁶⁹ According to Charnovitz, NGOs emerged during the last half of the Eighteenth Century.⁷⁰ These actors arose from the need to create more permanent structures that would facilitate the proper and more coordinated collaboration between associations having the common objective of furthering international interests.⁷¹ Some of the early NGOs include the International Committee of the Red Cross (1863), the International

⁶⁷ See Steve Charnovitz ‘Two centuries of participation: NGOs and international governance’ (1997) 18 *Michigan Journal of International Law* 183, 186 (quoting the International Law Dictionary).

⁶⁸ Ibid.

⁶⁹ Bowett, above n 46, 5.

⁷⁰ Charnovitz, above n 67, 191 – 2.

⁷¹ Amerasinghe, *ibid.*, 3; Bowett, *ibid.*

Law Association (1873) and the International Chamber of Commerce (1919).⁷² Since then, NGOs have proliferated.⁷³ It has been noted that these actors increased in numbers and involvement in international relations markedly between the 1970s and 1980s.⁷⁴ A contributing factor to the proliferation of NGOs has been globalisation. The latter has led to more international negotiations over domestic policies, which has offered wide opportunities for NGOs' participation.⁷⁵ As Wapner has argued, the extent of the growth in numbers, financial and territorial reach, and capability of NGOs demands that other actors must take them seriously.⁷⁶ In explaining the similarities between the institution of the state and NGOs Hans Schmitz illuminatingly writes:

Many transnational NGOs eschew exclusive control over a territory or the monopoly of violence, but they use specific strategies to mimic the state model. Non-governmental organisations often create a membership base ("population"), a hierarchical and professional governance structure ("government"), independent research capabilities ("intelligence"), and a coherent set of goals pursued against other states and non-state entities ("foreign policy"). NGOs dispute on a regular basis the exclusive right of states to represent local interests in international institutions such as the United Nations... Sometimes, even states treat NGOs like their own kind, in particular when it comes to

⁷² Ibid.

⁷³ Bowett, above n 46, 5.

⁷⁴ Karsten Nowrot 'Legal consequences of globalisation: The status of non-governmental organisations under international law' (1999) 6 *Indiana Journal of Global Legal Studies* 579, 585.

⁷⁵ Ibid 265.

⁷⁶ P Wapner 'Defending accountability in NGOs' (2002) 3 *Chicago Journal of International Law* 197; D Spar & J Dail 'Of measurement and mission: Accounting for performance in non-governmental organisations' (2002) 3 *Chicago Journal of International Law* 171.

issues of domestic sovereignty. When states reject transnational NGO efforts to influence domestic politics, they typically invoke the principle of non-intervention (as they would against intrusions by other states).⁷⁷

While NGOs deserve credit for the contribution they have made to, among other things, international peace efforts, the development and enforcement of international law, and improving the living standards of people,⁷⁸ they, too, have raised a range of human rights concerns. The main concern relates to the question of accountability. NGOs have acted as ‘watchdogs’ of other entities, but there has been no international framework for holding them accountable to the standards that they seek other actors to abide by.⁷⁹ Peter Spiro has expressed this point succinctly thus:

NGOs are independent players in the global system, and yet the system does not recognise them as such. As a result, NGOs comprise a potentially destabilising force. They can use the system to advance their agendas, but are not answerable to the system. They can bring others to task, but themselves remain immune. NGOs have not been held responsible for their conduct; they cannot violate international law or agreements.⁸⁰

⁷⁷ Hans P Schmitz ‘Being (almost) like a state: Challenges and opportunities of transnational non-governmental activism’ in Margaret G Hermann and Bengt Sundelius (eds) *Comparative foreign policy analysis: Theories and methods* (Prentice Hall, 2003), available at <<http://faculty.maxwell.syr.edu/hpschmitz/HPSPapers.htm>> (accessed: 30 March 2005).

⁷⁸ See generally Michael H Posner & Candy Whittome ‘The status of human rights NGOs’ (1994) 25 *Columbia Human Rights Law Review* 269; Dan A Tarlock ‘The role of non-governmental organisations in the development of international environmental law (1993) 68 *Chicago – Kent Law Review* 61; Charnovitz, above n 67.

⁷⁹ See generally Robert C Blitt ‘Who will watch the watchdogs? Human rights nongovernmental organisations and the case for regulation’ (2004) *Buffalo Human Rights Law Review* 261.

⁸⁰ Peter J Spiro ‘The democratic accountability of non-governmental organisations: Accounting for NGOs’, (2002) 3 *Chicago Journal of International Law* 161, 166. For similar observations, see also

Some NGOs have become so influential that their potential to violate human rights is arguably as high as that of states or MNCs. For example, the International Olympic Committee (IOC) has its own legal order whereby it administers and executes punishment on sportsmen and women but domestic courts usually refrain from assuming jurisdiction over this body's decisions.⁸¹ It has been argued that the punitive orders meted out by this body sometimes contravene international human rights standards.⁸² But since there is no international framework for holding such bodies accountable for human rights, the IOC cannot be held to account for those punishments. Furthermore, a pertinent question has been raised as to whether this body should be bound by human rights standards of fair trial and independence of its Court of Arbitration.⁸³ The concerns raised about the IOC also apply generally to other sport related NGOs that have mushroomed as a result of the 'tremendous commercialization and socialization of sports over the past two decades'.⁸⁴



Peter J Spiro 'New global potentates: non-governmental organisations and the unregulated market place' (1996) *Cardozo Law Review* 957, 963 – 7; Tamuka H Muzondo *The potential impact of the NGO Bill on the role of NGOs in the protection and promotion of human rights in Zimbabwe* (LLM Dissertation, University of Cape Town, 2005) 25 – 6.

⁸¹ Nowrott, above n 74, 599.

⁸² Ibid.

⁸³ See Anthony T Polvino 'Arbitration as preventative medicine for Olympic ailments: The International Olympic Committee's Court of Arbitration for Sport and the future for the settlement of international sporting disputes' (1994) 8 *Emory International Law Review* 347.

⁸⁴ Ibid 348.

In short, NGOs have also become important actors in domestic and international spheres warranting a consideration of their position with regard to human rights obligations.

3.5 Interim conclusion

In short, non-state actors are of different types and exercise varying degrees of influence on human beings. Notwithstanding the differences in nature and influence, the foregoing discussion demonstrates that the state faces a new challenge to its ability to protect and implement human rights of its citizens and other people under its jurisdiction. That states have total sovereignty over their territories and state functions is a fact that cannot be defended in reality as non-state actors have claimed more and more competence in what was previously the exclusive preserve for the state. This means that not only are states not capable of protecting their citizens fully from violations of human rights committed by other actors, but also that states may not have capacity and ability to ensure that people enjoy their rights fully. It is therefore important to examine critically the various means of holding non-state actors accountable for human rights (especially economic, social and cultural rights).

4 THE FOCUS ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A JUSTIFICATION

This study subscribes to the view that human rights are interdependent, indivisible and interrelated.⁸⁵ However, while this study is relevant to all human rights, special

⁸⁵ This principle has been affirmed and reaffirmed in a number of international human rights declarations and resolutions including the Proclamation of Tehran, 1968; the Final Act of the International Conference on Human Rights, Tehran, UN Doc. A/Conf. 32/41, art 13; The Vienna

attention is paid to economic, social and cultural rights. This focus was informed by three factors. Firstly, it is widely recognised that economic, social and cultural rights have suffered from neglect and enjoyed subordinate status to civil and political rights.⁸⁶ This picture, as will be shown below, has improved remarkably of late, but it can still not be said that these rights enjoy the same status worldwide presently.⁸⁷

Secondly, most of the literature on private sector responsibility for human rights dwells on civil and political rights.⁸⁸ This is in part a reflection of the continuing predominance of these rights over economic, social and cultural rights. Worse still, even some of the proponents of the horizontal application of human rights cast doubt on the applicability of economic social and cultural rights in the private sphere.⁸⁹ The arguments advanced against such an inference are dealt with in full in chapter 7. In short, they focus on the apparent differences between these sets of rights – that



Declaration and Programme of Action adopted by the World Conference on Human Rights, June 1993, UN Doc. A/ Conf. 157/23, part I, para 5.

⁸⁶ See eg Oloka-Onyango, above n 57, 1.

⁸⁷ See Asbjørn Eide ‘Economic, social and cultural rights as human rights’ Asbjørn Eide, Catarina Krause & Allan Rosas (eds) *Economic, social and cultural rights* (Dodrecht: Martinus Nijhoff Publishers, 1995) 9, 56 – 62.

⁸⁸ Exceptions include Jägers, above n 7; Scott, above n 12.

⁸⁹ See eg Stuart Woolman ‘Application’ in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional law of South Africa* (Cape Town: Juta & Co Ltd) 10—59; Alfred Cockrell ‘Private law and bill of rights: A threshold issue of “horizontality”’ in *Bill of rights compendium* (Durban: Butterworths, 2001) 3A—18; Halton Cheadle & Dennis Davis ‘The application of the 1996 Constitution in the private sphere’ (1997) 13 *South African Journal on Human Rights* 44, 59—60.

economic, social and cultural rights entail onerous obligations that cannot be borne by non-state actors.⁹⁰ It is therefore critical that these arguments are addressed.

Thirdly, the question of non-state actor responsibility for human rights has considerable ramifications for efforts at alleviating global poverty, which endures as a major test for human rights.⁹¹ The issue of poverty is closely linked to the notion of economic social and cultural rights.⁹² The latter are rights that aim to ensure access by all human beings to the resources, opportunities and services necessary for an adequate standard of living.⁹³ In addition, these rights serve as a means of enjoying other rights, such as the rights of association, equality, political participation and expression, is intricately linked to access to a basic set of social goods.⁹⁴ Economic, social and cultural rights are particularly relevant to vulnerable and disadvantaged groups of people⁹⁵ because of the important role they can play in enabling

⁹⁰ Ibid.



⁹¹ See Bertram G Ramcharan 'The United Nation's and human rights in the twenty-first century' in Gudmundur Alfredsson, Jonas Grimheden, Bertram G Ramcharan & Alfred de Zayas (eds) *International human rights monitoring mechanisms: Essays in honour of Jacob Th. Moller* (The Hague: Martinus Nijhoff Publishers, 2001) 1, 5 (arguing that unless poverty 'can be reversed and brought under control, the United Nations human rights programme will be condemned to marginalisation').

⁹² International Human Rights Council on Human Rights Policy *Duties sans frontières: Human rights and global social justice* (2003) 24 – 23.

⁹³ Sandra Liebenberg & Karisha Pillay (eds) *Socio-economic rights in South Africa* (Community Law Centre, 2000) 16.

⁹⁴ Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights handbook* (Lansdowne: Juta & Co Ltd, 2000) 398.

⁹⁵ See Liebenberg & Pillay (above n 93) 16.

disadvantaged groups to challenge conditions of poverty and socio-economic inequality.⁹⁶

On the other hand, poverty means something more than income or material deprivation. It connotes a state in which a person is unable to live a long, healthy and creative life, nor to enjoy a decent life worthy of self-respect and the respect of others.⁹⁷ In *The Programme of Action of the World Summit for Social Development 1995*, the meaning of poverty has been captured as follows:

Poverty has various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterised by a lack of participation in decision making and in civil, social and cultural life.⁹⁸

It is therefore clear that poverty signifies a lack of basic capabilities essential to a dignified life.

Viewed from this standpoint, economic, social and cultural rights can contribute to ending poverty since these rights are aimed at ensuring that people are free from want. Through the synergetic enjoyment of such rights as the right to food, education, adequate standard of living, work, health, housing, a share in scientific progress and social security, it is possible that poverty can be stamped out of society.⁹⁹

⁹⁶ International Council on Human Rights Policy, above n 92, 17-19.

⁹⁷ See UNDP *Human development report* (2000) 73.

⁹⁸ Para 19, available at <<http://www.un.org/esa/socdev/wssd/agreements/poach2.htm>> (accessed: 30 March 2005).

⁹⁹ See CESCR *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the implementation of the International Covenant*

Conversely, when economic, social and cultural rights are considered as an end in themselves, poverty makes it impossible for people to enjoy these rights. The two notions are demonstrably interrelated and interdependent. Therefore, access to economic, social and cultural rights is a key to breaking the downward spiral of entrapment in poverty as much as eradication of the latter can improve the enjoyment of the former.¹⁰⁰

In order for economic, social and cultural rights to be fulfilled, the duty-holders must discharge their obligations. This brings to the fore the question who are the bearers of those obligations. As is clear from the discussion in this chapter thus far, non-state actors have the potential to violate rights that fall into the category of

on Economic, Social and Cultural Rights CESCR statement adopted on 4 May 2011, A/CONF.191/BP/7.

¹⁰⁰ This discussion does not mean that economic, social and cultural rights are not the only set of rights that can contribute to the combat against poverty. Civil and political rights such as freedom of expression, access to information, equality before the law and political participation are all important. However, economic, social and cultural rights are directly linked to conditions of poverty. See Amartya Sen & Martha Nussbaum *The quality of life* (Oxford: Clarendon Press, 1993). Furthermore, these rights continue to be sidelined because of their perceived negative impact on the free market. The tendency has therefore been to adhere to selected rights, mostly civil and political rights, which are perceived to be compatible with free market principles. See UN Special Rapporteur of the Sub Commission on the Prevention of Discrimination and Protection of Minorities *The realisation of economic social and cultural rights* Final report, UN ESCR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Session, Provisional Agenda Item 8 at 27, 98, UN Doc. E/CN.4/Sub.2/1992/16, 1992. See also Silvia Danailov 'The accountability of non-state actors for human rights violations: The special case of transnational corporations' (unpublished), available at <http://www.humanrights.ch/bildungarbeit/seminare/pdf/000303_danailov_studie.pdf> (accessed: 30 March 2005).

economic, social and cultural rights. Non-state actors, as shown above, now exercise considerable influence on international and domestic policies relating to issues that have a significant direct and indirect impact on the enjoyment of economic, social and cultural rights. As a result, state action alone cannot guarantee the satisfaction of these rights. It is therefore critical to examine the possibility for holding non-state actors responsible for these rights given their importance to resolving one of the world's most pressing problems – poverty eradication.

5 ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS LEGAL RIGHTS

This study identifies itself with the considerable body of research that has convincingly demonstrated that economic, social and cultural rights can be enforced as legal rights. However, the full recognition of these rights has for long been resisted.¹⁰¹ Central to this resistance is the assertion that these rights are of a different nature from civil and political rights.¹⁰² At the time the UN was considering the conversion of the UDHR into a binding instrument, there was strong opposition to the idea that the proposed instrument should contain both economic, social and cultural rights and civil and political rights.¹⁰³ It was argued that economic, social and cultural

¹⁰¹ See generally, Matthew Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Clarendon Press, 1995) 6 – 16; Kitty Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* (Oxford: Intersentia, 1999) 16 – 23.

¹⁰² Ibid.

¹⁰³ Ibid.

rights are ideals to be attained.¹⁰⁴ They entail positive obligations which are expensive to execute and must therefore be fulfilled on a progressive basis depending on the availability of state resources.¹⁰⁵ Furthermore, it was argued that these rights lack specificity and entail that complex policy decisions are made regarding their implementation.¹⁰⁶ It was therefore contended that these rights are not suitable for enforcement by the complaints procedure. Similar arguments have also been made regarding the constitutional recognition of these rights at the domestic level.¹⁰⁷

These arguments led to the adoption of two instruments – the ICCPR containing civil and political rights and the ICESCR containing economic, social and cultural rights. These instruments made provision for different enforcement mechanisms for these sets of rights just to emphasise the difference between them.¹⁰⁸

In retrospect, it has been argued that the resistance to economic, social and cultural rights was motivated by the Cold War whereby the West championed civil and



¹⁰⁴ Arambulo, *ibid*, 16 – 18, 55 – 57.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ See eg Craig Scott & Patrick Macklem ‘Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution’ (1992) 141 *University of Pennsylvania Law Review* 1; Erika de Wet *The constitutional enforcement of economic and social rights: The meaning of the German Constitutional model for South Africa* (Durban; Butterworths, 1996) 40 – 41; Denis M Davis ‘The case against the inclusion of socio-economic demands in a bill of rights except as directive principles’ (1992) 8 *South African Journal on Human Rights* 475.

¹⁰⁸ The ICCPR provided for a complaints procedure as a key enforcement measure while the ICESCR did not. The latter made provision for state reporting as the main supervisory mechanism.

political rights while the East argued for the recognition of economic, social and cultural rights.¹⁰⁹

Since 1966, when the two instruments were adopted, economic, social and cultural rights have suffered from neglect. Although later international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) make no distinction between these categories of rights, they do not provide for an individual complaints procedure.

The attitude to economic, social and cultural rights has changed significantly since the end of the Cold War. At the world conference on human rights convened in Vienna in 1993, the idea that all rights are indivisible, interrelated and interdependent received unanimous approval.¹¹⁰ Not only has literature showing that there are lesser differences between these rights and civil and political rights than is actually argued by opponent of economic, social and cultural rights grown, these rights have received more attention and recognition.¹¹¹ At the international level, serious consideration has

¹⁰⁹ Craven, note 51 above, 8-9; Danwood M Chirwa 'Toward revitalising economic, social and cultural rights in Africa: Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria' (2002) 10(1) *Human Rights Legal Brief* 14.

¹¹⁰ See Vienna Declaration, above n 85.

¹¹¹ See Sandra Liebenberg 'Socio-economic rights' in Chaskalson, above n 92; Scott & Macklem (above n 107); David Beetham *Democracy and human rights* (Cambridge: Polity Press, 1999) 115 – 135; Pierre de Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67; Sandra Liebenberg 'The protection of economic and social rights in domestic legal systems' in Asbjørn Eide Catarina Krause & Allan Rosas (eds) *Economic, social and cultural rights: A textbook* (Dordrecht: Martinus Nijhoff Publishers, 2001) 55.

been given to boosting the monitoring mechanisms of this set of rights such that there now exists several regional and international instruments recognising or moving closely towards recognising the justiciability of these rights. Economic, social and cultural rights under the African Charter on Human and Peoples' Rights adopted in 1981, the African Charter on the Rights and Welfare of the Child adopted in 1990, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in 2003 are subject to individual complaints. The Additional Protocol to the European Social Charter (1961) adopted in 1995 provides for a system of collective complaints. This Protocol allows NGOs, trade unions and employers' organisations to refer complaints alleging breaches of the Charter to the Committee of Independent Experts. The Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights was adopted in 1998, providing for individual petitions to the Inter-American Commission and Inter-American Court on Human Rights in respect of alleged breaches of trade union rights and the right to education. An Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women was adopted on 12 March 1999 providing for both individual petitions and inquiry procedure. In 2001, the UN Commission on Human Rights appointed an independent expert to examine the question of an Optional Protocol to the ICESCR. At its 59th session, the Commission established an open ended working group to consider options regarding the elaboration of the Optional Protocol to the ICESCR. The working group was mandated to report to the Commission at its 60th session and make specific recommendations.¹¹²

¹¹² Commission on Human Rights Resolution 2003/18.

At the domestic level, these rights are increasingly gaining constitutional protection. In Africa, for example, most Constitutions adopted after 1989 have entrenched economic, social and cultural rights alongside civil and political rights in their bills of rights.¹¹³ The South African Constitutional Court, in particular, has delivered several decisions on economic, social and cultural rights underscoring the point that these rights are legal rights capable of judicial enforcements just like civil and political rights.¹¹⁴

The forgoing shows that economic, social and cultural rights have reached such a level of recognition that it is not a mere academic exercise to discuss the nature of their obligations and their duty-bearers.

6 STRUCTURE OF THE STUDY

This chapter demonstrates that non-state actors have become important actors as far as the implementation and enjoyment of human rights especially economic, social and cultural rights are concerned. While these actors can improve

¹¹³ Amongst the constitutions with elaborate provisions in this regard are the 1990 Constitution of Cape Verde, the 1990 Constitution of Saõ Tomé and Príncipe, the 1991 Constitution of Gabon, the 1992 Constitution of Madagascar, the 1993 Constitution of Seychelles, and the 1996 Constitution of South Africa. Although not as detailed, several other African Constitutions contain a long list of economic, social and cultural rights in their bills. They include the 1990 Constitution of Benin, the 1991 Constitution of Burkina Faso, the 1992 Constitution of Burundi, the 1992 Constitution of Togo, the 1992 Constitution of Mali and the 1992 Constitution of Niger. A few more have a number of economic social and cultural rights in the bill of rights but they also have directive principles of state policy in a separate chapter of the constitution. Examples include the 1990 Constitution of Namibia, the 1992 Constitution of Ghana, and the 1994 Constitution of Malawi. See Christof Heyns (ed) *Human rights law in Africa* Vol 2 (Leiden: Martinus Nijhoff Publishers, 2004).

¹¹⁴ See above n 111.

the enjoyment of human rights they can also impede their enjoyment. It is therefore significant to examine critically the existing procedures of holding these actors accountable for human rights and exploring the nature and extent of their obligations. Since these actors vary in their nature, activities and influence, it is also critical to fashion a framework for distinguishing the level of their obligations of these actors in relation to these rights.

Economic, social and cultural rights have suffered from neglect for a long time. However, they have received increasing recognition since the end of the Cold War. These rights are particularly important to efforts aimed at combating poverty. Given the threat that non-state actors pose to these rights, this study will pay particular attention to this set of rights.

Chapter 2 examines the philosophical underpinning of human rights with the aim of discovering whether there is a philosophical justification for limiting the application of human rights to state actors. This chapter will also consider whether there could be any human rights theories in support of the recognition of human rights obligations of non-state actors.

Chapter 3 examines the concept of subjects of international law. It aims to explore the definition of this concept and answer the question whether this notion excludes any possibility of recognising binding human rights obligations of non-state actors. Special attention shall also be paid to the question whether there are in existence any norms imposing direct obligations relating to economic, social and cultural rights on non-state actors.

Chapter 4 discusses the limitations of the concept of state responsibility as a means of ensuring that non-state actors discharge economic, social and cultural rights

obligations. The role and limits of the principles of home state and host state responsibility in this regard will be investigated.

Chapter 5 focuses on soft law norms of international law recognising the human rights obligations of non-state actors. This chapter will also give an account for the increase of voluntary initiatives adopted by business enterprises to address human rights concerns. It will examine the merits and demerits of these norms and procedures with regard to ensuring that non-state actors respect human rights.

Chapter 6 is a comparative and critical analysis of the emerging domestic constitutional norms and procedures for enforcing economic, social and cultural rights obligations of non-state actors. It will investigate the role that domestic constitutional norms can play in ensuring that non-state actors' are responsible for human rights and proposes an ideal framework in that regard.

Chapter 7 investigates the nature of obligations of non-state actors in relation to economic, social and cultural rights. It accepts that non-state actors are of disparate nature, exercise different levels of influence and are involved in dissimilar fields of activity. It therefore attempts to develop a framework for analysing the nature and extent of the obligations of non-state actors in relation to economic, social and cultural rights.

Chapter 8 concludes the study and makes some recommendations.

Chapter 2

PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS: DO THEY PRECLUDE OR SUPPORT THE APPLICATION OF HUMAN RIGHTS TO NON-STATE ACTORS?

1 INTRODUCTION

The concept of human rights owes its justification to moral philosophy.¹ It follows that the content of human rights and its applicability must be verified against the background of moral philosophy. Of particular importance for present purposes is the assertion that human rights confer entitlements on individuals or groups against the state, which cannot be claimed in the private sphere. This chapter seeks to answer the question whether moral philosophy precludes or supports the application of human rights in private relations. It demonstrates that the public/private distinction in the application of human rights is attributable to the natural rights theory and, to some extent, the positivist school. It will explain and critique the basis upon which these theories rest this distinction. This will be done with the help of other theories on human rights such as the Marxist and feminist jurisprudential schools, which directly or indirectly challenge this divide. This chapter will also demonstrate that there are some theories that support the application of human rights in the private sphere. These include the socio-historical school and the cross-cultural perspective of human rights. The former is a nascent school, which holds that

¹ Jeremy J Shestack 'The philosophic foundations of human rights' (1998) 20 *Human Rights Quarterly* 202.

human rights are shaped by changing socio-historical circumstances.² The latter is a school that has emerged to mitigate the undue dominance of the Western culture on the development of human rights and argues for the inclusion of non-Western cultures' conceptions of human rights in the mainstream discourse on human rights.³ It must be emphasized that this chapter does not advance the view that all the theories discussed in support of the horizontal application of human rights divide are not without fault themselves. However, unless relevant to the central focus of this chapter, it is beyond the scope of this chapter to examine the general demerits of these theories.

2 THE NATURAL RIGHTS THEORY

The natural rights theory (also often called the liberal theory) is internationally acclaimed as 'the most closely associated with the modern human rights'.⁴ It emerged in the 17th – 18th centuries and conceptualised human rights as injunctions against the state.⁵

² See section 6 below.

³ See section 7 below.

⁴ Shestack, above n 1, 207.

⁵ The origin of the natural rights theory is traceable to the natural law theory propounded first by the Stoics of Greece in the Hellenistic period and developed further by the Stoics of the Roman period. Earlier theorists considered natural law as an embodiment of unalterable and everlasting elementary principles of justice whose authority derived from metaphysical existence. The theory was given a secular touch after the decline of feudalism by such philosophers as Grotius and Pufendorf who replaced religion as the authoritative force behind natural law with human nature and reason. See generally Alan S Rosenbaum 'Introduction' in Alan S Rosenbaum (ed) *The philosophy of human rights: International perspectives* (Westport: Greenwood Press, 1980) 9; Shestack, above n 1, 205 – 206.

According to this theory, human rights are timeless truths and universal. They inhere in every human being by virtue of his/her reason. Everyone is born with human rights and, therefore, they cannot be lost without one losing oneself.⁶

The natural rights theory is a tradition most intricately linked to the state-centric application of human rights.⁷ This theory was premised on the belief that the state formed part of ‘a divine strategy’ and was therefore natural.⁸ However, the concern about the risk of abuse by the state of individuals’ freedom motivated theorists of the time to advocate for a limited government, which respected the freedom of individuals in areas not constrained by the sovereign.⁹ This was achieved by conceptualising the relationship between the state and the individual in terms of a social contract. John Locke, a leading

⁶ Margaret MacDonald ‘Natural rights’ in Jeremy Waldron (ed) *Theories of rights* (Oxford: Oxford University Press, 1984) 21, 27.



⁷ Gerald E Frug ‘The city as a legal concept’ (1980) 93 *Harvard Law Review* 1059, 1099 – 1100.

⁸ See also Shlomo Avineri *Hegel’s theory of the modern state* (London: Cambridge University Press, 1972) 177. Aristotle argued that the state was ‘natural’ and that it was essential for the creation of justice. Quoted in Alexander Gillespie ‘Ideas of human rights in antiquity’ (1999) 17(3) *Netherlands Quarterly of Human Rights* 233, 251.

⁹ Henry Steiner & Phillip Alston ‘Comment on some characteristics of the liberal political tradition’ in Henry Steiner & Phillip Alston (eds) *International human rights in context: Law, politics and morals* (New York: Oxford University Press, 2000) 361, 363; Rhoda E Howard & Jack Donnelly ‘Human dignity, human rights, and political regimes’ in Jack Donnelly (ed) *Universal human rights in theory and practice* (New York: Cornell University Press, 1989) 89 – also published in (1986) 80 *American Political Science Review* 801; Asbjørn Eide ‘Linking human rights and development: Aspects of the Norwegian debate’ in Irving Brecher (ed) *Human rights, development and foreign policy: Canadian perspectives* (Halifax: Institute for Research on Public policy, 1989) 5, 9.

proponent of the natural rights theory, imagined human beings in a state of nature with unlimited freedom.¹⁰ They were all equal and autonomous individuals. However, this freedom produced a chaotic result. In order to end this chaos, human beings entered into a social contract to form a body politic that would exercise control over them. In submitting to the body politic, individuals retained their civil rights of life, liberty and property. The exercise of political power by a government was therefore contingent on the discharge of the obligation to respect these natural rights of individuals.

Two key principles influenced the development of the distinction between the public and the private within the natural rights theory.¹¹ The first is the concept of sovereignty which was gaining ground in Western Europe at the time the natural rights theory was being articulated. Nation-states began to emerge in the 16th century to supplant the feudal system of governance.¹² The social contract sought to provide a legitimate basis of the rule of the nation-state then considered as the best way of protecting the individual from violence by various groups contesting for power.¹³ Gerald Frug succinctly makes this point as follows:

¹⁰ See Michael Freeman 'Is a political science of human rights possible' (2001) 19(2) *Netherlands Quarterly of Human Rights* 123, 125.

¹¹ See Adamantia Pollis 'Towards a new universalism: Reconstruction and dialogue' (1998) 16(1) *Netherlands Quarterly of Human Rights* 5, 12.

¹² According to Cassese, one will invariably realize from reading any reputable book of the period beginning with the signing of the peace of Westphalia until the end of the 19th century that this was an era for sovereign independent states where individuals or peoples played no remarkable part. See Antonio Cassese *Human rights in a changing world* (Cambridge: Polity Press, 1990) 11.

¹³ Eide, above n 8, 8 – 9. According to Baker:

Indeed, the progress of liberalism can be understood, as Gierke saw it, as a progressive dissolution of all unified structures within medieval society -- the feudal manor, the medieval town, and even the King himself. Instead of seeking to understand the harmonious working of the whole, liberalism separated out from each aspect of life an individual interest as contrasted with a group interest and, at the same time, consolidated all elements of social cohesion into the idea of the nation-state. With the development of liberalism, “the Sovereignty of the State and the Sovereignty of the Individual were steadily on their way towards becoming the two central axioms from which all theories of social structure would proceed, and whose relationship to each other would be the focus of all theoretical controversy.”¹⁴

The second principle, as is clear from the above quotation, is that of liberalism. Like the doctrine of state sovereignty, the principle of liberalism enjoyed popular appeal at the time the natural rights theory was being developed.¹⁵ Liberalism at that time promoted individualism, economic freedom, formal autonomy and abstract equality. According to Adamantia Pollis:

Liberal theory did not ignore the empirical evidence of community without good reason. Rather, times mandated the doctrine of individualism which could justify a human rights

The arrival of the territorial nation state created new questions and new kinds of obligations. The question of how obedience can be justified thus acquires new importance, and the arguments of Hobbes, or of Rousseau, are directed to discovering a way of justifying government when in previous times such justification would not have seemed necessary, or not urgently so.

Rodney Baker *Political legitimacy and the state* (Oxford: Clarendon Press, 1990) 7.

¹⁴ Above n 7, 1088.

¹⁵ See generally Frug, above n 7.

theory with civil and political rights at its core. ... The rise of capitalism from the 15th to the 18th centuries and the attendant political conflicts among monarchs, lords and vassals against the emerging middle class – the bourgeoisie – created a new social order. ... Civil and political rights and the attendant social contract became the rationale for the shift of power to the emerging business classes.¹⁶

Steiner and Alston have contended similarly that:

It is partly the prominence of the rights related to notions of individual liberty, autonomy and choice and the right related to property protection that produces the sharp divisions in much liberal thought between the state and the individual, between the government and nongovernmental sectors, between what are often referred to as the public and private realms or spheres of action.¹⁷

Thus, since it was conceived to justify political power especially the institution of the state, the natural rights theory recognised only what are now called civil and political rights to protect individuals in the public sphere.¹⁸ The inviolability of privacy was promoted because natural rights rested on the belief that individuals were autonomous beings capable of making rational choices.¹⁹ Individuals were entitled to use their

¹⁶ Pollis, above n 11, 10.

¹⁷ Steiner and Alston, above n 9, 363.

¹⁸ See Pollis, above n 11, 10.

¹⁹ David Sidorsky 'Contemporary reinterpretations of the concept of human rights' in David Sidorsky (ed) *Essays on Human rights: Contemporary rights and Jewish perspectives* (Philadelphia: The Jewish Publication Society of America, 1979) 89.

resources to achieve maximum happiness. Consequently, the conduct of private actors in the private sphere fell outside the concern of natural rights.²⁰

It is argued that that the natural rights theory was based on the wrong assumption that people are born equal and free. This is a point that is well illustrated by feminist writers and the Marxist theory discussed later in this chapter. It will suffice for now to underline that these theories converge on the point that the natural rights theory's conception of equality ignored the impact of systemic factors that impede the full exercise by individuals of their freedom and makes them vulnerable to victimisation by others in both the private or public sphere. Thus, this theory failed to provide protection to individuals from such serious human rights abuses committed in the private realm as slavery and violence against women.²¹ As was noted in chapter 1, non-state actors now exert more and more influence on international and domestic state policies with both direct and indirect impacts on the enjoyment of human rights than was the case when this theory was being formulated. As a result, it is now not possible to ensure the full enjoyment of human rights through state action alone.²² It was also shown in chapter 1 that non-state actors have potential to violate human rights and often do so. It is therefore important to

²⁰ Steiner and Alston, above n 9, 363.

²¹ See Rolando Gaete *Human rights and the limits of critical reason* (Aldershot: Dartmouth, 1993) 114.

²² See Mahmood Monshipouri & Claude E Welch 'The search for international human rights and justice: Coming to terms with the new global realities' (2001) 23 *Human Rights Quarterly* 370, 373. See also Neil Stammers 'Social movements and the social construction of human rights' (1999) 21 *Human Rights Quarterly* 980, 1004.

acknowledge that inequalities do exist in the private sphere enough to justify requiring the application of human rights to private relations as well.

It must also be observed that the natural rights theory was based on another wrong assumption that human beings were entirely autonomous, self-interested and egoistic individuals. Again, this is a point that is well illustrated by the Marxist critique discussed later. There has been no society in human history which conforms to the natural rights' construct of the individual as completely egoistic without any obligations to others. Adamantia Pollis, for example, has argued that even during the Enlightenment Age, 'men and women were', at a minimum, 'in a complex web of interpersonal relationships which included reciprocal rights and obligations'.²³ As will be shown below, conceptions of human rights in non-Western societies also emphasise the notion of individual human rights duties to one another within the society.

The view that individuals are not as egocentric as suggested by the natural rights theory but that they live in a society where they depend on and owe obligations to one another can be said to be consistent with the rationale behind the social contract itself. As originally conceived, the natural rights theory holds that natural rights exist independently from the state since they predate the state. Put differently, rights obtained in the state of nature before the conclusion of the social contract. The formation of the limited government (Locke), or the establishment of social order (Hobbes) or the general will (Rousseau), can therefore be seen as an acknowledgement of the duty of individuals to exercise rights responsibly in order to avoid inflicting harm on each other. While the natural rights theory regards the state as the natural means of protecting rights, the social

²³ Pollis, above n 11, 10.

contract can then be regarded as having tacitly endorsed the fundamental obligation on the part of every individual not to interfere with the freedom of another. As will be shown in chapter 7, this is a fundamental obligation on the part of everyone, which if observed by everyone, would render the state's duty to protect rights irrelevant.²⁴ It is therefore argued that the argument for the application of human rights in the private sphere does not constitute a challenge to the role of the state as a primary means of protecting human rights. Rather, it reinforces the recognition of duties that private actors owe one another for them to coexist in harmony and peace, which necessitated the conclusion of the social contract in the first place.

In conclusion, the natural rights theory is a theory that introduced the public/private distinction in the application of human rights. It did so at a time when such distinction was contextually required. The institution of the state had just appeared as a new organizing force of political power and autonomy in the private sphere to facilitate trade was also desired at the time. By limiting itself to analyzing society from the perspective of state/individual relations, the natural rights theory ignored certain important factors that pose a fundamental challenge to the validity of the non-application of human rights to non-state actors. The first is the non-recognition of the fact that private relations also involve unequal relations. The second one relates to the non-recognition of the interrelationships and interdependences between individuals or groups. The fact that inequalities in the modern world are much more nuanced in the private sphere supports a human rights model that allows human rights to have application in private relations as

²⁴ Henry Shue *Subsistence, affluence, and US foreign policy* (Princeton: Princeton University Press, 1980)

well. In addition, the fact that individuals are not as egoistic as maintained by natural rights writers but live in a 'complex web of relationships' owing one another obligations supports the inference that the social contract theory itself tacitly acknowledged that peaceful co-existence is not achievable unless individuals exercise their rights responsibly.

3 POSITIVISM

Positivism is a school of jurisprudence comes very close to endorsing the public/private divide in the application of human rights. It is a school that dominated legal reasoning for well over a century and a half since the 19th century, its key proponents being, in chronological order, Jeremy Bentham (1748 – 1832), John Austin (1790 – 1859), Hans Kelsen (1881 – 1973) and HLA Hart (1907 –). It is a theory that was formulated as a critique of the natural rights theory as remarkable progress in empirical natural sciences was being made in the 19th century. In this period, philosophy was based on concrete and empirical facts established by the emerging disciplines of natural sciences.²⁵ As a result, the metaphysical basis of human rights became suspect, since it could not be scientifically justified.²⁶

Although the exact definition of positivism varies from one theorist to another,²⁷ the central theme in this school is simple: law is what it is and not what it ought to be. In

²⁵ Dennis Lloyd *The idea of law* (Middlesex: Penguin Books Ltd, 1981) 95.

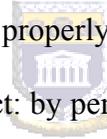
²⁶ RWM Dias *Jurisprudence* (5th ed) (London: Butterworths, 1985) 331.

²⁷ Hart has classified the various meanings of positivism under five heads. The first is that positivism means laws as commands (Bentham and Austin). The second meaning posits that analysis of legal concepts is worthy of pursuit but distinct from sociological and historical enquiries, and from critical evaluation. The

other words, this tradition draws a clear line between law and morality. Thus, law is considered to be state law regardless of its goodness or badness. Bentham, for one, considered law as:

[A]n assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning conduct to be observed by a certain person or class of persons, who are supposed to be subject to his power.²⁸

Likewise, John Austin stated that the science of jurisprudence ‘is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness’.²⁹ He defined law as ‘a rule laid down for the guidance of an intelligent being having power over him’.³⁰ He distinguished between laws ‘properly so called’ and laws ‘improperly so-called’. The latter were laws set by men for men such as through contract. By contrast, ‘laws properly so called’ were laws ‘established by political superiors, sovereign and subject: by persons exercising supreme and subordinate



third meaning states that decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality. The fourth definition avers that moral judgments cannot be established or defended by rational argument, evidence of proof. The last, but not the least, is that the law as it is actually laid down has to be kept separate from the law as ought to be. HLA Hart ‘Positive and the separation of law and morals’ (1957-80) 71 *Harvard Law Review* 601 fn 25.

²⁸ Jeremy Bentham ‘An introduction to the principles of morals and legislation’ in Clarence Morris (ed) *The great legal philosophers: Selected readings in jurisprudence* (Philadelphia: University of Pennsylvania Press: 1959) 262, 278.

²⁹ John Austin *The province of jurisprudence determined* (HLA Hart ed) (London: Weidenfeld & Nicolson, 1954) 126.

³⁰ John Austin ‘Lectures on jurisprudence’ in Morris (ed), above n 28, 335, 337.

government, in independent nations, or independent political societies'.³¹ In demonstrating that law was equivalent to a legal system, Kelsen also brought the positivists school firmly within the state machinery.³²

It is from positive laws that legal rights emanate according to the positivist school. Thus, on the basis that natural rights originated from imaginary law, Bentham ridiculed them categorically as 'nonsense upon stilts'.³³ To underscore the inseparable connection between the state and human rights, Hart, a more contemporary positivist, has stated that 'Government among men exists not because men have rights prior to government which government is to preserve, but because without government and law men have no rights and can have none.'³⁴ The positivist school, therefore, defines human rights as those that the state has recognised through positive law. One cannot look beyond state law to discover human rights.



³¹ Ibid.

³² In the so-called 'pure theory of law', Kelsen studied how legal systems work and constructed a theory that comprised a pyramid of norms, which established the validity of a particular legal outcome (norm). Accordingly, for a law to be valid one had to consider whether it is legitimated by the norms above it in the pyramid without reference to external political and social considerations. Thus, a legal system was conceived of as a hierarchy of norms, with the ultimate norm at the base of the pyramid, the Grundnorm, which will in normal cases be the Constitution or Parliament. See generally Hans Kelsen *Introduction to the problems of legal theory* (BL Paulson & SL Paulson, trans) (Oxford: Clarendon Press, 1992).

³³ Quoted in Anthony J Sebok *Legal positivism in American jurisprudence* (Cambridge: Cambridge University Press, 1998) 30.

³⁴ HLA Hart 'Utilitarianism and natural rights' in HLA Hart (ed) *Essays in jurisprudence and philosophy* (Oxford; Clarendon Press, 1983) 182.

It can therefore be seen that the positivist tradition associates the source of human rights closely with the state. One inference that can be drawn from this association is that this theory reinforces the role of the state in protecting human rights against private violations. To this extent, the positivist doctrine joins paths with the natural rights theory in that they both tacitly and expressly consider the state as the principal machinery of protecting rights. The difference between the two lies in the fact that rights within the natural rights school predate the state and this theory more clearly defines the role of rights as being injunctions against the state while in the positivist school rights are those that are recognised in accordance with predetermined processes within the existing state structures. While the state is considered to be the source of rights, it seems clear that the positivist school does not provide any further theoretical framework for determining the content of rights and how they must apply. This is particularly so because its insistence on distinction between law and morality.³⁵ This distinction enables the positivist theory to hold that human rights are only those granted by the state. Morality has no relevance in the determination of what human rights are. It can play a role in informing law reform or what new rights to recognise in positive law, but it does not assist in the determination of what is law.³⁶ Thus, other than the procedural criteria, positivism does not help in providing a basis for determining the content of human rights and their application.

³⁵ Modern adherents to the positivist school at least concede that inner morality is essential to every legal system, but they do not agree on what constitutes that inner morality. See James P Maniscalco 'The new positivism: An analysis of the role of morality in jurisprudence' (1995) 68 *Southern California Law Review* 989.

³⁶ See 'legal positivism' *Stanford Encyclopedia of Philosophy* available at < <http://plato.stanford.edu/entries/legal-positivism/>> (accessed: 30 March 2005).

Without such a basis, it is possible for the state to grant rights to individuals or groups of them claimable in both the private and public domains as long as such application is authorised by positive law. For example, chapter 7 demonstrates that the South African Constitution expressly recognises the horizontal application of human rights. The validity of such a provision can only be based on whether this provision was enacted in compliance with the state processes of enacting law but not on some moral or other basis. Since, this provision was adopted within a legitimate and legal process, this theory would consider it to be valid. At the same time, the positivist tradition would also validate the constitutional position in Canada, also discussed in chapter 7, which restricts the application of human rights to state action and allows a very limited application to conduct of non-state actors. There is therefore one danger implicit in this theory's reliance on procedures of law formation and the lack of the recognition of the role of morality in determining the validity of law. It is that this theory can be a great resource for justifying the *status quo*.³⁷

³⁷ According to Issa Shivji:

If the natural rights ideology of the Enlightenment was an instrument of change to establish bourgeois rule, positivism is eminently an ideology of the *status quo* to protect bourgeois rule. Natural law in its conservative form justified the political and economic inequalities of the classical and medieval periods, while positivism, which has never had any revolutionary angle, provides justification for the social and economic inequalities of the capitalist era as at the same time majestically proclaiming to be the theoretical fountain-head of political and legal equality.

See Issa G Shivji *The concept of human rights in Africa* (London: CODESRIA Book Series, 1989) 48 (also citing violations of human rights committed by the Nazi and Apartheid regimes respectively to demonstrate

However, it must be noted that one of the key proponents of the positivist school, Jeremy Bentham, did not rule out the possibility of a duty being imposed on one person towards another. While attempting to establish the extent to which penal law could interfere in the private domain, he wondered why, in cases where a person is in danger, it should ‘not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?’.³⁸ Bentham considered the purpose of law and ‘private ethics’ to be the same. According to him, the general objective of all laws is to ‘augment the total happiness of the community’ and therefore ‘to exclude mischief’. For this reason, he did not find it impossible for law to regulate private conduct, although he stated that if it did so in a direct manner, it ought to be by punishment.³⁹

In short, the positivist theory provides the criteria for determining the source of rights but it does not provide a benchmark for determining what the content of rights should be and how they should apply. This theory supports the position that the state is the primary bearer of the obligation to protect human rights. However, since it does not provide a basis for restricting the application of human rights to states only, this theory cannot be used to challenge state law that guarantees rights claimable even in the private sphere if such law was adopted following the established legal process.

how rigid positivism can be in the face of conduct or actions which are clearly morally wrong or illegitimate).

³⁸ Bentham, above n 28, 273.

³⁹ Ibid 271-2.

4 THE MARXIST CRITIQUE

Marxism is a theory that evolved contemporaneously with positivism as a challenge to natural law and natural rights. The raw materials for its evolution were provided by the industrial revolution, which highlighted the poor living conditions of workers.⁴⁰ It is a theory that critiques the public/private dichotomy in the application of human rights both directly and indirectly.

Marxism will be remembered for its stinging attack on natural law and the natural rights theory as tools of oppression. Rights, according to Marx, cannot be eternal or immutable because they take shape within a particular historical context.⁴¹ He contended that rights ‘can never be higher than the economic structure of society and its cultural development conditioned thereby’.⁴² Where the few control the means of production, natural rights, in Marx’s view, become the chief means of the ruling class for maintaining a capitalist order. He argued that ‘None of the supposed rights of man goes beyond the egoistic man ... an individual withdrawn behind his private interests and whims and

⁴⁰ Dennis Lloyd *Introduction to jurisprudence* (London: Stevens & Sons Limited, 1959) 280 fn 6.

⁴¹ Christine Sypnowich *The concept of socialist law* (Oxford: Clarendon Press, 1990) 88.

⁴² Karl Marx ‘Critique of the Gotha programme’ in Robert Tucker (ed) *The Marx-Engels reader* (2nd ed) (New York: WW Norton, 1978) 528.

separate from the community'.⁴³ Thus, he criticised individual rights as a pretext for the protection of individual property.⁴⁴

Unlike adherents to the natural rights theory, who consider the state as a natural institution, Marxists hold that the state is a reflection of unequal conditions.⁴⁵ It only came into existence by reason of the unequal distribution of commodities, which led to the development of class divisions. According to Engels:

The state is by no means a power imposed on society from the outside ... Rather, it is a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it is cleft into irreconcilable antagonism which it is powerless to dispel.⁴⁶

The state in a capitalist environment, Marxists argue, is an institution of compulsion, oppression and exploitation by the bourgeoisie of the working majority. According to Engels:



As the state arose out of the need to hold class antagonism in check, but as it, at the same time, arose in the midst of the conflict of those classes, it is, as a rule, the state of the most powerful, economically dominant class, which by virtue thereof becomes also the dominant

⁴³ Karl Marx 'On the Jewish question' in David McLellan (ed) *Karl Marx: Selected writings* (Oxford: University Press, 1971) 54.

⁴⁴ Tom Campbell *The left and rights: A conceptual analysis of Socialist rights* (London: Routledge & Kegan Paul, 1983) 26.

⁴⁵ RWM Dias *Jurisprudence* (5th ed) (London: Butterworths, 1985) 398.

⁴⁶ Quoted in WHC Eddy *Understanding Marxism: An approach through dialogue* (Oxford: Basil Blackwell, 1979) 47.

class politically, and thus acquires new means of holding down and exploiting the oppressed class.⁴⁷

The Marxist critique therefore highlights the important fact that the concept of human rights and the institution of state can serve the interests of those that are powerful in society or to legitimise systemic and other economic inequalities in the private sphere. This is a concern that is precisely raised by the question of the non-state actors' responsibility for human rights currently.

The Marxist school expressly embraces the notion of duties of individuals to the community. Aryeh Unger has observed that 'the interests of the individual' in a socialist conception of rights 'are subordinate to those of society and in particular to the collective enterprise of building socialism ... and that the rights of the individual are inseparably linked to his duties'.⁴⁸ Ernst Bloch has stated similarly that 'The solidarity of socialism ... signifies that the "human" in "human rights" no longer represents the egoistic individual, but the socialist individual who, according to Marx's prophecy, has transformed his *forces propres* into a social and political force'.⁴⁹ Natural rights, argued Marx, concerned themselves exclusively with political emancipation as opposed to human emancipation.⁵⁰ As a result, man is reduced on the one hand to 'a member of civil

⁴⁷ Quoted in Eddy, *ibid*, 48.

⁴⁸ Aryeh L Unger, *Constitutional development in the USSR: A guide to the Soviet constitutions* (London: Methuen, 1984) 274.

⁴⁹ Ernst Bloch *Natural law and human dignity* (DJ Schmidt trans) (Cambridge: Massachusetts Institute for Technology Press, 1986) 178.

⁵⁰ Marx, above n 43, 57.

society, an egoistic and independent individual' and to 'a citizen, a moral person' on the other hand.⁵¹ While in the public (political) sphere individuals were treated as communal beings, argued Marx, the private sphere became the territory for degrading others.⁵² This prompted him to remark that 'The *recognition of the rights of man by the modern state* has only the same significance as the *recognition of slavery by the State in antiquity*'.⁵³ He therefore submitted that the distinction between private law and public law should be effaced arguing that 'man must recognise his own forces as social forces, organise them, and thus no longer separate social forces from himself in the form of political forces'.⁵⁴

The Marxist theory also helps to criticise the public/private divide in another respect. This theory envisaged a strong state, which could control the distribution of resources in the transition to a classless society. As noted above, it proceeded on the premise that unequal distribution of resources spawns class cleavages patterned by the division of capital and labour. Marxists envisioned that the working class would mobilise and revolt against the minority ruling class to set up a dictatorship of the working class as a transition (socialism) to a classless society (communism).⁵⁵ Law and the state would be retained during the transition but would 'wither away' eventually upon the attainment of

⁵¹ Ibid.

⁵² Emphasis original. See Karl Marx 'The holy family' in Tom B Bottomore & Maximilien Rubel (eds) *Karl Marx: Selected writings in sociology and social philosophy* (Harmondsworth: Penguin, 1963) 224.

⁵³ Ibid.

⁵⁴ Marx, above n 43, 57.

⁵⁵ See generally Sypnowich, above n 41.

communism.⁵⁶ During the transition, the state would determine what rights to guarantee with a strong emphasis on individual duties to the community.⁵⁷ This theory therefore reckons that, while rights would be defined by states, individuals have obligations to society and the state. These obligations could therefore be defined and enforced by the strong socialist state. This would require the state to heavily regulate private conduct for the benefit of everyone. In practice, strong state control of private enterprises occurred in the few states where the envisaged communist revolutions took place. Individual ownership of property was replaced with public ownership. Unless expressly permitted, private enterprise and interests were illegal.⁵⁸ In the USSR, in particular, although private enterprises were reintroduced after 1921, they were under strict state control.⁵⁹ Thus, it can be seen that Marxism does not envisage a situation where non-state actors would have as much influence as they do currently because freedom and formal equality in the private sphere would be curtailed so as to give effect to the notion that every individual has duties to the community in which he/she lives.

In conclusion, the Marxist school highlights that the state machinery and human rights can be abused by powerful actors in society. It challenges the distinction between the 'public' and the 'private' arguing that such distinctions help to blur the structural socio-economic inequalities in society. While this theory was premised on the ideal of a strong socialist state to regulate private and public conduct before a classless society could be

⁵⁶ Ibid.

⁵⁷ Unger, above n 48, 274.

⁵⁸ Ibid 407.

⁵⁹ Ibid 406.

achieved, it expressly conceded that individuals were not as equal and autonomous beings as proposed by the natural rights theory but lived in a society where they owed human rights and other obligations to one another.

5 THE FEMINIST CRITIQUE

The feminist theory can by no means be presented as a single theory since it has wide ranging strands. However, what unites these strands is the use of ‘gender’ or ‘women’ as analytical tools and the focus on women’s experiences in their methodological approach to analysing law.⁶⁰ While feminism was recognised in academic circles as a jurisprudential school only in the 1980s, its roots are traceable to the late 19th century and the early 20th century.⁶¹

⁶⁰ According to Deborah Rhode:



Although they differ widely in other respects, these theories share three central commitments. On a political level, they seek to promote equality between women and men. On a substantive level, feminist critical frameworks make gender a focus of analysis; their aim is to reconstitute legal practices that have excluded, devalued, or undermined women's concerns. On a methodological level, these frameworks aspire to describe the world in ways that correspond to women's experience and that identify the fundamental social transformations necessary for full equality between the sexes.

Deborah L Rhode ‘Feminist critical theories’ (1990) 42 *Stanford Law Review* 617, 619. See also Clare Dalton ‘Where we stand: Observations on the situation of feminist legal thought’ (1988) 3 *Berkeley Women’s Law Journal* 1.

⁶¹ Catherine Albertyn ‘Feminism and the law’ in Christopher Roederer & Darrel Moellendorf (eds) *Jurisprudence* (Lansdowne: Juta & Company Ltd, 2004) 291, 295.

Feminism has been at the forefront in critiquing the public/private distinction in the application of human rights and the law generally.⁶² Feminists admit that this divide is a central tenet of the liberal or natural rights theory but trace the origins of this divide to a much earlier era. According to Margaret Thornton, the distinction between the public and the private ‘antedates modern liberalism by more than two millennia.’⁶³ She observes that Greek philosophy distinguished between the *polis* (the public sphere) and the *oikos* (the home or the private sphere).⁶⁴ The *polis* was the realm for politics in which only men with two Athenian parents were allowed to participate as free and equal citizens. The *oikos* was the province for slaves, children and women who were dominated by men. The *oikos* was regarded as a subordinate sphere to the *polis*. According to Thornton, freedom and inequality in the *oikos* was maintained in order to allow the master the freedom to participate within the *polis*.⁶⁵ Greek thought justified such treatment of the *oikos* as natural. Aristotle wrote:



From their very birth some are marked out for subjection and others for rule (...). It is both natural and advantageous for the body to be governed by the soul, and for the emotional to be governed by the mind ... Also the male has a different nature than the female, the one being

⁶² According to Carole Pateman: ‘The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.’ Carole Pateman ‘Feminist critiques of the public/private dichotomy’ in Stanely I Benn and Gerald F Gaus (eds) *Public and private in social life* (New York: St Martins Press, 1983) 281.

⁶³ Margaret Thornton ‘The cartography of public and private’ in Margaret Thornton (ed) *Public and private: Feminist legal debates* (Oxford: Oxford University Press, 1995) 2.

⁶⁴ *Ibid* 2 – 3.

⁶⁵ *Ibid* 3.

superior and the ruler, the other being inferior and the ruled. The same condition necessarily applies to all mankind.⁶⁶

This distinction between the *polis* and the *oikos* was inherited by the natural rights theory – using the terms the ‘public’ encompassing matters pertaining to government and service of the state and ‘civil society’ encompassing the sphere where individuals are free from state regulation or interference.⁶⁷ The term civil society was later replaced with ‘private sphere’ to represent private activities, interests, and institutions.⁶⁸ The institution of the family was regarded as falling within the private sphere not fitting for state or legal regulation.⁶⁹

Feminists argue that this categorisation, based on the social contract theory, is ‘aggressively male’ and legitimises or facilitates the subordination of women to men in the so-called private sphere.⁷⁰ Pateman succinctly contends:

The separation of the ‘paternal’ from political rule, or the family from the public sphere, is also the separation of women from men through the subjection of women to men. ... The fraternal social contract creates a new modern patriarchal order that is presented as divided into two spheres: civil society or the universal sphere of freedom, equality, individualism,

⁶⁶ Quoted in Gaete, above n 21, 114.

⁶⁷ Thornton, above n 63, 4.

⁶⁸ Ibid.

⁶⁹ Ibid. See also Halary Charlesworth, Christine Chinkin & Shelly Wright ‘Feminist approaches to international law’ (1991) 85 *American Journal of International Law* 613, 626.

⁷⁰ See eg Ruth Lister *Citizenship: Feminist perspectives* (London: MacMillan, 1997). See also Celina Romany ‘Women as aliens: A feminist critique of the public/private distinction in international human rights law’ (1993) 6 *Harvard Human Rights Journal* 87, 100 – 103.

reason, contract and impartial law – the realm of men or ‘individuals’; and the private world of particularity, natural subjection, ties of blood, emotion, love and sexual passion – the world of women in which men also rule.⁷¹

Thus, the thrust of the feminist critique is that the public/private dichotomy operates as a smokescreen for insulating violations of human rights committed in the private sphere against women. Feminists contend that infractions in the private sphere affect women more than men, who are in most cases the oppressors.⁷² The divide therefore serves the interests of men who dominate the public sphere and fear oppression from the state, but it does not benefit women who do not participate much in the public sphere and suffer oppression in both the private and public domains.⁷³ According to Hilary Charlesworth, the law has been used to exclude women from the public sphere – from professions, from the market place, from the vote – but it has not regulated the areas of social, economic and moral life which encompass the family, home, and sexuality and are associated with women.⁷⁴ As a result, such abuses as domestic violence and rape committed in the home, for example, are rarely the subject of state intervention or legal regulation while the same

⁷¹ Carole Pateman *The disorder of women: Democracy, feminism and political theory* (Cambridge: Polity, 1989) 43.

⁷² See Aaron X Fellmeth ‘Feminism and international law: Theory, methodology, and substantive reform’ (2000) 22 *Human Rights Quarterly* 658, 668.

⁷³ Ibid.

⁷⁴ Hilary Charlesworth ‘Worlds apart: Public/Private distinctions in international law’ in Thornton (ed), above n 63, 243, 245 – 6. See also Paul Hunt *Reclaiming social rights: International and comparative perspectives* (Aldershot: Ashgate, 1996) 86.

acts when committed by state attract legal responsibility.⁷⁵ In view of these arguments, feminists submit that the public/private distinction in the application of human rights and the law generally is undesirable.⁷⁶

In demonstrating the fact that the public/private distinction serves the purpose of subjugating women to men, the feminist critique also posits that the natural rights theory recognises only those rights that are tailored to suit the needs of men. This critique is directed at the recognition of civil and political rights and the rejection of socio-economic rights as human rights. Like Marxists, feminists contend that while the liberal conception of human rights guarantees equality between men and women, this formal equality is meaningless considering that women face diverse structural problems due to their historical exclusion and gendered division of labour.⁷⁷ In other words, feminists contend that the private sphere is also made up of unequal relationships contrary to the position held within the natural rights theory which considers the private sphere to be composed of free and equal individuals. Thus, Marshall argued that women can therefore not enjoy civil and political rights on the same footing as men without addressing the extant

⁷⁵ See Charlotte Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 486, 489 – 491; Dorothy Q Thomas & Michelle E Beasley 'Domestic violence as a human rights issue' (1993) *Human Rights Quarterly* 36, 40; Ursula A O'Hare 'Realizing human rights for women' (1999) 21 *Human Rights Quarterly* 364, 369.

⁷⁶ See Danwood M Chirwa & Sibonile Khoza 'Towards enhanced citizenship and poverty eradication: A critique of *Grootboom* from a gender perspective' in Amanda Gouws (ed) *(Un)thinking citizenship: Feminists debates in contemporary South Africa* (Aldershot: Ashgate, 2005) 137, 142.

⁷⁷ See Beth Goldblatt 'Citizenship and the right to childcare' in Gouws (ed), *ibid*, 117, 122.

structural inequalities between men and women.⁷⁸ He therefore argued for the recognition of social rights.⁷⁹ Many other feminist writers have endorsed Marshall's idea and highlighted that socio-economic rights are particularly relevant to women. For example, Hilary Charlesworth and Christine Chinkin have argued:

In major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men within their public life – their relationship with government. The

⁷⁸ According to Marshall citizenship should comprise of three elements, namely, civil, political and social rights defined as follows:

The civil element is composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert all one's rights on terms of equality with others and by due process of law ... By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body ... By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.

TH Marshall 'Citizenship and social class' in TH Marshall & Tom Bottomore (eds) *Citizenship and social class* (Cambridge: Cambridge University Press, 1950)1, 8.

⁷⁹ According to Pateman, 'The political lion skin has a large mane and belonged to a male lion; it is a costume for men. When women finally win the right to don the skin it is exceedingly ill-fitting and therefore unbecoming.' Pateman, above n 71, 6.

same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women, although these rights are addressed to states.⁸⁰

Charlotte Bunch has argued similarly that much of the abuses affecting women occur as part of ‘a larger socio-economic web that entraps women which cannot be delineated as exclusively political or solely caused by states.’⁸¹

In conclusion, the feminists critique challenges the characterisation of the private sphere as involving equal and free parties by showing that women and other actors such as children have historically been treated as second-rate citizens. The activities, acts and interests that fall within the private sphere largely concern women and are thus not the subject of rights and duties. Those that fall within the public sphere largely concern men because these dominate the public sphere. By defining human rights as those that relate to the exercise of power in the public sphere, which is dominated by men, and limiting these rights to applying in that sphere, the public/private divide serves to protect men’s interests and reinforces women’s subordination to men. The feminist critique therefore supports both the recognition of economic, social and cultural rights, which are viewed as important in the private sphere, and also the recognition of the horizontal application of human rights.

⁸⁰ Hilary Charlesworth & Christine Chinkin ‘The gender of *jus cogens*’ (1993) 15 *Human Rights Quarterly* 63.

⁸¹ Bunch, above n 75, 488.

6 THE SOCIO-HISTORICAL APPROACH TO HUMAN RIGHTS

The socio-historical approach to human rights is an emerging school that also lends support to the horizontal application of human rights.⁸² This approach is a blend of the sociological and historical schools of jurisprudence. It values the role of social and historical factors in the formulation and conception of human rights.

Like Marxism, the socio-historical conception of human rights does not support the view held by natural rights theorists that human rights pre-exist the state or society, and that they are immutable and timeless truths. Rather, its point of departure is that human rights are essentially social, historically conditioned phenomena.⁸³ Proponents of this school maintain that society gives credence to the moral compulsion of rights.⁸⁴ Not only is the notion of being human constructed by society but it is also only in society that man and woman is given moral existence.⁸⁵ Society humanises men and women as beings capable of exercising reason and concern for others. To be recognised as a bearer of rights, the argument proceeds, is in itself an acknowledgment of belonging to a

⁸² The term socio-historical approach is used here as a shorthand expression of several theories that acknowledge the role of society and history in the conception of human rights. Examples include what some theorists have called 'the struggle approaches', 'the social democratic theory', and 'the social approaches'.

⁸³ See Christof Heyns 'A "struggle approach" to human rights' in A Soteman (ed) *Pluralism and law* (Kluwer Academic Publishers, 2001) 171.

⁸⁴ Sypnowich, above 41, 106.

⁸⁵ Ibid.

community of individuals.⁸⁶ Thus, a man becomes an ‘intelligent being’ only when he becomes a member of society and becomes ‘stupid and unimaginative animal’ when he belongs to no society at all.⁸⁷ Furthermore, society provides a moral basis for the inviolability and significance of human rights. As morality takes shape in society, so is what is morally defensible or unacceptable determined by perceptions, beliefs and values of society.⁸⁸ Also, it is only through belonging to society that individuals are able to realise the impact of their and other peoples’ actions or omissions on others and to understand the need to treat others with equal concern and respect.⁸⁹

The socio-historical theory therefore posits that ‘the ideas and practices concerning human rights are created by people in particular historical, social, and economic circumstances’.⁹⁰ What spurs the recognition of human rights is the ‘struggles of real people experiencing real instances of domination’.⁹¹ Unlike the Marxist school, however, such instances of domination need not be limited to the capital owner/labourer relations.

⁸⁶ Ibid.

⁸⁷ Jean-Jacques Rousseau *Social contract*, in *Social contract and discourses*, (translation with an introduction by GDH Cole) (London: JM Dent, 1973) 178.

⁸⁸ Sypnowich, above n 41, 106.

⁸⁹ Ibid.

⁹⁰ Neil Stammers ‘A critique of social approaches to human rights’ (1995) 17 *Human Rights Quarterly* 488.

⁹¹ A Belden Fields & Wolf-Dieter Narr ‘Human rights as a holistic concept’ (1992) 14 *Human Rights Quarterly* 1, 5.

In a telling paragraph, Sypnowich has summed up this conception of human rights as follows:

Human rights are constructed in a process of insurgence, so that we come to understand them in the changing social context of new political projects. *Human rights often emerge from the margins of society, as the product of persecution and the protest it generates.* We create a human right to freedom in the face of a system of slavery; a right to vote when women or the propertyless are denied political power; a right to freedom of expression when dissent is repressed. *Human rights respond to the idea that a definition of reality cannot be exhausted by reference to the present.* They are rights constructed in a process of striving towards the ‘what has not yet become’, which has, in some sense, a truth surpassing the truth that exists.⁹²
(Emphasis supplied)

The thrust of the socio-historical school is therefore that societal perceptions, values, beliefs and disbeliefs are subject to change. Such changes shape the development of the notion of human rights. While human rights were first recognised to place limits on state power, the concept of power has come to be understood more broadly. According to Neil Stammers:

⁹² Sypnowich, above n 41, 105. Fields and Narr have expressed a similar view as follows:

Human rights constitute a historical phenomenon. People are not born with them, despite what the US and French texts proclaim. People may be born with the potential for rights; they may long for them consciously or unconsciously; they may struggle for them. But human rights are norms and practices which can be achieved only if proper historical circumstances are created.

See Fields and Narr, *ibid*, 4.

Within the liberal tradition, the concept of power has often been used in a very limited way: as the capacities of social actors located in the political sphere (the state, government, political parties, etc.). In other words, the sort of power that has been much described, studied, and analyzed has been restricted to political power. There have been, of course, much wider understandings of power than this, most evidently emanating from the discipline of sociology. However, for the most part, these alternative conceptions have tended to focus, not on power as such, but on the perceived structural basis of that power. For example, in the case of Marxism, the focus has been on the capitalist mode of production. In the last thirty years or so—and significantly linked to the rise of the so-called “social movements,” especially the feminist movement – power has come to be understood in a much wider sense, as being a pervasive feature of most, probably all, forms of social relations.⁹³

The socio-historical approach therefore holds that human rights must apply to protect people from all forms of power in addition to state power. According to Neil Stammers:



There are two levels at which the social democratic approach has a manifestly broader understanding of the relation between power and human rights than found in the liberal tradition with its traditional focus on state power. The first level comes back to the idea of individual vulnerability, because the social democratic approach accepts that individuals are vulnerable to the exercise of power per se, and further because their thinking is not limited to particular forms of power. The second level, a derivation from the first, recognises that individuals can be vulnerable to the operations of a capitalist market economy. This implies a recognition of the problems generated by the existence of economic power in the private realm.⁹⁴

⁹³ Neil Stammers ‘Social movements and the social construction of human rights’ (1999) 21 *Human rights Quarterly* 980, 982.

⁹⁴ Stammers, above n 90, 499.

Thus, conceived in terms of power the socio-historical approach regards human rights as a limit or challenge to the exercise of power in all its manifestations. Human rights must therefore apply in the private sphere to protect individuals and groups from abuses of power wielded in the private sphere. To limit the application of human rights, adherents of this school contend, would amount to legitimising human rights infractions that occur in the private realm and render the whole concept of human rights nugatory.⁹⁵

7 A CROSS-CULTURAL CONCEPTION OF HUMAN RIGHTS AND ITS IMPLICATIONS FOR NON-STATE ACTORS

7.1 The relevance of a cross-cultural perspective of human rights

This part seeks to demonstrate that certain non-Western notions of human rights support the cause for the application of these rights to non-state actors. Before doing so, two questions must be answered. The first relates to the relevance of non-Western notions of human rights while the second asks whether non-Western societies knew any notions of human rights or not.

Universalists, relying on the natural rights theory, hold that human rights are universal. While conceding that human rights originated from the West,⁹⁶ they still maintain that human rights have validity everywhere on three bases: that human rights adhere to every

⁹⁵ Ibid.

⁹⁶ See Shivji, above n 37, 11.

individual by virtue of being human;⁹⁷ that since key characteristics of Western societies have become globalised, it follows that the human rights ideology as developed in the West is directly relevant to other societies as well⁹⁸; and that human rights in the contemporary world are ‘almost universally accepted – at least in word, or as ideal standards’.⁹⁹ These claims have met with stern resistance from cultural relativists, who hold that human rights are culturally relative – that human rights are shaped by cultural contexts and, since cultures differ, it follows that human rights cannot be universal.¹⁰⁰ While cultural relativists fail to respond to the criticism that their theory gives credence to repressive regimes, universalists also fail to answer the charge that their theory amounts to cultural imperialism by the West.¹⁰¹ This has led some commentators to take a middle ground which accepts human rights are culturally relevant to a degree. However, these take the view that that there exists some minimum core of rights that can be considered universal and can be expanded through reinterpretation of both local and international

⁹⁷ Rhoda Howard ‘Dignity, community, and human rights’ in Abdullahi A An-Na’im (ed) *Human rights in cross-cultural perspectives: A quest for consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81, 82.

⁹⁸ See Edward Kannyo *Human rights in Africa: problems and prospects* A report prepared for the International League for Human Rights, May 1980, 4.

⁹⁹ Jack Donnelly *Universal human rights in theory and practice* (Ithaca: Cornell University Press, 1989) 23.

¹⁰⁰ See Roda Muskat ‘Culture and international law: Universalism and relativism (2002) 6 *Singapore Journal of International and Comparative Law* 1028, 1031.

¹⁰¹ See eg Guyora Binder ‘Cultural relativism and cultural imperialism in human rights law’ (1999) 5 *Buffalo Human Rights Law Review* 211, 215 – 219.

norms. Abdullah An-Na'im, for example, has argued for a cross-cultural approach 'to explore the possibility of cultural reinterpretation and reconstruction through *internal cultural discourse and cross-cultural dialogue*, as a means to enhancing the universal legitimacy of human rights'.¹⁰² He argues that this approach:

does not assume that sufficient cultural support for the full range of human rights is either already present or completely lacking in any given cultural tradition. Rather more realistically prevailing interpretations and perceptions of each tradition can be expected to support some human rights while disagreeing or even completely rejecting other human rights.¹⁰³

According to An-Na'im, the cross-cultural approach:

accepts the existing international standards while seeking to enhance their cultural legitimacy within the major traditions of the world through internal dialogue and struggle to establish enlightened perceptions and interpretations of cultural values and norms. Having achieved an adequate level of legitimacy within each tradition, through this internal stage, human rights scholars and advocates should work for cross-cultural legitimacy, so that people of diverse cultural traditions can agree on the scope, and methods of implementing these rights.¹⁰⁴

¹⁰² Abdullahi A An-Na'im 'Introduction' in An-Na'im (ed), above n 97, 1, 3.

¹⁰³ Ibid.

¹⁰⁴ Abdullahi A An-Na'im 'Towards a cross-cultural approach to human rights: The meaning of cruel, inhuman, or degrading treatment or punishment' in An-Na'im (ed), above n 97, 19 at 21.

While agreeing with An-Na'im, Adamantia Pollis has submitted further that the so-called cross-cultural approach should be extended so that change can also occur to Western notions of human rights.¹⁰⁵ She contends:

The liberal doctrine of human rights should be subjected to discourse and dialogue, as are non-Western values. Such an undertaking can be facilitated by recognising the absence of a single overriding verity in each philosophical tradition, particularly as it pertains to an individual and that person's rights. By not engaging primarily or necessarily with the official dogmas and accepting potential alternative strains within each tradition, shared values may be ascertainable. ... By modifying An-Na'im's approach through an interpenetration of the universality and cultural relativist doctrines, both doctrines can be reconstructed to lead to minimal common ground.¹⁰⁶

Furthermore, Chokr has contended that, in addition to cultural legitimacy, a universal basis of human rights can be established by interpreting human rights in the context of the lived experiences of disparate peoples, their histories and existing power relations within them. He writes:

While I agree that the reality of the universality of human rights can greatly be enhanced by the marshalling of cross-cultural data and analyses, ... I agree with Jennifer Schirmer, that 'the discussion of human rights must be further *contextualised* in two ways: in terms of the *meanings* of inner "cultural logics, of the various "ways of world making", and in terms of *power* itself – between the powerful and the powerless.' For, 'these are issues which cannot

¹⁰⁵ Adamantia Pollis 'A new universalism' in Adamantia Pollis & Peter Schwab (eds) *Human rights: New perspectives, new realities* (London: Lynne Rienner Publishers, 2001) 9, 24. See also Jason Morgan-Foster 'A new perspective on the universality debate: Reverse moderate relativism in the Islamic context' (2003) 10 *ILSA Journal of International and Comparative Law* 35.

¹⁰⁶ *Ibid.*

be ignored in an interdependent world in which rights – no matter how they are called or whose they are – are too often ignored altogether’.¹⁰⁷

The upshot of this discussion is that the universality of human rights can be enhanced if notions of human rights in non-Western societies are incorporated into mainstream discourse on human rights. Otherwise, the idea of human rights will continually suffer from the criticism that it is a western concept that lacks universal legitimacy.

7.2 Is the concept of human rights alien to non-Western societies?

However, some jurists contend that human rights are alien to non-Western societies. Rhoda Howard and Jack Donnelly, for example, argue that these societies knew the concept of human dignity but not the idea of human rights.¹⁰⁸ According to these jurists, human dignity refers to ‘the particular understandings of the inner moral worth of the human person and his or her proper political relations with society’.¹⁰⁹ It does not confer a claim on an individual against a society. Rather, it confers privileges on socially ‘unequal’ beings.¹¹⁰ By contrast, they define human rights as entitlements that every human being ought to have regardless of status.¹¹¹ Human rights, they claim, are

¹⁰⁷ Nader N Chokr *Human rights: Beyond Universalism and cultural relativism – Towards a contextual, dynamic and cross-cultural approach* (R&D Consultants, 1999) (unpublished).

¹⁰⁸ See Rhoda E Howard & Jack Donnelly ‘Human dignity, human rights, and political regimes’ in Jack Donnelly *Universal human rights in theory and practice* (New York: Cornell University Press, 1989) 89; Howard, above n 97.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

‘inalienable’ and confer claims on the ‘physical, socially equal human being’ against the family, community, or the state.¹¹² Thus, Howard and Donnelly take the view that human rights are a means of protecting human dignity. They therefore submit that while all societies have underlying concepts of dignity and justice, it is only western societies that knew the concept of human rights.¹¹³

Non-Western scholars have found the suggestion that human rights are foreign to non-Western societies objectionable. Makau Mutua poignantly argues:

[T]his argument in effect destroys any claim of universality because it places the concept of human rights exclusively within a specific culture. Unless they believe that these ideals of liberalism are inherently universal, it is impossible to reconcile their assertion that the concept of human rights is universal, while at the same time assigning to it uniqueness and cultural specificity.¹¹⁴



Others have criticised Howard’s and Donnelly’s position as a façade of imperialism. Fernyhough has argued:

From one perspective the human rights tradition was quite foreign to Africa until Western, ‘modernising’ intrusions dislocated community and denied newly isolated individuals access to customary ways of protecting their lives and human dignity. Human rights were alien to Africa precisely because it was pre-capitalist, preindustrial, decentralised, and characterised by communal forms of social organisation. From the opposing viewpoint is a fundamental rejection of this as a new, if rather subtle, imperialism, an explicit denial that human rights

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Makau Mutua ‘The Banjul Charter: The case for an African fingerprint’ in Abdullahi A An-Na’im (ed) *Cultural transformation and human rights in Africa* (London: Zed Books Ltd, 2002) 68, 78.

evolved only in the Western political theory and practice, especially during the American and French revolutions, and not in Africa.¹¹⁵

In short, the claim that non-Western societies have no original notions of human rights is ‘paternalistic’ and presumptuous. In particular, the distinction between human dignity and human rights highlighted by Howard and Donnelly is difficult to maintain insofar as the claim that non-Western societies did not know any notions of human rights is concerned. As will be shown below, certain non-Western societies especially from Africa recognized both the concept of dignity and notions of human rights that are similar to current human rights norms. It will also be shown that these human rights concepts recognized the notion of individual duties to parents, elders, the sick, the family, the community and other members of society.

7.3 The conception of human rights in non-Western societies



Studies of certain ethnic groups in Africa reveal that these societies afforded limited protection of what are now called human rights. The concept of human rights in Africa was communitarian in the sense that it provided protection based on ascribed status and membership to the community,¹¹⁶ and sought a vindication of communal well-being.¹¹⁷

¹¹⁵ Timothy Fernyhough ‘Human rights and precolonial Africa’ in Ronald Cohen, Goran Hyden & Winston P Nagan (eds) *Human rights and governance in Africa* (Gainesville, FL: University Press of Florida, 1993) 39, 40.

¹¹⁶ Chris C Mojekwu ‘International human rights: The African perspective’ in Jack L Nelson & Vera M Green (eds) *International human rights: Contemporary issues* (Stanfordville, N.Y.: Human Rights Publishing Group, 1980) 85, 86.

Unless one was insane or quarantined because of a contagious disease, it was anomalous for one to die alone or live alone.¹¹⁸ However, individual rights were also recognised.¹¹⁹ The rights recognised ranged from the right to life, land, marriage, personal freedom, fair trial, welfare, conscience and association to limited government.¹²⁰ As is obvious from this list, the category of the rights was not limited to civil and political rights. Some rights were socio-economic in nature.¹²¹

Significantly, African societies conceived of guarantees of human dignity as embodying both rights and obligations. The basis of the right/duty dialectic lies in the African notion that an individual forms an integral part of the community as captured beautifully by Mbiti in the following terms: 'I am because we are, and because we are therefore I am'.¹²² The African conception of human rights, it has been argued, attunes

¹¹⁷ Josiah AM Cobbah 'African values and the human rights debate: An African perspective, (1987) 9 *Human rights Quarterly* 309, 321.

¹¹⁸ Ronald Cohen 'Endless teardrops: Prolegomena to the study of human rights in Africa' in Cohen (ed), above n 115, 3, 14.

¹¹⁹ According to Gyekye, 'the African social order is, strictly speaking, neither purely communalistic nor purely individualistic'. Kwame Gyekye *An essay on African philosophical thought: The Akan conceptual scheme* (Cambridge: Cambridge University Press, 1987) 154.

¹²⁰ Fernyhough, above n 115, 76.

¹²¹ El-Obaid El-Obaid and Kwado Appiagyei-Atua have argued that 'A truly African conception of rights would not identify civil and political rights as distinct from economic, social and cultural rights'. El-Obaid A El-Obaid and Kwado Appiagyei-Atua 'Human rights in Africa: Linking the past to the present' (1996) 41 *McGill Law Journal* 819, 846.

¹²² John Mbiti *African religions and philosophy* (New York: Praeger, 1970) 141.

‘individual interests to the interests of others’ and requires ‘positive assistance to one’s fellow human beings’.¹²³ According to Bonny Ibhawoh:

For every right to which a member of society was entitled, there was a corresponding communal duty. Expressed differently, ‘the right of one kinship member was the duty of the other and the duty of the other kinship member was the right of another’. Although certain rights attached to the individual by virtue of birth and membership to the community, there were also corresponding communal duties and obligations.¹²⁴

Julius Nyerere also observes that common obligations among African societies of individuals to others, their families, and the communities included: deference to age because a long life is generally associated with wisdom and knowledge; solidarity with fellow human beings, especially in times of need; and reciprocity in labour issues and for generosity.¹²⁵



Thus, rights and duties in Africa were inseparable.¹²⁶ They served to highlight the reciprocal relationship between the individual and the community to which he belonged. A combination of rights and duties was necessary to achieve and maintain unity, cohesion

¹²³ Francis M Deng ‘A cultural approach to human rights among the Dinka’ in Abdullahi An-Na’im & Francis M Deng (eds) *Human rights in Africa: Cross cultural perspectives* (Washington DC: Brookings Institution, 2001) 266.

¹²⁴ Bonny Ibhawoh ‘Cultural relativism and human rights: Reconsidering the Africanist discourse’ (2001) 19(1) *Netherlands Quarterly of Human Rights* 43, 53 – 54.

¹²⁵ See Mutua, above n 114, 75.

¹²⁶ K Mbaye & B Ndiaye ‘The Organisation of the African Unity’ in K Vasak (ed) *The International dimensions of human rights* (Vol 2) (Westport: Greenwood Press, 1982) 583, 588 – 589.

and viability.¹²⁷ These rights and obligations were not framed as legal entitlements because African societies did not make clear cut distinctions between morality, religious values and laws, which all formed part of a ‘homogenous cosmology’.¹²⁸ However, they were enforceable within the existing procedures of the societies.¹²⁹

The communitarian conception of rights is not exclusive to pre-colonial African societies. Adamantia Pollis notes that the values of human dignity and humanity also existed in Confucianism and Buddhism.¹³⁰ In these societies, a community was responsible for ensuring ‘the survival and security needs both of its members and those outside the communal group’, ‘for without this there was no human dignity’.¹³¹ Furthermore, Pollis observes that the concept of equality in ‘traditional’ societies was different from the liberal one, which in principle guarantees equal opportunity. In ‘traditional’ societies, she argues, equality meant ‘equal treatment within the defined parameters for all group members’. It entailed an obligation on the community to care for the survival and security needs of all its members.¹³²

¹²⁷ Mutua, above n 114, 81.

¹²⁸ Ibhawoh, above n 124, 46.

¹²⁹ Ibid.

¹³⁰ Pollis, above n 11, 16.

¹³¹ Ibid.

¹³² Ibid 15.

It has also been argued that Islamic communities also knew certain notions of human rights that recognised both rights and duties.¹³³

7.4 Implications of the non-Western conception of human rights for non-state actors

Admittedly, many beliefs, perceptions and values have been altered by colonialism and modernisation. However, some of these values have proved resilient. Solidarity, communal and individual duties, and concern for others, though modified in detail, remain important principles that govern non-Western societies.¹³⁴ As will be shown in chapters 3 and 7, the notion of individual duties characterizes the African regional system of human rights. Both the African Charter on Human and Peoples Rights and the African Charter on the Rights and Welfare of the Child recognize these duties. While the extent to which emphasis can be placed on these duties relative to rights will remain a topic of debate,¹³⁵ it is clear that non-Western notions of human rights support the obliteration of

¹³³ See Morgan-Foster, above n 105. However, it must be noted that this limited notion of equality meant that other members of society such as women enjoyed a subordinate status to men.

¹³⁴ With respect to Africa, Cobbah has observed that ‘Within a changing world, we can expect that some specific aspects of African lifestyles will change. It can be shown, however, that basic Afrocentric core values still remain and these values should be admitted into the international debate on human rights.’ Cobbah, above n 117, 331.

¹³⁵ It is often argued that emphasis on duties to the state can be an effective trump card by repressive governments who would violate individual rights in order to implement state policies aimed at securing social and economic development. See Hastings WO Okoth-Ogendo ‘Human rights and people’s rights: What point is Africa trying to make?’ in Cohen et al, above n, 74, 79. A response has been that this argument is overstated. Although the record of human rights of African states remains poor, their violations

the public/private divide in the application of human rights. These societies consider non-state actors as an integral part of the society and therefore that they have both rights and duties. While pre-colonial societies did not know legal persons in the modern sense of the term, the foregoing discussion demonstrates that these societies would also consider these actors as falling within the reach of these duties. Furthermore, it has also been shown that these societies' conception of human rights was also wider in that they embraced what are now called economic, social and cultural rights.¹³⁶

8 CONCLUSION

This chapter demonstrates that the natural rights theory is largely responsible for the state-centricity in the application of human rights. It has shown that this theory was constructed to justify the rising institution of the state in a context where liberalism and capitalism was gaining ground. The legitimacy of state power was erected on the idea of social contract whereby the legitimacy of state authority was conditioned upon the assurance that the state would refrain from interfering into and protect individual freedom in the private sphere. Thus, individuals were given freedom to contract and use their resources in order to maximise their happiness in the private realm. Accordingly, the rights and obligations generated by the natural rights theory were limited to civil and political rights which enabled certain individuals to participate in the public sphere. This chapter has argued that the state-centric approach that the natural rights theory took was

is hardly attributable to social-economic policies that stress individual duties to the state. See Mutua, above n 114, 89 – 90.

¹³⁶ See above n 121.

largely shaped by the context of the time. Apart from the fact that individual/state relations have changed significantly over time, as shown in chapter 1, this theory ignored the important fact that individuals live in a 'complex web of relations' and that the private sphere is not really composed free and equal individuals.

The position of positivism with regard to the application of human rights is not very clear. Some may consider it as supporting the state centric application of human rights to the extent that adherents to this school consider rights to be those recognised by the state. Thus, one may argue that it is only states that can hold obligations in relation to human rights. However, this chapter has shown that such a conclusion cannot be easily defended. This school, it has been argued, does not espouse any basis for determining the content and duty bearers of rights apart from the methodological criteria – namely that human rights are those that are recognised in positive law lawfully and duly enacted in accordance with recognised legal processes. It is therefore possible that a state can pass law that applies in the private sphere or imposes obligations on non-state actors.

Significantly, this chapter has demonstrated that there are a number of jurisprudential schools that actually critique the natural rights theory's distinction between the public and the private and support the horizontal application of human rights either directly or indirectly. The first is the Marxist school. A significant contribution of this school has been its critique of natural rights as a potential tool for powerful actors to oppress poor and often defenceless people. Marxists argue that economic inequalities in the private sphere have a huge impact on the ability of people to participate on an equal basis in the public sphere. Thus, Marxism advocated for a strong state that would be able to control

private actors and distribute resources amongst everyone. It also advocated for the collapsing of the distinction between public and private law.

That private actors should have binding human rights obligations is strongly supported by the feminist and socio-historical schools respectively. The feminist critique argues poignantly that the public/private divide serves the interests of men and shield non-state actors from human rights responsibility for abuses committed against women and children in the private sphere. It maintains that the activities, interests and institutions considered to fall in the public domain are relevant to advancing the interests of male members of society who dominate this sphere while those that are categorised as private are predominantly relevant to women. Feminists therefore contend that non-state actors must also be held accountable for human rights and that the law should regulate the private sphere more than it currently does in order to prevent and redress violations committed by non-state actors in this sphere.

The socio-historical school, it has been argued, holds that human rights are shaped by changing socio-historical circumstances. It states that human rights are entitlements that impose limitations on or claims against powerful entities. Thus, this theory holds that human rights should be applicable to protect people from possible abuse of all forms of power by both state and non-state actors.

A cross-cultural perspective of human rights also lends support to the recognition of binding human rights obligations of private actors. Human rights are currently dominated by the natural rights conception. As this chapter has argued, there is need for a cross-cultural dialogue that should permit other cultures to contribute to the development of a more universally acceptable doctrine of human rights. This chapter has demonstrated that

African societies and other non-Western cultures knew ideas similar to current human rights standards, which emphasised duties of individuals to the family, community and the society as a whole. These societies' perspectives lend support to the idea that non-state actors must be bound by human rights.

In conclusion, it can be argued that the view that human rights cannot bind non-state actors has less philosophical support than that which advocates for the recognition of human rights obligations of these actors. The next chapter will consider the question whether non-state actors can be considered as subjects of international law and, thus, bear direct obligations in relation to international human rights.



Chapter 3

THE CONCEPT OF SUBJECTS OF INTERNATIONAL LAW AND NON-STATE ACTORS

1 INTRODUCTION

The public/private distinction in the application of human rights law is not restricted to domestic law. This distinction is also maintained in international law.¹ As a result, the prevailing view is that non-state actors cannot have binding human rights obligations in international law on the ground that these actors are generally considered incapable of qualifying as subjects of international law.²

While most of the arguments advanced against the public/private divide in chapter 2 are also valid with respect to the application of this divide in international law,³ the



¹ This distinction operates at two levels. The first distinguishes between public international law and private international law. The former is regarded as encompassing the law governing intergovernmental issues while the latter is considered as encompassing domestic laws governing the choice of legal systems regarding dealings between private persons. The second level relates to the application of human rights itself, namely that these rights apply on to public relations not private relations. See Hilary Charlesworth 'Worlds apart: Public/private distinctions in international law' in Margaret Thornton (ed) *Public and private: Feminist legal debates* (Oxford: Oxford University Press, 1995) 243 – 244. This chapter focuses on the latter distinction.

² See part 3 below.

³ See eg Celina Romany 'Women as aliens: A feminist critique of the public/private distinction in international human rights law' (1993) 6 *Harvard Human Rights Journal* 87; Hilary Charlesworth Christine Chinkin & Shelly Wright 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613.

question of subjects of international law deserves special treatment because it is the key principle that defines which actors can bear rights and duties in international law. This chapter therefore seeks to unpack the concept of subjects of international law. It demonstrates that this concept does not present any theoretical barriers to the recognition of binding human rights obligations of non-state actors in international law. It is argued that a range of new actors including international organisations and insurgents qualify as subjects of international law. Although controversy still surrounds the status of individuals, non-governmental organisations (NGOs) and multinational corporations, it is argued that the concept of subjects of international law, in and of itself, does not preclude the recognition of these as subjects and that the trend is towards accepting them as international legal persons bearing rights and obligations.

The chapter begins by exploring the links between the definition of international law and the concept of subjects of international law. It then defines what being a subject of international law entails. Some of the commonly identified elements of subjectivity are explored and critiqued. This discussion is followed by a discussion of the emerging norms in international human rights law and international law generally that suggest that international law, while primarily aimed at binding states, also can have direct application to non-state actors. Direct application here refers to a situation where international law norms are defined in a manner that expressly indicates that the particular norm imposes an obligation on a non-state actor. The last part deals with selected actors and discusses their status in international law.

2 THE OBJECT THEORY OF INTERNATIONAL LAW

The view that non-state actors cannot bear rights and duties in international law was largely supported by the so-called ‘object theory’ of international law propounded by a German jurist, Heilborn, in 1896.⁴ According to this theory, non-state actors (especially individuals) cannot be subjects of international law because they have no international rights and duties, and can neither invoke this law nor break it.⁵ On the contrary, this theory considers these actors as objects of this law because they can benefit from international law or get restrained by it to the extent that this law imposes a duty on the state or confers a right on the state to protect the interest of or regulate these actors in the domestic sphere.⁶ As an object of international law, non-state actors rely on their nation state to protect their interests or rights. Proponents of the object theory argue that the link between international law and non-state actors is nationality. According to Oppenheim:



It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations ... Such individuals who do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no

⁴ See George Manner ‘The object theory of the individual in international law’ (1952) 46 *American Journal of International Law* 428, 443 – 444.

⁵ Ibid 428.

⁶ See Manner, above n 4, 428. In supporting the object theory, Oppenheim asked; ‘But what is the real position of individuals in International Law, if they are not subjects thereof?’ The only answer to this question, according to him, was that individuals ‘are *objects* of international law’. See L Oppenheim *International law: A treatise* (London: Longmans, 1955) 3.

restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals. On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right.⁷

The object theory permeates the reasoning of those who currently still hold that non-state actors are not subjects of international law.⁸

This chapter argues that the object theory rests on shaky foundations. For one thing, it relies on the assumption that the right to bring international claims is a central

⁷ Oppenheim, *ibid*, 3 – 4.

⁸ John Dugard, while noting that treaties are increasingly affording protection to individuals, has argued that individuals are mere beneficiaries of those treaties. They cannot be described as ‘proper subjects of international law’ because these treaties impose the duty on states ‘to afford protection to their citizens’. See John Dugard *International law: A South African perspective* (Kenwyn: Juta & Co Ltd, 2000) 1 – 3. In a recent article, Alexander Orakhelashvili also maintains that individuals do not have international personality on these grounds:

The individual cannot bring a claim against a State when the State is alleged to have violated his rights, only the State of the individual’s nationality can bring a claim in international forums, such as the International Criminal Court. Furthermore, the domestic remedies available in the host State must be exhausted before the international forum can be utilised. The claim against the violating State must be made, not on behalf of an injured individual, but on behalf of the State of his nationality. The damage suffered in this case is considered damage to the State, rather than damage to the individual.

Later in the same article, he concludes that the ‘general international law does not recognise the capacity of the individual other than that of a (passive) beneficiary of the rules of international law’. See Alexander Orakhelashvili ‘The position of the individual in international law’ (2001) 31 *Western California International Law Journal* 241, 252 & 253.

element of international legal personality. As will be argued below, this assumption is misconceived because the question of enforcement of rights and duties is separate from the question of being a subject of international law. It will also be shown that lack of capacity to bring international claims or absence of international judicial remedies, *per se*, does not disqualify an entity from being considered as a subject of international rights and duties. Finally, and as noted above, this chapter will also demonstrate that international and regional human rights norms and other international law standards increasingly recognise that non-state actors have some direct rights and duties in international law.

3 THE NATURE OF INTERNATIONAL LAW AND THE CONCEPTION OF ITS SUBJECTS

The definition of international law is intricately linked to the concept of subjects of international law.⁹ Traditionally, international law is defined as a body of rules stipulating the rights and duties of independent states.¹⁰ This definition considers international law as an embodiment of principles of law derived from the consent of states. In the *SS Lotus Case*, the Permanent Court of International Justice (PCIJ) stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to

⁹ Oppenheim, above n 6, 117 (noting that ‘The conception of International Persons is derived from the conception of the Law of Nations’).

¹⁰ Ibid.

regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.¹¹

The definitions of most early authors on international law reflected this classical postulation.¹² It is a definition, which does not embrace the idea that other entities can be direct bearers of rights and duties in international law.¹³ Judge Anzilotti, for example, argued in 1912 that '[i]t follows from the very notion of international law as the body of rules established by the collective will of States for the regulation of their mutual relations that the subjects of that law are States and States only.'¹⁴ Oppenheim argued similarly that '[s]ince the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations.'¹⁵

Despite its wide acceptance, the view that states are the only subjects of international law based on the fact that international law is solely concerned with state

¹¹ *SS Lotus Case (France v Turkey)* (1927) PCIJ Ser A No 9, reproduced in Martin Dixon & Robert McCorquodale *Cases and materials on international law* (Oxford: Oxford University Press, 2003) 268, 269.

¹² For scholarship on the various definitions in this regard, see Mare St. Korowicz *Introduction to international law: Present conceptions of international law in theory and practice* (The Hague: Martinus Nijhoff, 1959) 9 – 18; Chris N Okeke *Controversial subjects of contemporary international law: An examination of the new entities of international law and their treaty-making capacity* (Rotterdam University Press, 1974) 9 – 16.

¹³ See Wolfgang Freidmann *The changing structure of international law* (London: Stevens & Sons, 1964) 213.

¹⁴ Quoted in Guenter Weissberg *The international status of the United Nations* (New York: Oceana Publications, 1961) 3.

¹⁵ Oppenheim, above n 6, 636.

relations has long been the subject of criticism. A number authoritative writers of the early to mid 20th Century considered international law as law that also applied to horizontal relations. Hans Kelsen, for one, argued that '[I]ike all law, international law, too, is a regulation of human conduct. It is to men that the norms of international law apply; it is against men that they provide sanctions; it is to men that they entrust the competence of creating the norms of the order.'¹⁶

Antonio Sanchez de Bustamante, defined international law as:

A body of principles which rule the external rights and duties and the relations of legal persons who participate in the international community, among themselves and with the League of Nations and the Pan-American Union, as well as the common rules of individual protection internal and external established by international agreements.¹⁷

Similarly, Hildebrando Accioly considered international law as consisting of rules and principles, which govern states and 'other analogous organisms endowed with similar rights and duties' and individuals.¹⁸ According to Marek St. Korowicz's definition, international law is 'the body of rules which govern mutual relations of States and the situations of other collectivities as well as of organisations and individuals, which are not subject to the internal legal order of a State'.¹⁹

These definitions, though not easily reconcilable, attempt to capture the idea that certain entities of a non-state nature can be and are in some cases direct addressees of international law.

¹⁶ Hans Kelsen *Principles of International law* (New York: Holt, Rinehart & Winston, 1966) 180.

¹⁷ Quoted in Korowicz, above n 12, 13 – 14.

¹⁸ See Korowicz, above n 12, 14.

¹⁹ Quoted in Korowicz, above n 12, 15.

The number of early writers that adopted the classical definition of international law excluding all other actors than states from the definition outweighed those that adopted the more expansive view.²⁰ However, Marek St. Korowicz has demonstrated that ‘a trend in the theory of international law to include in its definition not only states but also some other legal persons as well as individuals, grew gradually in strength between the two World Wars’.²¹

This trend has continued to grow to date. In 1968, HB Jacobini defined international law as ‘that body of rules or laws which is binding on states and other international persons in their mutual relations’.²² More recently, Rebecca Wallace has written that ‘[t]oday, international law refers to those rules and norms which regulate the conduct of states and other entities which at any time are recognised as being endowed with international personality ... in their relations with each other.’²³ This definition, Wallace argues, ‘takes into account international law’s “youthfulness” and recognises that new actors may be required to participate on the international stage.’²⁴

A similar view is expressed by O’Connell thus:

International law like any other law is the framework of human community within which patterns of any other behaviour are formalised. The common good of the community of

²⁰ Korowicz, *ibid*, 14.

²¹ *Ibid*.

²² HB Jacobini *International law: A text* (Homewood: The Dorsey Press, 1968) 1.

²³ Rebecca MM Wallace *International law* (London: Sweet & Maxwell, 2002) 1.

²⁴ *Ibid*.

men is the only intelligible end of international law, and there is something offensive to reason in the doctrine that international law addresses itself only to States ...²⁵

It must be observed that even those contemporary scholars who retain the classical definition of international law are, unlike their predecessors, more willing to accept that international law regulates more subjects than states. John Dugard, for example, defines international law as ‘a body of rules and principles which are binding upon states in their relations with one another’.²⁶ However, he quickly observes that while ‘[e]arly international law concerned itself with states only’, ‘[n]ow there are other actors on the international stage’.²⁷ Malcom Shaw writes that public international law ‘covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions’.²⁸ Later in the same work, he reacts to the orthodox positivist assertion that only states are subjects of international law that ‘it is less clear that in practice this position (is) maintained’.²⁹ He goes further to state that the Holy See, insurgents and belligerents, international organisations, chartered companies and various territorial entities such as the League

²⁵ DP O’Connell *International law* (London: Stevens & Sons, 1970) 83.

²⁶ Dugard, above n 8, 1.

²⁷ Ibid. However, while he accepts that international organisations are subjects of international law, he states that individuals are not ‘proper subjects of international law’, and that corporations ‘fail to qualify as international subjects’.

²⁸ Malcom N Shaw *International Law* (Cambridge: Cambridge University press, 2003) 2

²⁹ Ibid 139.

of Cities were all at one time or another treated as possessing the capacity to become international persons.³⁰

Unprecedented developments in international law have taken place since the Second World War, which merit a reassessment of the traditional position that international law governs state relations exclusively.³¹ Among other things, many new actors such as international organisations and non-governmental organisations have increasingly participated in the making and enforcement of international law.³² In addition, while international law might previously have been intended to concern itself with state relations only in the realms of diplomatic protection and the conduct of war,³³ its scope has widened considerably since the Second World War. The

³⁰ Ibid.

³¹ For example, Menon has noted the following changes: the significant horizontal expansion of the international society due to the decolonisation process; the phenomenal growth of international organisations as permanent institutions for the cooperation of states, and the expansion in the scope of the subject matter of international law including the promotion of human welfare rather than just the mere prevention of national warfare. See PK Menon 'The international personality of individuals in international law: A broadening of the traditional doctrine' (1992) 1 *Journal of Transnational Law and Policy* 151, 151 – 152. The most significant changes have, of course, been brought about by globalisation, which has rendered national boundaries increasingly less significant and encroached on the notion of state sovereignty so much that other actors have become significant players on the international scene. See Michael Reisman 'Designing and managing the future of the state' (1997) 8(3) *European Journal of International Law* 409; Serge Sur 'The state between fragmentation and globalisation' (1997) 8(3) *European Journal of International Law* 421.

³² Ibid 153 – 154.

³³ See Korowicz, above n 12, 125 (discussing the Soviet perspective of international law, in particular that of Professor Krylov).

development of the international regime for the protection of human rights, in particular, has highlighted that human rights are a matter of international concern.³⁴

As demonstrated in chapter 1, these rights are prone to violations not only by states but also by non-state actors. The protection and fulfilment of these rights is also no longer dependent on state action alone. These changes underscore the need to revisit the traditional, state-centric conception of subjects of international law.

4 DEFINING A ‘SUBJECT OF INTERNATIONAL LAW’

The issue of subjects of international law has generated controversy for a long time. Who is a subject of international law? In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice (ICJ) suggested that a subject of international law is an entity ‘capable of possessing rights and duties’.³⁵ This case dealt with the question whether the UN had

³⁴ According to Bolin Pennegard:

The signing of the Charter of the United Nations was a significant step in the right direction in bringing human rights more firmly within the sphere of international law... Experience showed that laws and policies at a national level could not sufficiently guarantee that the human rights of the subjects residing within the jurisdiction of a particular State would be promoted and protected ... Thus violations of human rights by persons representing state power also needed to be seen as a breach of an international contract, a breach of obligations towards the international community.

See Bolin Pennegard ‘Overview over human rights – the regime of the UN’ in Gudmundur Alfredsson , Jonas Grimheden, Betram G Ramcharan & Alfred de Zayas (eds) *International human rights monitoring mechanisms: Essays in honour of Jacob Th. Moller* (The Hague: Martinus Nijhoff Publishers, 2001) 19, 23.

³⁵ (1949) 1 ICJ Rep 174, 179 (*Reparations Case*).

capacity as an organisation to bring an international claim against a state to obtain reparations in respect of damage caused to the UN or to its agents. It was held that the UN did have such capacity.

Many commentators accept this definition with minor variations. A common one incorporates the requirement that such rights and duties must be conferred or imposed on an entity directly. According to Spiropolous, '[a] subject of law is one to whom the rules of a juridical system are *immediately* addressed, that is to say, one who is *directly* qualified or obligated by the rules of a juridical system.'³⁶

Likewise, Korowicz has written that 'Subjects of international law are legal and physical persons upon whom international law *directly* imposes duties and confers rights'.³⁷

The term 'subjects of international law' is often used interchangeably with the term 'international legal personality'.³⁸ As defined by O'Connell, personality is a 'shorthand for the proposition that an entity is endowed by international law with legal capacity.'³⁹ Muller observes that international legal personality is essentially 'a *conditio sine qua non* for the participation of an entity in a legal system'.⁴⁰

These statements suggest that the concept of 'international personality' is not materially different from that of a subject of international law. Indeed some authors

³⁶ Quoted in Okeke, above n 12, 9 fn 1. (Emphasis in original).

³⁷ Korowicz, above n 12, 274. (Emphasis supplied).

³⁸ Jacobini, above n 22 above, 48.

³⁹ O'Connell, above n 25, 81.

⁴⁰ AS Muller *International organisations and their host states: Aspects of their legal relationship* (The Hague: Kluwer Law International, 1995) 71.

consider them as having the same meaning. According to Rebecca Wallace, for example, the ‘possession of international personality means that an entity is a subject of international law’.⁴¹ Malcom Shaw also defines a legal person as a person who possesses ‘the capacity to have and maintain certain rights and being subject to perform specific duties’.⁴² This article uses these terms interchangeably.

4.1 Elements of subjectivity

While the definition of a subject of international law appears to be less controversial, the question, which entities qualify as subjects of international law or international persons, has generated a protracted debate. This has been so because no fixed criteria exists for determining who is a subject or not and international lawyers have tended to provide their opinions on the status of particular entities without providing a comprehensive theoretical basis for those opinions. This section examines the commonly cited elements of international legal personality.



4.1.1 *Capacity to bear rights and duties*

The definition of a subject of international law discussed above makes it clear that an entity must be directly bound by international law for it to be admitted as a subject of international law. In other words, the entity must have capacity to bear ‘rights and duties’ *directly* conferred or imposed on it by international law. In the *Reparations Case*, it was suggested that for an entity to have international legal personality it was

⁴¹ Wallace, above n 23, 56.

⁴² Shaw, above n 28, 175.

not necessary that 'all its rights and duties must be on the international plane, any more than all the rights and duties of a State must be on that plane.'⁴³

Much of the divergence in opinions on the issue of international subjects stems from the fact that it is not clear what the terms 'rights' and 'duties' for purposes of imputing subjectivity mean. Rights of states include the right to independence, the right to equality and sovereignty, the right to participate in international commerce or international intercourse, and the right to self-preservation.⁴⁴ Duties of states include that the duty to refrain from intervening in the affairs of another state,⁴⁵ the duty to treat all persons under its jurisdiction with respect for their human rights, the duty to settle international disputes peacefully, and the duty to fulfil its international obligations in good faith.⁴⁶ Those who reject the notion that non-state actors can be or are subjects of international law often suggest in their arguments that failure to enjoy

⁴³ Above n 35, 179.



⁴⁴ See Articles 1-5 of the Draft Declaration on the Rights and Duties of States (Draft Declaration on States), adopted by the International Law Commission (ILC) at its first session, in 1949, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.

⁴⁵ While this duty is still valid, there are certain circumstances in which states will be justified to intervene in another state's affairs in order to prevent or stop gross violations of international law. However, the circumstances under which such intervention may be permitted remain the subject of controversy. See generally Kithure Kindiki *Humanitarian intervention in Africa: The role of intergovernmental organisations* (LLD Thesis: University of Pretoria, 2002) (arguing that humanitarian intervention should be allowed where such action is undertaken multilaterally pursuant to a decision reached through proper channels of seeking international consensus, eg, through the UN General Assembly or other regional bodies).

⁴⁶ See articles 6 – 11, and 13 – 14 of the Draft Declaration on States.

these rights or discharge these obligations disqualifies these actors from being subjects of international law.⁴⁷

This approach is misconceived. There is no requirement that all subjects of international law must exercise similar rights or be burdened with similar duties to those of the state. The ICJ long embraced this view in the *Reparations Case* where it observed that ‘[t]he subjects of law in any legal system are not necessarily identical in their nature or the extent of their rights, and their nature depends upon the needs of the community.’⁴⁸

It seems clear though that the notion of ‘rights and duties’ as used in the context of subjects of international law is broad. It covers rights and obligations arising from treaties to which the subject is party and other sources of international law including human rights law. While consent is the implied or express basis on which states are bound by international law,⁴⁹ other actors need not consent to the application of international law norms for them to be bound by them or enjoy their benefits. Furthermore, consent of a subject is not a necessary condition for that subject to be bound by a given norm of international law. The foregoing observations resonate with the ICJ’s advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.⁵⁰ The ICJ stated in this case, in the context of the legal personality of international organisations, that these actors ‘are subjects of

⁴⁷ It is often argued, for example, that an entity must have capacity to enter into treaties and be a sovereign for it to be considered a subject. See this part, subsections 3 & 4 below.

⁴⁸ Above n 35, 178.

⁴⁹ See *SS Lotus Case*, above n 11.

⁵⁰ (1980) ICJ Reports 73 (*WHO Agreement Case*).

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.⁵¹

Furthermore, there is no specific requirement of reciprocity between duties and rights emanating from international law for an entity to qualify as a subject of international law.⁵² Thus, in the *Reparations Case*, for example, in answering the question whether the UN had procedural capacity to bring an international claim against a state to obtain reparations in respect of damage caused either to the UN itself or its agents, the ICJ did not explore the possible duties which international law directly imposes on the UN. Rather, the ICJ found that the UN had international personality and consequently the right to maintain such a claim without a corresponding finding on whether it could also be held responsible by other parties for a similar violation complained of or other violations of international law committed by it or its agents. However, recognition that an entity is a subject of international rights necessarily means that it has potential to be a subject of international duties and vice versa.

An entity need not have many obligations for it to acquire the status of a subject of international law. According to Giorgio Gaja, the special rapporteur on the responsibility of international organisations, ‘an entity has to be regarded as a subject

⁵¹ Para 37, 89-90. Emphasis added.

⁵² For a distinction between a subject of rights and a subject of duties see Carl A Nørgaard *The position of the individual in international law* (Copenhagen: Munksgaard, 1962) 33.

of international law even if a single obligation is imposed on it under international law'.⁵³

4.1.2 *Procedural capacity*

What does it mean to have rights or duties *directly* arising from international law? This question is closely related to what some authors call 'procedural capacity'. In the *Reparations Case*, the ICJ held that the UN was a subject of international law because it was 'capable of possessing international rights and duties, and *that it (had) capacity to maintain its rights by bringing international claims*'.⁵⁴ This dictum suggests that capacity to maintain an international claim is a precondition for recognition as an international subject. Rebecca Wallace expresses this proposition in the following statement:

A subject of international law owes responsibilities to the international community and enjoys rights, the benefits of which may be claimed, and which if denied, may be enforced to the extent recognised by the international legal system, via legal procedures. That is, the entity will have procedural capacity.⁵⁵

Kolowicz expresses the same view thus:

The subjects of international law may be defined as persons to whom international law attributes rights and duties directly and not through the medium of their states. But if we do not endow the individual with even partial, limited capacity for action before international judicial or political bodies, we may speak of him as a potential subject of

⁵³ See Giorgio Gaja 'First Report on responsibility of international organisations' International Law Commission, 26 March 2003, A/CN.4/532, para 15.

⁵⁴ *Reparations Case*, above n 35, 179.

⁵⁵ Wallace, above n 23, 56.

international law, because the protection of his international rights, directly conferred upon him, still rests with the state'.⁵⁶

It has also been suggested that duties must also be capable of enforcement at an international level for an entity to be called a subject of international duties. According to Hans Kelsen, legal personality means 'the capacity of being a subject of legal duties and legal rights, of performing legal transactions and of suing and being sued at law'.⁵⁷

Thus, those who take the traditional view of subjects of international law contend that since non-state actors cannot bring international claims or be sued for breach of international law, they fail to meet the requirement of procedural capacity and can therefore not be called subjects of international law. This view is premised on the proposition that when international law purports to impose rights or duties on an entity, it actually imposes a duty on states to protect these rights or recognise these duties in their domestic system.⁵⁸ 'It is through the medium of their nationality only', argued Oppenheim, 'that individuals can enjoy benefits from the existence of the Law of Nations'.⁵⁹ Individuals are mere 'beneficiaries of international law'.⁶⁰

⁵⁶ Marek St Korowicz 'The problem of the international personality of individuals' (1956) 50 *American Journal of International Law* 533, 535.

⁵⁷ Hans Kelsen *The law of the United Nations: A critical analysis of its fundamental problems* (London: Stevens & Sons Ltd, 1951) 329.

⁵⁸ Ibid 1-2.

⁵⁹ Oppenheim, n 6 above, 3.

⁶⁰ Dugard, n 8 above, 1.

However, the argument that non-state actors cannot be subjects of international law on the alleged ground that they cannot present their cases before international tribunals except through the state of their nationality was rejected recently by the ICJ in the *LaGrand Case*.⁶¹ In this case, Kar and Walter LaGrand, both German nationals, were arrested, tried and convicted of murder, kidnapping and attempted robbery in the United States and sentenced to death.⁶² The case before the ICJ involved allegations by Germany that the United States had violated the Vienna Convention on Consular Relations⁶³ by failing to observe the rights of non-nationals arrested, committed to prison or detained in a foreign state.⁶⁴ One of the issues raised by Germany's application was whether the United States had violated article 36 of this Convention, which grants non-nationals certain rights regarding consular assistance when they are placed in custody and being accused of a criminal offence in a foreign state.⁶⁵ It was argued by Germany that that the breach of article 36 by the



⁶¹ *Germany v United States of America*, 27 June 2001, ICJ General list No 104, available at <<http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm>> (accessed: 30 April 2005) (*LaGrande Case*).

⁶² *Ibid* paras 13-14.

⁶³ Opened for signature 24 April 1963, 596 U.N.T.S. 262 (entered into force 19 March 1967).

⁶⁴ *LaGrande Case*, above n 61, paras 37 – 38.

⁶⁵ Article 36 provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

US infringed not only the rights of Germany but also infringed the individual rights of the LaGrand brothers.⁶⁶ In defence, the United States argued that rights of consular

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

⁶⁶ *LaGrande Case*, above n 61, para 75. This submission was largely motivated by one of the remedies that Germany sought – namely, an assurance that the United States would not commit similar acts or violate the paragraphs in any future cases of detention of and criminal proceedings against German Nationals. Germany also sought an assurance that in cases involving the death penalty, the

notification and access under this Convention are rights of states, not of individuals although individuals could benefit from these rights.⁶⁷ It argued that the treatment due to individuals under this Convention was ‘inextricably linked to and derived from the right of the State, acting through its consular officer, to communicate with its nationals, and does not constitute a fundamental right or human right’.⁶⁸ A related argument advanced by the United States concerned the issue whether judicial remedies are a requirement for recognising an entity as a subject of international law. The United States argued that since article 36 did not define the nature of those rights or determine the remedies required under the Convention for breaches of those rights, and in the absence of any support from the *travaux préparatoire* of the Convention, it could not be said to create immutable individual rights as opposed to individual rights derivative of the rights of States.⁶⁹

The ICJ held that article 36 of the  Vienna Convention creates both rights of the sending state and individual rights, which may be invoked by the national state of the detained person.⁷⁰ Effectively, the ICJ recognised that individuals are direct subjects of international law, not beneficiaries as contended by traditionalists. By implication, the fact that it is their nation state, which will enforce those obligations, does not disqualify individuals from being considered as direct bearers of international rights.

United States would provide effective review of and remedies for criminal convictions secured in violation of these paragraphs.

⁶⁷ Ibid para 76.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid paras 77 & 89.

This decision was confirmed by the ICJ in the *Avena Case*.⁷¹ This case also related to a claim by Mexico that the United States failed to comply with article 36 of the Vienna Convention on Consular Relations. Mexico argued that this failure meant that the United States violated its international legal obligations to Mexico in the latter's own right and in the exercise of the latter's rights of diplomatic protection of its nationals.⁷² While the United States did not raise the objection that this article did not create individual rights, it argued that the case was inadmissible on the ground that the nationals whose rights had allegedly been infringed had not exhausted local remedies in the United States.⁷³ The ICJ held, approving the *LaGrande Case*, that 'violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the individual.'⁷⁴ Thus, it was held that in these special circumstances of interdependence of the rights of the states and the individual, Mexico was entitled to ask the Court to rule on those violations it claimed to have suffered directly and those it suffered indirectly through its nationals.⁷⁵ The rule regarding the exhaustion of local remedies was therefore held not to be applicable in such a case.

⁷¹ *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)*, 31 March 2004, General List 128, available at <<http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>> (accessed: 30 April 2005).

⁷² *Ibid* para 40.

⁷³ *Ibid* para 38.

⁷⁴ *Ibid* para 40.

⁷⁵ *Ibid*.

These decisions dealt a decisive blow both to the traditional definition of international law as a body of law regulating interstate conduct exclusively and to the traditional conception of subjects of international law.

A key principle emerging from these cases is that an entity need not have the capacity to enforce its own rights or to be sued (prosecuted) in an international tribunal for it to be called a subject of international law. This holding can also be said to be consistent with current international law standards and practices. International law has increasingly considered domestic courts as agents of enforcing the international law obligations of non-state entities. Under the doctrine of universal jurisdiction, for example, a state can try any person, whether their national or not, who commits grave violations of human rights amounting to international crimes anywhere in the world.⁷⁶ When courts assume universal jurisdiction they enforce their own law as well as international law prohibiting the commission of international crimes.⁷⁷ The



⁷⁶ Lyal S Sunga *Individual responsibility in international law for serious human rights violations* (Dordrecht: Martinus Nijhoff Publishers, 1992) 104 – 107.

⁷⁷ In his dissenting opinion in the *SS Lotus Case* (above n 11), Judge Moore defined the effect of universal jurisdiction, in the context of piracy, thus:

in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come ... *Though statutes may provide for its punishment, it is an offence against the law of nations ...*

Emphasis added. Section 35(3)(l) of the South African Constitution also provides that every accused person has a right to fair trial including the right ‘not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed’. This provision

litigation generated by the Alien Tort Claims Act is another example. Under this Act, courts in the United States can find an entity, including non-state actors, liable for violating international law, not national law, committed outside the United States.⁷⁸ As will be shown in chapter 4, a non-state actor could be held responsible under this Act for acts that require state complicity and those that do not require state involvement in their commission. The defendant need not be a national of the US.⁷⁹

suggests that a person may be prosecuted for an international crime, which was not recognised in domestic law at the time it was committed.

⁷⁸ The Alien Tort Claims Act 28 USC § 1350 (2004) provides: ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’ This Act, enacted in 1789, was applied for the first time in 1980 in the celebrated case of *Filartiga v Pena-Irala* 630 F 2d 876 (2nd Cir, 1980). The US Court of Appeals held that a claim against Pena-Irala, then acting as the Inspector-General of Police in Paraguay, relating to the death by torture of Filartiga, could properly be decided in US courts. In handing down the judgment, the US Court of Appeals stated:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture ... In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest ... Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfilment of the ageless dream to free all people from brutal violence.

⁷⁹ US courts in deciding cases under ATCA have adopted the ‘minimum contact test’, not nationality, as a standard for assuming jurisdiction over a corporation. This test involves an assessment of the degree of contact of the defendant corporation with the forum state as well as the relatedness of the contacts to the claim at hand. See Lucinda Saunders ‘Rich and rare are the gems they war: Holding De

The examples highlight the inaccuracies in the assertion that the link between international law and an individual or other non-state actor is his nation. They also undermine the significance of procedural capacity before an international tribunal as an important element of international legal personality.

Another important principle emerging from the *LaGrande Case* is that absence of effective international remedies directly available to the entity or against it flowing from the rights and obligation derived from international law does not necessarily disqualify an entity from being considered a direct addressee of international law norms. This holding too is consistent with the current conception of international law. It has long been recognised that international law is different from domestic law with regard to how it is formed and enforced. While domestic legal systems rely predominantly on sanctions, international law does not although the trend is towards recognising more sanctions. This difference has sometimes given rise to the question whether international law is valid law. Presently, there is a large measure of consensus that international law qualifies as valid law although it does not entail effective sanctions.⁸⁰ What earns it validity is the fact that it operates within a political system; it consists of a body of rules and principles; and members of the international community recognise these rules and principles as binding upon them.⁸¹ The existence of effective sanctions does not feature as the prerequisite for recognising the authority

Beers accountable for trading conflict diamonds' (2001) 24 *Fordham International Law Journal* 1402, 1457.

⁸⁰ John Dugard, for example, has remarked that 'Few serious jurists insist on effective sanctions as a requirement for the existence of international law. See Dugard, above n 8, 8.

⁸¹ *Ibid.*

of international law norms.⁸² This means that to insist that an entity must have capacity to bring claims before an international body as a condition for recognition as a subject of international law is a misconception of the nature of international law itself.

International human rights law, in particular, has developed more procedures for ensuring the protection of human right than the complaints mechanism. While making provision for a range of international monitoring bodies with a mandate to consider complaints alleging violations of human rights, state reporting has become a principal means of monitoring the implementation of human rights.⁸³ Almost every international human rights treaty has state reporting as a main monitoring mechanism. Some treaties such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child do not even provide for a complaints mechanism but requires states to submit state reports periodically.⁸⁴ This



⁸² According to Brierly:

The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, insofar as he is a reasonable being to believe that order and not chaos is the governing principle of the world in which he has to live.

JL Brierly *The law of nations* (5th ed) (Oxford: Clarendon Press, 1955) 57. See also Anthony D'Amato 'Is international law really "law"?' (1984) 79 *Northwestern University Law Review* 1293.

⁸³ See generally Gudmundur Alfredsson et al, above n 34; Janusz Symonides (ed) *Human rights: International protection, monitoring, enforcement* (Aldershot: Ashgate Publishing, 2003).

⁸⁴ However, as regards the ICESCR, efforts towards the adoption of an optional protocol recognising the complaints procedure are underway. In 2001, the UN Commission on Human Rights appointed an independent expert to examine the question of an Optional Protocol to the ICESCR. At its 59th session,

does not mean that the rights and obligations under these instruments are not binding. Neither would it be competent to argue states are not the subjects of international law provisions contained in these treaties. It could be argued that in these cases, a state is bound by these instruments because it ratified them. However, it has been argued above that consent is not a necessary requirement for all subjects to be bound by international law. The question of consent also touches on the issue of treaty making power as an element of international legal personality. As argued below, this too is not a prerequisite for international legal personality.

In addition to state reporting, a range of special procedures including special rapporteurs, independent experts, special representatives of the UN's Secretary General, and working groups has been adopted pursuant to the UN Economic and Social Council's Resolution 1235(XLII).⁸⁵ These procedures deal either with selected substantive human rights problems (thematic procedures) or with human rights



the Commission established an open-ended working group to consider options regarding the elaboration of the Optional Protocol to the ICESCR. The working group was mandated to report to the Commission at its 60th session and make specific recommendations (Commission on Resolution 2003/18).

⁸⁵ International human rights bodies have thus far not used these extra-judicial mechanisms to enforce human rights obligations of private actors arising from international law. However, the UN Norms suggest that there is no philosophical justification for not using these mechanisms against private actors. The UN Norms propose that transnational corporations must be required to submit periodical reports on and take other measures fully to implement the Norms. The Norms further envisage a system of periodic monitoring and verification by the UN. The Commentary to the Norms recommends that the Commission on Human Rights should consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms. See section 6.5 below and chapter 5.

situations in specific countries (country-specific procedures).⁸⁶ They focus on preventing violations of human rights and mark a ringing shift way from the traditional approach to the protection of human rights that focussed on reactive measures in the form of court redress to that focussed on both preventive and reactive measures.⁸⁷ Preventive measures have been developed with the realisation that reactive measures do not always provide satisfactory results regarding the protection of human rights.⁸⁸ The view that insists on the requirement of a right of appearance before an international tribunal as an element of subjectivity therefore ignores the role of non-judicial or quasi-judicial mechanisms of protecting human rights.⁸⁹

Moreover, it must be pointed out that international human rights law has widened the scope of actors who can submit complaints before enforcement bodies. It is no longer the exclusive right of a state to bring an international claim on behalf of its



⁸⁶ Zdzislaw Kedzia 'United Nations mechanisms to promote and protect human rights' in Janusz Symonides (ed), above n 83, 1, 49.

⁸⁷ Ibid 4 & 27.

⁸⁸ Ibid 27. Lyal Sunga after considering the role of special procedures submits, among other things, that these mechanisms have 'allowed the international community to deal relatively quickly and flexibly with human rights issues of concern as they have arisen' and that they should therefore not be 'scrapped'. See Lyal S Sunga 'The special procedures of the UN Commission on Human Rights: Should they be scrapped?' in Alfredsson et al (eds), above n 34, 233, 269 – 270.

⁸⁹ This is not to deny the importance of judicial remedies. In fact, this study advances the argument that the human rights obligations of private actors must also be enforceable judicially. What this means though is that judicial mechanisms and other procedures such as those mentioned above are mutually reinforcing and all important.

citizens. Other non-state actors such as individuals, corporations and NGOs can bring complaints before international human rights monitoring bodies.⁹⁰

⁹⁰ According to Zdzislaw Kedzia, individual communications constitute ‘either the most, or one of the most, significant changes in international law.’ See Kedzia, above n 86, 73. For example, Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol to the ICCPR) provides that a state party that becomes a party to this protocol is deemed to recognise the competence of the Human Rights Committee to receive and consider communications ‘from individuals subject to its jurisdiction’ who claim to be victims of a violation of the rights recognised in the ICCPR. According to article 2 of the Optional Protocol, ‘individuals who claim that any of the rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.’ The Optional Protocol clearly departs from the traditional approach requiring the nation state of the victim of a human rights violation to bring an international claim on his behalf. The individual can do so himself not only against his own nation but also against a foreign state as long as he can prove that the violation occurred while he was subject to the jurisdiction of that foreign state. However, it must be noted that the views of the HRC are not *per se* legally binding and states have to ratify the Optional protocol for individuals to bring international claims. These observations do not affect the argument advanced herein, which is that states can allow non-state actors to be treated as limited subjects of international law. Individual complaints are also permissible under article 2 of Optional Protocol to CEDAW, Article 22 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and article 14(2) of CERD, and under the ‘1503 procedure’ of the Commission on Human Rights and under the United Nations Educational, Scientific and Cultural Organisation’s system. For the former see Kedzia, above n 86, 69; for the latter see Karl Josef Partsch & Klaus Hufner ‘UNESCO procedures for the protection of human rights’ in Janusz Symonides (ed), above n 83, 111, 122. In the European system, the position used to be that individuals could submit complaints before the European Commission but not before the European Court on Human Rights. See PT Muchlinski ‘The status of the individual under the European Convention on Human Rights and contemporary international law’ (1985) 34 *International Comparative Law Quarterly* 375, 378. However, article 34 of the European Convention as amended by Protocol No 11 now provides that ‘The Court may receive applications

It can be concluded therefore that the question of being a subject of international law is separate from the issue of enforcement of the rights and duties that the subject has. A subject of international law need not enforce its rights directly. Conversely, a subject of international law need not have its international duties enforced directly against it. Some subjects may have both rights and duties, and the capacity to sue and be sued in international law. Others may have rights and duties but may not have capacity to sue and be sued directly. This situation can be likened to the position in domestic law. A minor may have rights and duties in domestic law but may not sue or be sued directly in their own name. the same can be said of insane and insolvent persons. Furthermore, the fact that no judicial mechanisms exists for the enforcement of duties, which otherwise are considered directly applicable to the subject, does not disqualify an entity as a subject of those international duties. The main premise on which this study proceeds is that international law and domestic jurisdictions should recognise binding and enforceable human rights obligations of non-state actors. The conclusions reached above do not weaken this premise. Rather, they help to criticise the traditional view that operates as a barrier to the recognition of binding obligations

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.' Articles 55 & 56 of the African Charter permits the African Commission to admit individual communications. Although article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights states that the African Court may allows petitions by NGOs and individuals, states have to make a specific declaration that they will entertain such petitions in terms of article 34(6) of the Protocol. In the Inter-American system, article 44 of the American Convention provides that any person or group of persons, or non-governmental entity may submit petitions alleging human rights violations against states.

of non-state actors in international law simply on the ground that no binding international mechanisms exist to enforce those obligations against them.

4.1.3 *Treaty-making power*

Some international law authors contend that treaty-making power is an index for legal personality in international law. According to Alexander Orakhelashvili, ‘an important aspect of international personality is the ability to participate in the norm creating process in international law.’⁹¹ This argument is essentially based on the idea that international law derives its binding effect from consent on the part of the rights and duty bearers.

However, authority is in abundance establishing the view that treaty-making power could be a consequence of international legal personality but that it is not an index for it.⁹² Thus, it is not necessary that all entities must have this right for them to be called subjects of international law. This view is best captured in the warning sounded by Rebecca Wallace thus:

... while a treaty-making power is evidence of international personality, a general treaty-making power should not be deduced from the possession of some degree of personality. In other words, entities having a treaty-making capacity possess some international personality, but not all international entities necessarily possess a general-making capacity.⁹³

The jurisprudence of the ICJ supports this viewpoint. In the *Reparations Case*, for example, the ICJ considered the practice of the UN of concluding treaties with states

⁹¹ Orakhelashvili, above n 8, 256.

⁹² See eg Muller, above n 40, 82 – 84; O’Connell, above n 25, 80 – 83.

⁹³ Wallace, above n 23, 70.

as evidence of its separate existence from member states.⁹⁴ Furthermore, the *LaGrande Case* discussed earlier demonstrates that to have direct rights and obligations of international law does not really depend on having the capacity to enter into treaties. This case, as discussed earlier, held that the Vienna Convention on Consular Relations created individual rights although this treaty was concluded between states. Effectively, these decisions create an exception to the principle that consent is the basis of the binding effect of international law norms. Thus, not all entities need have the right to enter into treaties for them to be bound by them.

Even if it were accepted that treaty-making power is a prerequisite for international legal personality, which is denied by the present author, it appears that this requirement relates to *participation* in the norm-creating process, not necessarily the capacity to enter into international treaties. Professor Modzhorian, a soviet jurist and proponent of this element, writes:



A necessary attribute for any subject of international law is the capacity to be represented on the international plane by a supreme authority which is *capable of participating in law-creating process*, is capable of undertaking international legal obligations and of

⁹⁴ At page 179, the Court stated:

Practice – in particular the conclusion of conventions to which the organisation is a party – has confirmed this character of the Organisation, which occupies a position in certain respects in detachment from its Members ... The ‘Convention on the Privileges and Immunities of the United Nations’ of 1946 creates rights and duties between each of the signatories and the Organisation... It is difficult to see how such a convention could operate except upon the international plane and as between parties possessing international personality.

(Emphasis added).

fulfilling them, and is so capable of taking part in measures aimed at their enforcement of the observation of norms of international law by other subjects.⁹⁵

GI Tunkin has submitted similarly that a subject of international law must only have international rights and duties but must also *participate actively* in the international law-making creating process.⁹⁶ As will be shown below, many actors including international organisations, NGOs and corporations now participate in the international law-creating processes to varying degrees.⁹⁷ This means that they would satisfy this requirement.

One may therefore conclude that not all subjects of international law need have the capacity to enter into international treaties.

4.1.4 *Sovereignty*

A minority of international law lawyers, predominantly of Soviet orientation, have expressed the view that an entity must be a sovereign for it to qualify as a subject of international law. Professor Modzhorian, for example, argues '*[a]ll subjects of international law are sovereign, ipso facto, have equal rights.*'⁹⁸ VU Eugeniev has argued that entities that have not yet created their own independent state cannot attain international personality.⁹⁹

⁹⁵ Quoted in Okeke, above n 12 above, 13. (Emphasis added).

⁹⁶ Discussed in Okeke, *ibid*, 13.

⁹⁷ See section 6 in this chapter.

⁹⁸ Quoted in Okeke, above n 12, 13.

⁹⁹ Cited in Okeke, *ibid*, 14 – 15 fn 26.

Like the requirement of treaty-making power, sovereignty is not an index for international legal personality although it is a requirement of statehood giving rise to the international personality of the state. O'Connell has, quite persuasively, argued that colonies and protectorates and other subordinate territories had the power to enter into international agreements without them being sovereign.¹⁰⁰ Similarly, Chris Okeke asserts that there is 'little doubt that a measure of international personality is possessed by part- or semi-sovereign states or protectorates'.¹⁰¹ He further argues that 'the right of individual states, cantons or component territories to conclude treaties on their own account for certain purposes has been recognised'.¹⁰² It may be added that the UN is not a sovereign but the ICJ held in *Reparations Case* that it had the status of a subject of international law. Thus, it can be concluded that sovereignty is not an essential element of international legal personality.

4.2 Interim conclusion



The above discussion demonstrates that the important element of a subject of international law is the capacity to bear rights and duties directly arising from international law. These rights and duties must have a binding effect on the entity for it to be called a subject of international law. However, such binding effect is not determined solely by the existence of a right of the entity to submit international claims or the capacity to be sued in an international judicial body. While treaty making power and sovereignty are rights enjoyed by states and could constitute

¹⁰⁰ O'Connell, above n 25, 83 – 84.

¹⁰¹ Okeke, above n 12, 14 – 15 fn 26.

¹⁰² Ibid.

evidence of the international personality of certain entities such as international organisations (in the case of treaty-making power), they are not prerequisites for international legal personality. As noted above, subjects of international law are of different nature and the extent of their capacities, rights and duties varies.

5 THE OBLIGATIONS OF NON-STATE ACTORS IN INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: EMERGING NORMS

5.1 Introductory remarks

International law increasingly recognises that non-state actors have obligations emanating from this law. The sources of these obligations range widely from international law labour law, international trade and international environmental law to international anti-corruption law.¹⁰³ As this study's focus is on human rights obligations, this chapter will be restricted to international human rights law.

Much of the recognition of the human rights obligations of non-state actors has occurred indirectly through the operation of the doctrine of state responsibility.¹⁰⁴ The state has the duty in international law to protect all persons under its jurisdiction from violations of their human rights by private actors.¹⁰⁵ Through the discharge of this duty by the state, non-state actors are indirectly responsible for human rights in

¹⁰³ See Steven Ratner 'Corporations and human rights: A theory of responsibility' (2001) 111 *Yale Law Journal* 443, 475 – 486.

¹⁰⁴ See chapter 4 of this study.

¹⁰⁵ *Velásquez Rodríguez v Honduras* [1988] Inter-Am Court HR (ser C) No 4 (discussed in chapter 4 of this study).

international law. The nature of this duty and its operation in practice are discussed in chapter 4. This part will therefore focus on those norms that manifestly appear to have direct application to non-state actors.

As noted earlier, 'direct' in this chapter is used to refer to instances where a treaty or other authoritative document in international law expressly imposes an obligation on a non-state actor. This understanding is drawn from the *LaGrand Case*, discussed above, where the ICJ, in deciding that article 36 of the Vienna Convention on Consular Relations created individual rights, stated that these provisions were clear and admitted of no doubt about this meaning.¹⁰⁶ This case considered the question of having rights and duties in international law as separate from the question of having the right to enforce an international right. This is consistent with the definition of a subject of international law advanced herein, which does not consider capacity to sue and be sued as an element of subjectivity for all subjects of international law. It can therefore be said that where a treaty provision expressly states that it binds non-state actors, that norm should be regarded as binding on those actors directly. It must be admitted that there are currently limited means of enforcing such obligations directly against non-state actors. This section will demonstrate that some of the human rights obligations on non-state actors could be enforced directly through international criminal law. It will also be shown in chapter 5 that some of the human rights obligations of non-state actors can also be enforced through soft law procedures in international law.

¹⁰⁶ Above n 61 para 77.

5.2 The UDHR

While the Universal Declaration of Human Rights,¹⁰⁷ which is widely considered as the bedrock of the modern international human rights system, chiefly pronounces the human rights obligations of states, some of its provisions can be interpreted to have direct application to non-state actors. The often-cited preamble to it, to start with, proclaims the UDHR:

[A]s a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹⁰⁸

It has been contended that this provision imposes a duty on a range of actors to secure the universal and effective recognition and observance of the rights recognised in the UDHR. Louis Henkin, for example, has argued that ‘every individual’ as used in this provision includes ‘juridical persons’.¹⁰⁹ He further contends that ‘every individual and every organ of states excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.’¹¹⁰ The UDHR, according to Henkin, challenges “private institutions” to recognise their responsibility, whether

¹⁰⁷ GA Res 217A, UN GAOR, 3rd Sess, 183rd Plen, mtg, UN Doc A/RES/217A (III) (1948) (UDHR).

¹⁰⁸ Emphasis supplied.

¹⁰⁹ Louis Henkin ‘The Universal Declaration at 50 and the challenge of global markets’ (1999) 25(1) *Brooklyn Journal of International Law* 17, 25.

¹¹⁰ *Ibid.*

or not states do.’¹¹¹ The International Council on Human Rights Policy has argued in support of Henkin’s view thus:

An ‘organ’ in the sense used in the preamble suggests an institution or group of people or thing which performs some function, in this case for ‘society’. It is not difficult to see that ‘organs of society’ encompass businesses, since they play a clear economic (and increasingly social) function in society. This is especially true for companies or other legal persons that are artificial constructs created in law as a way of organising commerce, to encourage investment and reduce risk.¹¹²

Apart from the preamble, several articles of the UDHR speak directly to non-state actors’ duties. Article 1 provides that all human beings are born free and equal in dignity and rights. It goes further to provide that all human beings ‘are endowed with reason and conscience and *should act towards one another in a spirit of brotherhood*’.¹¹³ Article 29(1) states that ‘everyone has duties to the community in which alone the free and full development of his personality is possible’. Although in context of rights holders, the European Court of Human Rights has construed ‘Everyone’ as used in the European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹⁴ as referring to both natural and legal persons.¹¹⁵ Lastly, article 30 provides that:

¹¹¹ Ibid.

¹¹² International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (Versoix: International Council on Human Rights Policy, 2002) 58 – 59.

¹¹³ Emphasis supplied.

¹¹⁴ Adopted by the Council of Europe on 4 November 1950, entry into force 3 September 1953.

Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

This provision recognises tacitly that every person or groups of them have a duty to refrain from infringing human rights.

These articles reinforce the preambular statement of the UDHR discussed above, which admits of a construction that the rights under it are intended to bind non-state actors in addition to states. With particular reference to article 30 cited above, Jordan Paust has submitted:

Because numerous human rights treaties are set forth in the Declaration without any mention of “state” actors or any limitation to state actor duties or “color”, the express and unavoidable interpretive command in Article 30 prohibits adding words or implying limitations that the drafters did not choose. Article 30 also should not be read as to interpret particular human rights articles as if groups or persons can engage in any activity or perform any act aimed at the destruction of such rights, but state actors or those acting under “color” – and only such actors – cannot do so. The correlative reach of Article 30 is to “any” group or person.¹¹⁶

¹¹⁵ In *Autronic AG v Switzerland* ECHR Series A 178 (1990); 12 (1990) EHRR 485, at para 47, it was held in the context of freedom of expression thus: ‘Neither Autronic AG’s legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (freedom of expression). The Article applies to ‘everyone’, whether natural or legal persons.’

¹¹⁶ Jordan J Paust ‘Human rights responsibilities of private corporations’ (2002) 35 *Vanderbilt Journal of Transnational Law* 801, 812 – 813. See also David Weissbrodt ‘Non-state entities and human rights within the context of the nation-state in the 21st century’ in Monique C Castermans-Holleman, Fried van Hoof and Jacqueline Smith (eds) *The role of the nation-state in the 21st Century: Human rights, international organisations and foreign policy; Essays in honour of Peter Baehr* (The Hague: Kluwer

However, some commentators such as Bruce Abrahamson have criticised the interpretation of the UDHR that acknowledges that private actors are directly burdened by human rights obligations on the ground that, being a resolution of the UN General Assembly, the UDHR does not impose legal obligations on private persons.¹¹⁷ That the UDHR is not a treaty is obvious. However, it is now settled that some of its provisions have crystallised into customary international law.¹¹⁸ The UDHR can also be regarded as an elaboration of the human rights norms contained in the UN Charter.¹¹⁹ To that extent, the UDHR is binding. However, it is not clear whether the provisions cited above, which expressly target non-state actors, have also become part of international law. There is still scope though for these to translate into customary international law in the near future given the emerging state practice providing for non-state actors' responsibility for human rights in municipal law as



Law International, 1998) 175, 180 (noting that 'although not its principal thrust, it appears that non-State entities have human rights duties under the Universal Declaration.')

¹¹⁷ Bruce Abramson 'Who has legal obligations under the CRC? The relation of private actors to the CRC' submission to the Committee on the Rights of the Child's Day of General Discussion on 'The private sector as service provider and its role in implementing child rights, 20 September 2002.

¹¹⁸ See eg Kenneth A Acheampong 'Reforming the substance of the African Charter on Human and People's Rights: Civil and political rights and socio-economic rights' (2001) 1(2) *African Human Rights Law Journal* 185, 189. Examples of such provisions include the right to life, non-discrimination, and the prohibition of torture and genocide.

¹¹⁹ Article 1 of the Charter includes promoting and encouraging respect for human rights and fundamental freedoms as a main purpose of the UN. Article 55 of the Charter also makes reference to the UN's commitment to promoting the observance of human rights.

demonstrated in chapter 6 of this study.¹²⁰ Above all, it must be noted that some of the relevant provisions of the UDHR have already been transformed into binding norms of international law by a range of treaties.

¹²⁰ An oft-cited domestic innovation for holding private actors accountable for human rights is the Alien Tort Claims Act (discussed in chapter 4). Apart from this Act, Constitutions adopted after 1990 by African states have, in addition to recognising both civil and political rights and economic, social and cultural rights increasingly entrenched the horizontal application of human rights. Article 18 of the 1990 Constitution of Cape Verde provides that ‘Constitutional norms regarding rights, liberties and guarantees shall bind all public and private entities and shall be directly enforced’. The Constitutions of Ghana [1992, section 12(1)] and Malawi [1994, section 15(1)] contain a similar provision with different formulation. They both provide similarly that:



The (fundamental) human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, and where applicable to them, by all natural and legal persons in (Ghana), and shall be enforceable by the courts (as provided for in this Constitution).

Under the 1996 Constitution of South Africa, the Bill of Rights also applies to private actors. Section 8(2) provides that ‘A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ Section 8(3) provides that when applying a provision of the Bill of Right to a natural or legal person, a court ‘must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right’. Furthermore, section 39(2) provides that ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

5.3 The ICCPR and the ICESCR and other international human rights instruments

The preambles to both the International Covenant on Civil and Political Rights (ICCPR)¹²¹ and the ICESCR realise that ‘the individual, having duties to other individuals and to the community to which he belongs’, is ‘under a responsibility to strive for the promotion and observance of the rights’ recognised under these instruments. In addition, they both contain a common provision (similar to the UDHR’s article 30) stating that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.¹²²

The CESCR has in its recent general comments made statements, which support the view that human rights treaties (in this context the ICESCR) have a direct horizontal effect. For example, it has stated that before any action that interferes with an individual’s right to water is carried out by ‘the State party, or by any other third party’, the relevant authorities ‘must ensure that such actions are performed in a manner warranted by law, compatible with the covenant.’¹²³ With respect to the right to food and health, the CESCR has stated:

¹²¹ Opened for signature 19 December 1966, 999 U.N.T.S. 171, entry into force 23 March 1976 (ICCPR).

¹²² See article 5(1) common to both the ICCPR and the ICESCR.

¹²³ General Comment No 15 (2003) ‘The right to water (arts 11 and 12 of the ICESCR)’ EC12/2002/11 para 56. General Comments are generally not legally binding. However, they can be treated as soft-law

While only States are parties to the Covenant and (are) thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, (intergovernmental and) non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities in the realisation of the right to (adequate food/health).¹²⁴

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹²⁵ defines ‘discrimination against women’ as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2(e) of this instrument enjoins states to ‘take appropriate measures to eliminate discrimination against women by any person, organisation or enterprise’. Furthermore, states have the obligation in terms of article 3 of CEDAW to take all appropriate measures in all fields to ensure the full development and advancement of women and, in terms of article 5, to modify social and cultural patterns of conduct of

norms of international law and have particularly proved persuasive in interpreting regional treaties and domestic constitutions. See eg *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No 155/96 (2001); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

¹²⁴ General Comment No 12 (1999) ‘The right to adequate food (Art 11 of the ICESCR)’ E/C12/1999/5 para 20; General Comment No 14 (2000) ‘The right to the highest attainable standard of health (art 12 of the ICESCR)’ E/C12/2000/4 para 42.

¹²⁵ Adopted by The UN General Assembly Resolution 34/180 of 18 December 1981, entered into force 3 September 1981.

men and women in order to eliminate prejudices against women. These provisions appear to be consistent with the feminist conception of human rights as discussed in chapter 2 of this study, which posits that human rights ought to bind both state and non-state actors.

In addition to these treaties, the Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹²⁶ the UN Declaration on the Elimination of All Forms of Discrimination Against Women¹²⁷ and UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief¹²⁸ also explicitly provide that non-state actors have a duty not to discriminate against any person and group of person on certain prohibited grounds.

These provisions and statements clearly and unambiguously support the view that international law is not intended to bind state conduct only. It also increasingly imposes obligations on non-state actors.



¹²⁶ Adopted by the UN General Assembly Resolution 2106A (XX) of 21 December 1965, entered into force 4 January 1969. See eg article 2(d).

¹²⁷ Adopted on 20 November 1963 by UN General Assembly Resolution 1904 (XVIII). Article 2(1) provides: 'No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.'

¹²⁸ Adopted by the UN General Assembly Resolution 36/55 on 25 November 1981. Article 2(1) provides: 'No one shall be subject to discrimination by any State, institution, group of persons or person on grounds of religion or belief.'

5.4 Regional human rights treaties and declarations

Like international treaties, regional human rights treaties also tend to impose human rights obligations of non-state actors directly in addition to stipulating the duties of states. Article 30 of the UDHR, also found in article 5(1) common to the ICCPR and the ICESCR, finds expression in article 17 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹²⁹ The latter states that nothing in the European Convention may be interpreted as implying ‘for any State, group or person any right to engage in an activity or perform any act aimed at the destruction of any of the rights’ recognised under it. The African Charter on Human and Peoples’ Rights¹³⁰ is even more forthright in recognising human rights responsibilities of non-state actors. It’s preamble acknowledges quite clearly that ‘the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone’. This statement is elaborated in the substantive provisions of the Charter. Article 27(1) provides that every individual has ‘duties towards his family and society, the State and other legally recognised communities and the international community’. Article 27(2) goes on to provide that ‘the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. Article 28 provides that the individual has the duty to ‘respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect

¹²⁹ Opened for signature 4 November 1950, 213 U.N.T.S. 221, entry into force 3 September 1953 (European Convention).

¹³⁰ Opened for signature 27 June 1981, 1520 U.N.T.S. 217, entry into force 28 December 1988 (African Charter).

and tolerance'. Article 29 contains other duties of individuals although these may not correlate to any specific human rights.¹³¹

Like the African Charter, the African Charter on the Rights and Welfare of the Child¹³² imposes general and specific obligations on parents, children and other non-state actors. Its preamble affirms that 'the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone'. Article 20(1) states that the primary responsibility for the upbringing and development of the child rests on parents or other persons responsible for the child. In particular, these have the duty to ensure that the best interests of the child are their basic concern at all times; to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and to ensure that domestic discipline is administered with humanity.¹³³ The responsibilities of children are stipulated in article 30. According to this article, every child has 'responsibilities towards his family and society, the State and other legally recognised communities and the international community.' Children have other duties listed under this article similar to those contained in article 29 of the African Charter referred to above.¹³⁴

¹³¹ Eg the duty to of the individual to preserve the harmonious development of the family, serve his national community, not to compromise the national security of the state, to preserve and strengthen social and national solidarity, to preserve and strengthen the national independence and territorial integrity of his country, to work and pay taxes in interest of the society, to preserve and strengthen positive African cultural values, to contribute to the promotion and achievement of African Unity.

¹³² OAU Doc CAB/LEG/24.9/49 (1990), opened for signature 11 July 1990, entry into force 29 November 1999 (African Children's Charter).

¹³³ Article 20(a)-(c).

¹³⁴ See above n 131 and the accompanying text.

Article 29(1) of the American Convention on Human Rights,¹³⁵ like the European Convention, codifies the UDHR's article 30. Furthermore, the American Convention provides that '[e]very person has responsibilities to his family, his community, and mankind'.¹³⁶ '[T]he rights of each person', according to this Convention, 'is limited by the rights of others, by the security for all, and by the just demands of the general welfare, in a democratic society.'¹³⁷ Adopted almost contemporaneously with the Universal Declaration, the American Declaration of the Rights and Duties of Man,¹³⁸ as the name suggests, not only recognises the rights of individuals but also imposes human rights obligations on non-state actors. In its preamble, the American Declaration proclaims that all men 'should conduct themselves as brothers one to another' and that the 'fulfilment of duty by each individual is a prerequisite to the rights of all'. Its substantive provisions expressly recognise the following duties of individuals: to support and protect one's own children; to acquire at least elementary education; to vote; to obey the law; to serve the community and the nation; to work; to

¹³⁵ Opened for signature 22 November 1969, 1144 U.N.T.S. 123, entry into force 27 August 1979 (American Convention).

¹³⁶ Article 32(1).

¹³⁷ Article 32(2).

¹³⁸ OAS Res XX (1948) (American Declaration). This Declaration was adopted as a non-binding conference resolution with no legal effect. However, it has gradually gained legal status and is widely viewed as embodying the authoritative interpretation of the fundamental rights of the individual proclaimed in the Organisation of the American States Charter. See Dinah Shelton 'Abortion and right to life in the Inter-American system: The case of "Baby Boy"' (1981) 2 *Human Rights Law Journal* 309, 312 – 313; Thomas Buergenthal *International human rights in a nutshell* (West Group: 1995) 180 – 181.

co-operate with the state and the community with respect to social security and welfare; to pay taxes; and to refrain from political activities in a foreign country.¹³⁹

This discussion illustrates that international human rights law, though principally concerned with human rights obligations of states, also contains obligations, which apply directly to both legal and natural persons. These obligations relate to both civil and political rights, and economic, social and cultural rights. This discussion supports the contention advanced earlier that human rights law has reinforced the idea that international law is not a body of law exclusively concerned with inter-state relations, but that it also regulates and governs the relations of non-state actors *inter se*.

5.5 International criminal and humanitarian law

The fields of international criminal law and international humanitarian law cogently lend support to the idea that international law recognises human rights obligations of non-state actors. International human rights law and international humanitarian law are branches of international law that for long developed separately.¹⁴⁰ International humanitarian law initially developed to regulate the relations between nations by providing rules for the protection of certain categories of enemy persons in time of war while human rights law were aimed at preventing war, but not to regulate war. However, the differences between the two have become

¹³⁹ See chapter two of the Declaration, articles XXIV – XXXVIII.

¹⁴⁰ Dietrich Schindler 'Human rights and humanitarian law: Interrelationship of the laws' (1982) 31 *American University Law Review* 935.

¹⁴¹ *Ibid* 935 – 937.

more obscure since 1968.¹⁴² International human rights law has since greatly influenced the development of international humanitarian law and the latter has become a chief means of enforcing the human rights obligations of individuals in international law.¹⁴³

International humanitarian law has long recognised that individuals have duties in international law. The 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land recognised both rights and duties of war or armed conflict applicable to armies, militias, volunteer corps and individuals.¹⁴⁴ The four Geneva Conventions reinforced these Conventions.¹⁴⁵ However, individual criminal responsibility in international law for violating the laws of war was not established

¹⁴² Ibid. See also Yusuf Azsar *Implementing international humanitarian law: From ad hoc tribunals to a permanent International Criminal Court* (London: Routledge, 2004) 1.

¹⁴³ Schindler, above n 140, 937.



¹⁴⁴ The Hague Conventions were negotiated at the First and Second Peace Conferences at The Hague, Netherlands. The 1899 Hague Convention was signed on 29 July 1899 and entered into force on 4 September 1900. The 1907 Hague Convention was signed on 8 October 1907 and entered into force on 26 January 1910.

¹⁴⁵ These Conventions were first adopted in 1864, 1906, 1929. They were revised and a fourth one was added in 1949. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), adopted on 12 August 1949, 75 UNTS 31, entry into force 21 October 1950; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of in Armed Forces at Sea (Geneva Convention II), adopted on 12 August 1949, 75 UNTS 85, entry into force 21 October 1950; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), adopted on 12 August 1949, 75 UNTS 135, Entry into force 21 October 1950; and Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), adopted on 12 August 1949, 75 UNTS 287, entry into force 21 October 1950.

until after First World War.¹⁴⁶ The Treaty of Versailles included three articles that provided for punishment of person accused of infringing the laws and customs of war during the World War.¹⁴⁷ International prosecution for violating the laws of war was to await the Second World War. It was thus the creation of the Nuremberg Military Tribunal,¹⁴⁸ which established that individuals bear direct responsibility for violating humanitarian law and, by implication, human rights law.¹⁴⁹ A judgement delivered by this Tribunal stated:

that international law imposes duties and liabilities upon individuals as well as upon States has long been recognised ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.¹⁵⁰

This dictum affirms that international law recognises that non-state actors can and actually have certain duties in international law. Since the Second World War, individual criminal responsibility in international criminal law has become well entrenched. For example, the Convention on the Prevention and Punishment of the

¹⁴⁶ Steven Ratner & Jason S Abrams *Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (2nd ed) (Oxford: Oxford University Press, 2001) 5.

¹⁴⁷ Treaty of Peace, 28 June 1919, articles 228 – 230.

¹⁴⁸ Created by the London Agreement and Charter of the International Military Tribunal, adopted on 8 August 1945, 82 UNTS 280, entered into force 8 August 1945.

¹⁴⁹ Ratner & Abrams, above n 146, 6.

¹⁵⁰ Transcript of Proceedings, 1 October 1946, Quoted in Andrew Clapham *Human rights in the private sphere* (Oxford: Clarendon Press, 1993) 95 – 96.

Crime of Genocide,¹⁵¹ the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹⁵² the Statute of the International Criminal Tribunal for Rwanda (ICTR),¹⁵³ and the Rome Statute for International Criminal Court (ICC)¹⁵⁴ define a range of international crimes, which may be committed by non-state actors and punished at both domestic and international levels. Although most international offences relate to gross violations of civil and political rights, some, such as

¹⁵¹ GA Res 260A (III) (1948), opened for signature 9 December 1948, entry into force 12 January 1951. Article IV provides: '*Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.*' Emphasis added.

¹⁵² UN SC Res 827 of 25 May 1993. According to article 1 of the Statute of the ICTY, the ICTY has the power to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991' including those who committed grave breaches of the Geneva Conventions 1949, violations of the laws of war, genocide, and crimes against humanity. See articles 2-5. However, in terms of article 6, the ICTY's jurisdiction under this Statute is limited to natural persons.

¹⁵³ UN SC Resolution 955 of 8 November 1994. Like the Statute of the ICTY, article 1 of the Statute of the ICTR stated that the ICTR has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. Furthermore, articles 2-4 of the Statute provide that the ICTR can prosecute any person who committed or ordered others to commit genocide, crimes against humanity, and violations of the Geneva Conventions. Like the ICTY, the ICTR's jurisdiction under this Statute is limited to natural persons in terms of article 5 of the Statute.

¹⁵⁴ Article 1 of the Rome Statute provides that the ICC has 'the power to exercise its jurisdiction over persons for the most serious crimes of international concern'.

genocide,¹⁵⁵ grave breaches of the Geneva Conventions¹⁵⁶ and crimes against humanity,¹⁵⁷ involve infringements of economic, social and cultural rights. Company directors, for example, may therefore be individually responsible for international crimes involving violations of economic, social and cultural rights despite the fact that corporate liability for international crimes remains a contested issue.¹⁵⁸ Individuals

¹⁵⁵ This offence includes acts committed with intent to destroy in whole or in part a national ethnic, racial or religious group. Such acts include deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in part or in whole, imposing measures intended to prevent births within a group, and forcibly transferring children of a group to another group. See article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and article 2 of the Statute of International Criminal Tribunal for Rwanda. See also article 6 of the Rome Statute.

¹⁵⁶ These crimes involves such acts as devastation of property, plunder of public or private property, and destruction or wilful damage to institutions dedicated to religion or education. See Common article 3 of the Geneva Conventions referred to above in this section.

¹⁵⁷ Crimes against humanity encompass such acts as extermination of a population, forced and arbitrary displacement of people, enforced prostitution, forced pregnancy and enforced sterilisation. In *Prosecutor v Baskic*, Judgment IT-95-14-T, 3 March 2000, destruction of property was considered by the ICTY to form part of persecution if it consists of the destruction of towns, villages and other public and private properties belonging to a given civilian population, or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily.

¹⁵⁸ For instance, the debate during the drafting of the Rome Statute failed to yield a consensus on the issue, with the result that corporate liability was excluded from the statute. See Andrew Clapham 'The question of jurisdiction under international criminal law over legal persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T Kamminga and S Zia-Zarifi (eds) *Liability of multinational corporations under international law* (The Hague: Kluwer Law International, 2000) 139 – 195.

whether acting on their own behalf or on behalf of states, international organisations, or insurgent movements may also be held responsible for violations of human rights that constitute international crimes. For example, Steven Ratner has noted that several German industrialists, who were leaders of large German industries, were prosecuted in American courts for crimes against peace, war crimes, and crimes against humanity because of their involvement in Nazi practices of slave labour and deportation.¹⁵⁹ International punishment here can be seen as an example of piercing the veil of incorporation at the international level in the sense that the persons in charge of given legal persons are liable to punishment for failure to discharge or comply with their individual duties or those of the entity they represent.

An interesting remedy that has developed in international criminal law is that of reparations. Before the ICC Statute, international criminal law recognised restitution as the only form of remedy. Article 28 of the Nuremberg Charter made, and articles 24(3) and 23(3) of the Statutes of the ICTY and the ICTR respectively make provision for restitution only. Now, this law recognises a wider range of reparations. According to article 77(2) of the ICC Statute, fines and forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of bona fide third parties, are penalties that can be imposed alongside imprisonment. This Statute also provides that other forms of reparations such as restitution, compensation and rehabilitation may be ordered directly against the offender in terms of article 75. These forms of reparations are not labelled as criminal sanctions as such. The recognition of reparations as a sanction in international law against individuals supports the view that these actors have duties in international law which can be enforced against them directly in certain circumstances.

¹⁵⁹ Ratner, above n 103, 477.

5.6 Conclusion

In view of this discussion, one may be correct to conclude that international law increasingly recognises that non-state actors may have duties in international law. In particular, this section has demonstrated that contrary to popular belief, international human rights treaties and other documents increasingly make provision for human rights duties of non-state actors. While most of these duties may not be enforced directly against these actors, this does not mean that non-state actors are not subjects of international law. Moreover, the rights and duties of these actors could be enforced indirectly through the state as will be shown in chapter 4 or directly through soft law procedures in international law as will be shown in chapter 5. Importantly, this section has shown that where these obligations relate to international crimes, they could also be directly enforced against individuals in international humanitarian and criminal law.



6 SELECTED ACTORS

As shown earlier, common characteristic of all subjects of international law is that they have capacity to bear direct rights and duties in international law. We have also noted that subjects of international law are different in nature and may have different rights and duties. While the preceding sections dealt with general provisions of international law, which could be considered applicable to non-state actors generally, this part discusses the position of some specific actors regarding their capacity to bear these international rights and duties. It seeks to demonstrate that international law has developed to regard a range of non-state entities as having capacity to bear international rights and duties, effectively as subjects of international law.

6.1 International organisations

6.1.1 *Position in international law*

It is no longer in dispute that international organisations qualify as subjects of international law. Any doubt regarding this was put to rest in the *Reparations Case*, mentioned earlier, where it was held that the UN had international personality. In reaching this decision the Court said:

Accordingly, the Court has come to the conclusion that the Organisation is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of the State. Still less is it the same thing as saying that it is a 'super-State', whatever that expression may mean ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.¹⁶⁰



The ICJ has reaffirmed this opinion in a range of its later decisions. In its advisory opinion of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Nuclear Weapons Case)*,¹⁶¹ it stated that '[t]he Court need hardly point out that international organisations are subjects of international law, which do not, unlike States, possess a general competence.'¹⁶² Both this opinion and the *WHO Agreement*

¹⁶⁰ *Reparations Case*, above n 35, 179.

¹⁶¹ 8 July 1996, General List No 23, available at < <http://www.icj-cij.org/icjwww/icas/ianw/ianwframe.htm> > (accessed: 30 April 2005).

¹⁶² *Ibid* para 25.

*Case*¹⁶³ held that that the WHO, being an agency of the UN, has international personality. By implication, all other UN agencies¹⁶⁴ including the International Monetary Fund and the World Bank are subjects of international law.¹⁶⁵

6.1.2 *International organisations as subjects of human rights duties*

It must be noted that the jurisprudence discussed in the preceding section has developed from a perspective of international organisations as subjects of international rights.¹⁶⁶ The ICJ has stated that the functions and powers accorded to the organisation constitute a benchmark for determining the extent of the rights and duties of the organisation in international law.¹⁶⁷ As noted in chapter 1, some

¹⁶³ See above n 50.

¹⁶⁴ See also Wolfgang Friedmann *The changing structure of international law* (London: Stevenson & Sons, 1964) 217.



¹⁶⁵ For scholarship on the legal personality and human rights obligations of the IMF and the World Bank see Sigrun I Skogly *The human rights obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing Ltd, 2001) 63 – 92; Fergus MacKay ‘Universal rights or a universe unto itself? Indigenous peoples’ human rights and the World Bank’s Draft Operational Policy on Indigenous Peoples’ (2002) 17 *American University International Law Review* 527.

¹⁶⁶ The *Reparations Case*, above n 35, concerned the right of the UN to bring an international claim on its own behalf and on behalf of its agent for violations of its international rights or those of its agents. The *WHO Agreement Case* (above n 50) dealt with the question of the right of the WHO to choose the location of its headquarters. Finally, the *Nuclear Weapons Case*, above n 161, concerned the rights of the WHO to address the question of the legality of the use of nuclear weapons.

¹⁶⁷ See the *Reparations Case*, above n 35, 182 – 183. In its advisory opinion on the *Nuclear Weapons Case*, the ICJ stated that ‘International organisations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a

organisations have interpreted this to mean that the organisations, which do not incorporate, expressly or impliedly, the protection of human rights as one of their functions, have no obligations in relation to human rights.¹⁶⁸

However, while the functions and powers of an organisation would help to define the scope of its competence on the international scene, the question of the precise human rights duties (and international rights for that matter) of international organisations cannot be defined solely by reference to the express or tacit functions and powers of an organisation.¹⁶⁹ The fact that an entity is recognised as a subject of international rights means that it can also be a subject of international duties arising from the organisation's mandate, treaties it enters into, and customary international



function of the common interests whose promotion those States entrust to them'. See above n 161, para 25.

¹⁶⁸ See section 3.3 of chapter 1.

¹⁶⁹ See Gerhard Hafner 'Can international organisations be controlled? Accountability and responsibility' (2003) 97 *American Society of International Law Proceedings* 236, 240 (noting that 'the constituent instruments or, more generally, the treaty law of IOs can no longer be seen as the sole legal basis of their activities. In order to find legal solutions to the questions raised by their existence and activities, recourse must be made to customary international law or general principles of law.' See also Elizabeth Abraham 'The sins of the saviour: Holding the United Nations accountable to international human rights standards for executive order detentions in its mission in Kosovo' (2003) 52 *American University Law Review* 1291, 1311 – 1312 (noting that the functional necessity approach 'creates a loophole where international organisations are not held to the same standards as States performing the same tasks').

law and other sources of international law.¹⁷⁰ As the ICJ stated in the *WHO Agreement Case*:

International organisations 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.¹⁷¹

As shown in part IV, current human rights standards impose direct obligations on non-state actors, including international organisations.

There is another sound reason why international organisations must be bound by human rights standards, whether the protection of the latter forms part of their mandate or not. It is that international organisations are not ‘super-states’, a fact recognised in the *Reparations Case*.¹⁷² International organisations cannot engage in conduct violating international human rights law, which if committed by states (which created those organisations) would have attracted their responsibility.¹⁷³ The maxim



¹⁷⁰ Sigrun Skogly has argued in relation to the IMF and the World Bank thus: ‘The fact that the two organisations possess international legal personality implies a position in the system of international law, and that certain rights and obligations follow from this. The legal position is that they are under an obligation to operate within the framework of the international legal regime. See Skogly, above n 165 above, 70.

¹⁷¹ Paras 37, 89 – 90. Emphasis added.

¹⁷² See above n 35, 179.

¹⁷³ See Mahnoush H Arsanjani ‘Claims against international organisations: Quis custodiet ipsos custodes’ (1981) 7(2) *The Yale Journal of World Public Order* 131, 132 (arguing that ‘It would be illogical to assume that member States intended to create international organisations with competence to transgress the obligations the States themselves were assuming’).

that no one is above the law is as applicable to international organisations in relation to international law as it is to states.

Currently there is no international body of a judicial nature entrusted with the power to adjudicate claims against international organisations alleging violations of international law or human rights. Only states can bring cases before the ICJ.¹⁷⁴ International organisations have no *locus standi* before this Court. All that the UN (the only organisation with some standing before this Court) and its specialised agencies can do is to request advisory opinions of the Court on legal issues arising within the scope of their activities.¹⁷⁵

¹⁷⁴ See Article 34(1) of the UN Charter.

¹⁷⁵ Article 96 of the UN Charter. However, there are a range administrative and quasi-judicial mechanisms through which these organisations can be held responsible for violations of international law, including human rights. As most international organisations enjoy extensive immunities in member states, negotiation has been used as a preferred means of resolving claims against the former. Another common method of resolving disputes between international organisations and third parties has been arbitration. Due to concerns about the impact of UN peace-keeping missions, the UN has developed a practice of including a provision for a Claims Commission to hear claims by, for example, any citizen of a host country or government in respect of damages resulting from an act or omission of a member of the force relating to his duties or claims. Administrative tribunals are used for purposes of settling claims of employees of organisations. These procedures are internally operated by the organisations themselves. For a detailed discussion of these see Arsanjani, above n 173, 131; Karel Wellens *Remedies against international organisations* (Cambridge: Cambridge University Press, 2002) 88 – 105. The effectiveness of these mechanisms has been questioned and no consistency exists on the practice of international organisations regarding the use of these mechanisms, highlighting the need for a uniform regime of the accountability of international organisations for human rights in particular and international law in general. Michael Singer ‘Jurisdictional immunity of international organisations: Human rights and functional necessity concerns’ (1995) 36 *Virginia Journal of International Law* 53,

However, the absence of an international procedure to enforce the duties of international organisations does not mean that these organisations are not subjects of those duties. In a recent advisory opinion of the ICJ on the *Difference relating to Immunity from Legal process of Special Rapporteur of the Commission on Human Rights*,¹⁷⁶ the ICJ, while recognising that the UN enjoys immunity in national courts, stated that the UN may still be required to bear responsibility for the damage arising from acts performed by it or its agents (acting in their official capacity).¹⁷⁷ Such claims, it stated, may be settled in accordance with the appropriate modes of settlement provided for by the UN,¹⁷⁸ which are not akin to judicial remedies the ICJ may grant. This discussion also supports the contention advanced earlier that the right to present claims or be sued before an international tribunal is not a valid requirement of international personality.



163; Wellens, above in this note, 174. Karel Wellens has submitted that alternative remedial action of both legal and non-legal nature should be adopted. He proposes that complaint-handling and investigative mechanisms such as the institution of the Ombudsman, commissions of inquiry, and panel inspections could help to fill the gap. While also recommending the role of arbitral proceedings, he submits that the ICJ has an inevitable role to play in this regard. See Wellens, above in this note, 169 – 262.

¹⁷⁶ 19 April 1999, General List No 100, available at <<http://www.icj-cij.org/icjwww/idocket/inuma/inumaframe.htm>> (accessed: 30 April 2005) para 66.

¹⁷⁷ Ibid para 66.

¹⁷⁸ Ibid. For these mechanisms see above n 175 and the accompanying text.

6.1.3 *Draft Articles on Responsibility of International Organisations*

The Draft Articles on Responsibility of International Organisations (Draft Articles) adopted provisionally by the International Law Commission (ILC)¹⁷⁹ thus far affirm that international organisations¹⁸⁰ are subjects of international duties.

According to the Draft Articles, '[e]very internationally wrongful act of an international organisation entails the international responsibility of the international

¹⁷⁹ At its 52nd Session held in 2000, the ILC decided, a year before completing its second reading of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, to put the topic of the responsibility of international organisations on its agenda. At its 54th session held on 8 May 2002 Mr Giorgio Gaja of Italy was appointed Special Rapporteur and a Working Group was also appointed. At the 55th Session, the ILC adopted the first reading of Draft Articles 1-3 after considering the First Report of the Special Rapporteur. See Report of the ILC on its work of its 56th Session, 29-49, available at <www.un.org/law/ilc/> (accessed: 30 April 2005). The first reading of Draft Articles 4-7 was adopted at the ILC's 56th session held in May 2004. See Report of the ILC on its work of its 55th Session, 94-135, available at <www.un.org/law/ilc/> (accessed: 30 April 2005).

¹⁸⁰ Article 2 of the Draft Articles defines an international organisation as one 'established by a treaty or other instrument governed by international law and possessing its own international legal personality'. This definition takes into account the possibility that an organisation may be other means than a treaty. For example, the Organisation for Security and Cooperation in Europe, the Organisation of the Petroleum Exporting Countries and the Pan American Institute of Geography and History were not established by a treaty. See para 5 of the ILC's Commentary on article 2 of the Draft Articles, in the Report of the ILC on its work of its 55th Session, 40. For these, it suffices that the organisation is established by such means as 'resolutions adopted by the General Assembly of the United Nations or by a conference of States'. Article 2 provides further that composition of international organisations could consist of non-state entities in addition to states.

organisation'.¹⁸¹ An 'internationally wrongful act' is one consisting of an action or omission attributable to the international organisation under international law, which constitutes a breach of an international obligation of that international organisation.¹⁸² Like the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility),¹⁸³ these articles as mean that breach of international law by an international organisation gives rise to the responsibility of the organisation.

Significantly, the Draft Articles affirm that international organisations are responsible for their own acts or those of their agents although sometimes those acts would raise the responsibility of member states.¹⁸⁴ The rules on attribution of conduct to an organisation adopted thus far are similar to those relating to state responsibility. For example, an international organisation could be held responsible for the conduct of an organ of a state or an organ or agent of an international organisation placed at the disposal of another international organisation if the latter exercises effective

¹⁸¹ See article 3(1) of the Draft Articles.

¹⁸² See article 3(2) of the Draft Articles.

¹⁸³ As contained in *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/55/10 (2000) (Draft Articles) and adopted by the International Law Commission on 9 August 2001. Discussed in James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, text and commentary* (Cambridge: Cambridge University Press, 2002).

¹⁸⁴ For a detailed discussion on the liability of states for acts of international organisations see Moshe Hirsch *The responsibility of international organisations toward third parties: Some basic principles* (Dordrecht: Martinus Nijhoff Publishers, 1995) 96 – 148.

control over that conduct.¹⁸⁵ An international organisation could also be held responsible for the conduct of an organ or agent of that international organisation if the agent or organ acts in that capacity although the conduct exceeds the authority of that organ or agent or contravenes instructions.¹⁸⁶ Furthermore, conduct, not otherwise attributable to an international organisation, may nevertheless be considered an act of that international organisation if and to the extent that the organisation acknowledges and adopts the conduct in question as its own.¹⁸⁷

Like the Draft Articles on State Responsibility, the Draft Articles on the Responsibility of International Organisations constitute secondary rules of international law and are therefore not intended to stipulate any procedures for enforcing the obligations of international organisations in international law. However, they restate existing norms of international law especially the basic principle that international organisations have obligations under international law including international human rights irrespective of whether the organisation's mandate relates to human rights.

6.2 Non-governmental organisations

The preceding discussion has shown that international law recognises international organisations as subjects of international law and that, as such, they have capacity to bear rights and duties in international law including human rights obligations. However, a distinction is often drawn between an international organisation and an

¹⁸⁵ Article 5 of the Draft Articles.

¹⁸⁶ Article 6 of the Draft Articles.

¹⁸⁷ Article 7 of the Draft Articles.

international non-governmental organisation (NGO). As noted in chapter 1, this distinction is largely based on membership. The former is considered an intergovernmental body while the latter is considered to comprise non-state entities.¹⁸⁸ Does this mean that international organisations formed by non-state actors are not subjects of international law? This part answers this question. The term NGOs as used herein refers to all international organisations, which do not qualify as international (governmental) organisations on the ground that their membership does not include states.

Most leading textbooks on international law do not discuss the position of NGOs in international law.¹⁸⁹ There is also no international decision on the issue. The available literature suggests that many writers take the orthodox position that NGOs are not subjects of international law.¹⁹⁰ It is a view that is based on the traditional conception of subjects of international law, which considers states as the only addresses of international law, with international organisations being the exception.

¹⁸⁸ See PR Menon 'The legal personality of international organisations (1992) 4 *Sri Lanka Journal of International Law* 79, 81; Henry G Schermers *International institutional law: Functioning and legal order* (Vol II) (Leiden: AW Sijthoff, 1972) 623; Henry G Schermers *International institutional law: Structure* (Vol I) (Leiden: AW Sijthoff, 1972) 5 – 11; AS Muller *International organisations and their host states: Aspects of their legal relationship* (The Hague: Kluwer Law International, 1995) 75 – 76; Steve Charnovitz 'Two centuries of participation: NGOs and international governance' (1997) 18 *Michigan Journal of International Law* 183, 186.

¹⁸⁹ See eg the chapters on subjects of international law in Ian Brownlie *Principles of public international law* (Oxford: Oxford University Press, 2003); and Shaw, above n 28.

¹⁹⁰ Matt Noortmann 'Non-state actors in international law' in Bas Arts, Math Noortmann & Bob Reinalda (eds) *Non-state actors in international law* (Ashgate: Ashgate Publishing Ltd, 2003) 59, 71.

However, recent studies on NGOs demonstrate that these organisations enjoy a wide range rights and have certain duties in international law. Dina Shelton has demonstrated that while NGOs have rarely participated in proceedings before the ICJ, the practice in other international and regional tribunals shows that these entities are allowed to participate as *amici curiae* in international proceedings.¹⁹¹ Furthermore, NGOs do not only participate in international law making processes and other critical international policy decision-making processes, they also play an important role in holding other actors accountable to international law.¹⁹² In the context of human rights, a practice has evolved among international human rights monitoring bodies allowing NGOs to make comments, written or oral, when considering state reports, or to submit shadow reports, and inviting them to make contributions on proposed treaties.¹⁹³ In some cases, NGOs are also allowed to be parties to international proceedings.¹⁹⁴ Of particular interest to note is some treaties, quite apart from the



¹⁹¹ See generally Dinah Shelton 'The participation of nongovernmental organisations in international judicial proceedings' (1994) 88 *American Journal of International Law* 611.

¹⁹² See generally Karsten Nowrot 'Legal consequences of globalisation: The status of non-governmental organisations under international law' (1999) 6 *Indiana Journal of Global Legal Studies* 579. See also Asher Alkoby 'Non-state actors and the legitimacy of international environmental law' (2003) 3 *Non-State Actors and International Law* 23.

¹⁹³ See Nowrot, *ibid*, 621 – 631.

¹⁹⁴ Eg article 34 of the European Convention on the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 provides that NGOs may submit complaints alleging violations of human rights. Similar provisions can be found in the Additional Protocol to the European Social Charter providing for a System of Collective Complaints, E.T.S. 128, 5 May 1988, not in force;

human rights treaties discussed above, grant certain rights to such NGOs as the International Red Cross. For example, article 123 of the Geneva Convention III grants the IRC the right to set up a central prisoner of war information agency. Article 125 of this Convention provides that the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the detaining Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps. The Geneva Convention IV has similar provisions.¹⁹⁵ There is also evidence in support of the fact that some NGOs have entered into agreements with states and enjoyed immunity from states.¹⁹⁶ These norms and practices suggest an emerging trend towards recognising their legal personality.



The view that NGOs are subjects of international law is gaining more and more support from scholars in international law. While commenting on the implications of the *LaGrande Case* discussed earlier, Mr Giorgio Gaja, the Special Rapporteur on Responsibility of International Organisations, found it difficult to understand ‘why

article 44 of the American Convention on Human Rights; article 55 of the African Charter as read with Rule 114 of the Rules of procedure; article 42 of the African Children’s Charter.

¹⁹⁵ See eg articles 59 – 63.

¹⁹⁶ According to Matt Noortmann, the ICRC and the Regional Environmental Centre for Central and Eastern Europe have enjoyed diplomatic immunity from their host states. The Greenpeace, an environmental NGO has entered into agreements with France on submitting a dispute regarding the destruction of ‘The rainbow Warrior’ to arbitration. See Matt Noortmann ‘Non-state actors in international law’ in Bas Arts, Math Noortmann & Bob Reinalda (eds) *Non-state actors in international law* (Ashgate: Ashgate Publishing Ltd, 2003) 59, 71 – 72.

individuals may acquire rights and obligations under international law while the same could not occur with any international organisation, provides that it is an entity which is distinct from its members.¹⁹⁷ The ILC appears to have endorsed this view tacitly. In its commentary on article 2 of the Draft Articles on Responsibility of International Organisations, which defines international organisations as those whose composition includes states and which are created under international law, the ILC states that this article does not imply that certain principles stated in the Draft Articles do not apply to organisations, which do not meet one or more of those requirements.¹⁹⁸ Stephan Hobe has also argued that ‘one should consider NGOs as subjects of international law because their conduct is directly regulated by international law.’¹⁹⁹ After an in-depth review of a range of international law norms and practices, Karsten Nowrot quite persuasively contends:

This illustrative list of rights granted to NGOs under primary international law shows that these entities not only possess a certain legal status under secondary international law of international organisations and treaty regimes, but also hold a growing number of legal entitlements under primary international law. This can be regarded as a further indication that NGOs not only participate in the interactions of the international system, but also have gained acceptance by the international community and thus received a legal personality under international law.²⁰⁰

¹⁹⁷ Giorgio Gaja *First report on responsibility of international organisations* 26 March 2003, available at <<http://www.un.org/law/ilc>> (accessed: 30 April 2005).

¹⁹⁸ See para 2.

¹⁹⁹ Stephan Hobe ‘Global Challenges to statehood: The increasingly important role of nongovernmental organisations’ (1997) *Indiana Journal of Legal Studies* 191, 201.

²⁰⁰ Above n 192, 631.

As is the case with international organisations, there is currently no international regime of accountability of NGOs. However, this does not mean that these actors are not subjects of international duties. Rather, it means that there is a lacuna in international law, which needs to be addressed.

6.3 Individuals

The question of the international legal personality of individuals is one of the oldest legal issues on the topic of subjects of international law. Although some leading authorities in international law maintain that individuals are not subjects of international law,²⁰¹ Marek St. Korowicz has argued that international law has applied directly to individuals since its inception.²⁰² He cites the works of such early authorities as Grotius, Pufendorf and Hobbes, and those of the 19th Century such as Heffter, Fiore, Bluntschli, Martens, and Kaufmann in support of this contention.²⁰³ Other early writers went as far as arguing that individuals were the sole subjects of international law.²⁰⁴ This view was based on the understanding that the notions of the 'state' and 'sovereignty' were abstract. Since individuals constituted the state and

²⁰¹ Eg Brownlie, above n 189 above and Dugard, above n 8.

²⁰² In his own words, Korowicz has argued: 'The idea that international law rules not only the intercourse of independent States but also that its provisions are directly binding on individuals without the intermediary of their States, is as old as the science of international law itself.' See Korowicz, above n 12, 327 – 328.

²⁰³ Ibid 328.

²⁰⁴ Eg Duguit, Jeze and Krabbe, Politis, Kelsen, and Scot. See Korowicz, *ibid*, 338 – 341.

were therefore the ultimate addressees of international law, not the abstract 'state', they were therefore the true and exclusive subjects of international law.²⁰⁵

However, the view that individuals were subjects of international law came under a stinging attack from a German jurist, Heilborn, in terms of the object theory. As stated earlier, this theory posits that individuals are beneficiaries of international law not subjects of it. The thrust of this theory is that since individuals cannot be sued or sue in international law, they cannot be said to be direct bearers of rights and duties under international law.²⁰⁶

As argued earlier, this theory is itself open to criticism because it wrongly assumes that the right to bring international claims is a central element of international legal personality. As demonstrated herein, the question of enforcement of rights and duties is separate from the question of being a subject of international law. It is therefore appropriate at this stage to adopt the distinction that Korowicz draws between 'passive' and 'active' subjects of international law. According to Korowicz:

It seems that whenever an international treaty speaks about rights and duties of individuals, and obliges the contracting parties to observe those rights and duties and to help in their implementation, the individuals concerned become subjects of international law. However, if the treaty provides only for substantive rights of individuals without procedural rights connected with them, if it does not authorise the individual to directly claim their rights under international law before international bodies, the individuals become only passive subjects of international law.²⁰⁷

²⁰⁵ Ibid.

²⁰⁶ See above section 2.

²⁰⁷ Korowicz, above n 12, 345.

This distinction is important as it highlights the fact that lack of capacity to bring international claims or absence of international judicial remedies, *per se*, does not disqualify an entity from being a subject of international rights and duties. The international and regional human rights norms discussed earlier clearly recognise that every individual including children have direct rights and duties in international law.

In its oft-cited advisory opinion on the *Jurisdiction of the Courts of Danzig*,²⁰⁸ the PCIJ suggested that it was possible for international treaties signed between states to create direct rights and duties for individuals, contrary to what the object theory posits. This case concerned the agreement between Poland and Danzig relating to conditions of employment. The treaty had not been domesticated by Poland. An issue therefore arose as to whether the agreement could be interpreted as having created rights not only between the Poland and Danzig but also for individuals. The PCIJ held that this treaty, being an international agreement, could not create 'direct rights and obligations for private individuals.'²⁰⁹ However, it noted that '[i]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'²¹⁰

Lauterpacht commented that through this decision, the PCIJ had effectively held that 'no considerations of theory can prevent the individual from becoming the subject of international rights if States so wish.'²¹¹ Some commentators have challenged this

²⁰⁸ 1928 PCIJ Series B, No 15.

²⁰⁹ Ibid 17.

²¹⁰ Ibid.

²¹¹ L Lauterpacht *International law and human rights* (London: Stevenson and Sons Ltd, 1950) 29.

conclusion,²¹² but the *LaGrande Case*²¹³ (which was approved in the *Avena Case*²¹⁴) decided in 2001 has finally vindicated Lauterpacht's conclusion. As mentioned earlier the ICJ in the *LaGrande Case* held that article 36 of the Vienna Convention created both individual rights and those of the state and that, by failing to uphold those rights, the United States violated not only the rights of Germany, the complaining party, but also those of the LaGrande brothers, who were not parties to the case. In effect, this case upheld the position that individuals are subjects of international law and dismissed the object theory, on which the arguments presented on behalf of the US were largely based.

It must also be noted that the object theory ignored evidence of practice in support of the view that individuals could sometimes maintain international claims before international tribunals. Commonly cited examples of treaties allowing such claims include the Hague Convention XII,²¹⁵ Treaty of Versailles,²¹⁶ the German-Upper



²¹² See eg Orakhelashvili, above n 8, 267 – 268.

²¹³ Above n 61.

²¹⁴ Above n 71.

²¹⁵ Opened for signature 18 October 1907. This Convention (which never became operational due to lack of ratifications) created an International Prize Court. Articles 4 and 5 of this Convention empowered the Court to admit claims by neutral individuals against foreign states.

²¹⁶ Opened for signature on 28 June 1919. This Treaty established the Mixed Arbitral Tribunals to decide claims for compensation by allied nationals in respect of injury to property and interests caused by exceptional war measures in Germany. Articles 299-304 empowered these Tribunals to adjudicate claims of individual claimants from victorious states against the defeated states. Individuals could also be parties to these disputes.

Silesia Convention concluded in 1922.²¹⁷ In addition to these,²¹⁸ various international and regional human rights treaties adopted since the Second World War and the practice of human rights monitoring bodies have reinforced the position that that individuals can enforce their rights against states before international tribunals.²¹⁹ This means that not only do international human rights treaties grant direct rights on individuals, the latter can enforce these rights in international law.

Moreover, and as mentioned above, the establishment of the ICTY, the ICTR, and the ICC has strengthened the precedent set by the Nuremberg trials, which highlighted that individuals have duties with regard to humanitarian law and human rights.²²⁰ The Nuremberg Tribunal held that the principle that ‘international law imposes duties and

²¹⁷ This Convention concluded between Poland and Germany created an Arbitral Tribunal with power to adjudicate any private disputes concerning the application of the Convention. This Convention recognised the legal capacity of individuals as parties to disputes before this tribunal and conferred a direct right on minority groups to the Council of the League.

²¹⁸ For a detailed discussion of these treaties and others with similar effect, see PK Menon ‘The international personality of individuals in international law: A broadening of the traditional doctrine’ (1992) *Journal of International Law and Policy* 151, 159 – 168; Korowicz, above n 12, 348 – 353.

²¹⁹ See above 90 and the accompanying text. Another example is the Iran-US Tribunal, which was established to resolve the crisis in relations between the Islamic Republic of Iran and the United States of America arising out of the detention of 52 US nationals at the US Embassy in Tehran, which commenced in November 1979, and the subsequent freezing of Iranian assets by the USA.

²²⁰ See *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (‘Nuremberg Judgment’), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm> (accessed: 30 April 2005). The relevant parts can be found under ‘The law of the Charter’.

liabilities upon individuals as upon States has long been recognised.’²²¹ It stated that the very essence of the Nuremberg Charter was ‘that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.’²²²

This discussion supports the view that individuals are subjects of international law. Otherwise, if individuals can bear direct human rights and obligations, which they can enforce before international tribunals, and which can be enforced against them through international criminal law for example, then the whole concept of subjects of international law itself is redundant.

6.4 Insurgents and national liberation movements

According to Antonio Cassese, ‘States and insurgents are “traditional” subjects of the international community, in the sense that they have been the *dramatis personae* (the characters of the play) on the international scene since its inception.’²²³ Ian Brownlie has also regarded the statement that insurgent communities having a belligerent status and *de facto* authorities in control of a specific territory, have international legal personality as correct in principle.²²⁴

²²¹ Ibid.

²²² Ibid.

²²³ Antonio Cassese *International Law* (Oxford: Oxford University Press, 2001) 46.

²²⁴ Brownlie, above n 189, 63. There is lack of clarity though with regard to the question when does a rebel group qualify as an international subject. Cassese has proposed at least two minimum requirements to be met. Firstly, the rebels must prove that they have effective control over a territory and, secondly, the civil strife should reach a certain degree of intensity and duration. The question

The consequence of the legal personality of an insurgent is to confer on it the right to administer the territory under its control.²²⁵ Conduct of insurgents is attributable to the newly created state as a whole.²²⁶ Thus, if the insurgent government commits human rights violations, the state as a whole will be liable for them. If the violations constitute international crimes, the perpetrators could be prosecuted individually by states exercising universal jurisdiction or in the ICC. By virtue of that international personality, the insurgent government is also entitled to exercise belligerent rights against the *de jure* government.²²⁷ Thus, other states are obliged to remain neutral on the conflict.

National liberation movements (NLM) involve the struggle against colonial rule.²²⁸ It is because of their aspiration to gain control over a population living in a given territory that claims for the recognition of their international legal personality are

whether a given rebel group meets these minimum requirements is dependent on the attitude of states including the state against which the rebellion is waged. See Cassese, above n 223, 67.

²²⁵ O'Connell, above n 25, 86.

²²⁶ Art 10 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001) provides:

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

²²⁷ O'Connell, above n 25, 86.

²²⁸ Cassese, above n 223, 75.

based.²²⁹ According to Ian Brownlie, the practice of the UN and its organs and its member states conferred legal status on certain NLMs during the anti-colonial period.²³⁰ In the case of *Arafat and Salah*, the Italian Court of Cassation held that NLM 'enjoy a limited international personality'.²³¹ The object of granting these actors legal personality is to give them an equal opportunity with territorial states to discuss the question of the self-determination of the people they represent. According to Antonio Cassese and Iain Brownlie, NLM have the right to self-determination, the right to enter into treaties and the duty to carry out treaty obligations, the rights and duties arising from the conduct of hostilities, and rights to certain immunities for their representatives.²³²

As this discussion demonstrates, insurgents and NLMs lend further credence to the argument that the concept of subjects of international law is not a rigid one accepting the state only as its exclusive candidate. Other entities bearing some resemblance or none at all to the characteristics of a state can be subjects of international law.

6.5 Corporations

Ian Brownlie has argued that '[i]n principle, corporations of municipal law do not have international legal personality'.²³³ The recognition of the separate legal personality of a corporation in municipal law, according to Brownlie, has no

²²⁹ Ibid 76.

²³⁰ Brownlie, above n 189, 61-62.

²³¹ Quoted in Cassese, above n 223, 76.

²³² Cassese, *ibid*, 77; Brownlie, above n 189, 62.

²³³ Brownlie, *ibid*, 65.

consequence regarding the autonomy of the corporation from the state for purposes of international law.²³⁴ However, he envisages one instance where a corporation could acquire international legal personality. This is when it exhibits the characteristics of an international organisation.²³⁵ He gives the example of a corporation created by two or more states by treaty, which confers certain immunities and powers on the corporation. If the corporation has organs and powers that affirm the autonomy of the corporation from the states, which created it, it will qualify as a subject of international law.²³⁶

Malcom Shaw discusses the legal personality of corporations under two subheadings: international public companies and transnational corporations.²³⁷ Like Brownlie, he argues that a company established as an intergovernmental structure with powers that distance itself sufficiently from municipal law has international legal personality.²³⁸ However, unlike Brownlie, Malcom Shaw states that the ‘question of



²³⁴ Ibid.

²³⁵ Ibid 66.

²³⁶ Ibid.

²³⁷ Shaw, above n 28, 223 – 225. The definition of international public companies adopted by Shaw refers to those corporations which ‘have not been constituted by the exclusive application of one national law; whose members and directors represent several national sovereignties; whose legal personality is not based, or at any rate not entirely, on the decision of a national authority or the application of a national law; whose operations, finally, are governed, at least partially, by rules that do not stem from a single or even from several national laws.’ See Shaw, above n 28, 223.

²³⁸ Ibid 224.

the international legal personality of transnational corporations remains an open one.²³⁹

The weight of authority currently speaks in favour of the view that transnational corporations are subjects of international law. Jonathan Charney has observed that ‘TNCs have had international legal personality and have participated in the international legal system for some time’.²⁴⁰ In a forceful submission, Charles Leben states:

there is no reason other than dogma for continuing to refuse to face up to the reality of modern international law, namely that by means totally different from those used in the field of human rights, private persons have acquired in the legal institution of state contracts, and more generally in the field of investment law, (limited) international legal personality by dint of their capacity to act directly against the state for the defence of their rights and to do so in international courts.²⁴¹

David Kinley and Juno Tadaki also argue that ‘[t]here is, in fact, ample evidence that TNCs do possess international rights and duties, and, with respect to their rights, the capacity to enforce them.’²⁴² Math Noormann writes that:

²³⁹ Ibid 224 – 225.

²⁴⁰ Jonathan I Charney ‘Transnational corporations and developing public international law’ (1983) *Duke Law Journal* 748, 762.

²⁴¹ Charles Leben ‘Hans Kelsen and the Advancement of International Law’ (1998) *European Journal of International Law* 287, available at <http://www.ejil.org/journal/Vol9/No2/art4.pdf> (accessed: 30 April 2005).

²⁴² David Kinley & Junko Tadaki ‘From talk to walk: The emergence of human rights responsibilities for corporations at international law’ (2004) 44 *Virginia Journal of International Law* 931, 946.

It can be concluded that international corporate activities are no longer conducted outside the realm of international law. Corporate rights and duties have been increasingly internationalised. TNCs can make legal claims and be held responsible on the basis of international legal instruments, and as such they may be qualified as new subjects.²⁴³

Surya Deva argues, similarly, that ‘it is desirable to treat MNCs, having an international area of operation, as limited subjects of international law, at least for a limited purpose.’²⁴⁴ After examining international and regional human rights norms regarding corporations, Steven Ratner concludes that ‘[t]he cumulative impact of this lawmaking and application suggests a recognition by many decision makers that corporate behaviour is a fitting subject for international regulation’.²⁴⁵

The view that transnational corporations must be treated as subjects of international law can be justified on three related grounds. The first relates to the fact that those who consider transnational corporations as having no international legal personality do not provide a theoretical basis for their position. As this chapter has shown, transnational corporations need not have the same rights and obligations as states for them to have legal personality. There is in principle no theoretical impediment to states, being the primary subjects of international law, according expressly or impliedly limited international legal personality to transnational

²⁴³ Noortmann, above n 190, 70 – 71.

²⁴⁴ Surya Deva ‘Human rights violations by multinational corporations and international law: Where from here?’ (2003) 19 *Connecticut Journal of International Law* 1, 54.

²⁴⁵ Steven R Ratner ‘Corporations and human rights: A theory of legal responsibility’ (2001) 111 *Yale Law Journal* 443, 488.

corporations.²⁴⁶ As has been demonstrated earlier, states through various treaties have created human rights and duties binding non-state actors generally who may include transnational corporations. Nicola Jägers has even suggested that, before the rise of the positivist doctrine in the 19th Century, such companies as the English East India Company and the Dutch United East India Company had international legal personality.²⁴⁷

The second is that the doctrine of state responsibility fails to address issues raised by these actors adequately.²⁴⁸ As was shown in chapter 1, there is no dispute about the fact that transnational corporations have in recent years assumed enormous powers that dwarf those exercised by ‘weak’ states.²⁴⁹ While corporations based in one state may be easily regulated, both weak and powerful states are facing difficulties in controlling those that are transnational in character through domestic law.²⁵⁰ These

²⁴⁶ Ibid. See also Kinley and Tadaki, above n 242, 945.



²⁴⁷ Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002) 20.

²⁴⁸ See chapter 4 in this study.

²⁴⁹ Claudio Grossman and Daniel Bradlow ‘Are we being propelled towards a people-centered transnational legal order?’ (1993) 9 *American University Journal of International Law and Policy* 1, 8 – 9.

²⁵⁰ Rob Walker and Saul Mendlovitz ‘Interrogating state sovereignty’ in Rob Walker and Saul Mendlovitz (eds) *Contending sovereignties: Redefining political community* (1990) 1. See also Silvia Danailov *The accountability of non-state actors for human rights violations: The special case of transnational corporations* (1998) 25 available at <[http://www.humanrights.ch/cms/pdf/000303_danailov_studie .pdf](http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf)> (accessed: 30 April 2005) (arguing that ‘no State today is capable of controlling adequately the phenomenon of the TNC on its own’). Johns has observed similarly that ‘Even those

actors operate in a complex web of relationships, which render efforts aimed at regulating them unsuccessful.²⁵¹ The weaknesses in the operation of the doctrine of state responsibility regarding the activities of transnational corporations provide a theoretical justification for considering an international regime of regulating these actors.

The third argument rests on the interpretation of current international human rights standards and practices. As demonstrated earlier, while intended to bind states, human rights treaties in some instances expressly imposes obligations on non-state actors who may include corporations. This chapter maintains that it is not necessary that a subject of rights must enforce its own obligations for it to be called a subject of international law. The same is true of a subject of duties. The obligations of transnational corporations can be enforced indirectly by suing the state if it can be established that the state failed to exercise due diligence to prevent the violations or investigate and redress them.²⁵² As already argued above, they can also be enforced through international criminal law by bringing criminal proceedings against directors or other persons exercising the will of the corporation if the acts of the corporation amount to international crimes. They can also be enforced through soft law norms as

nations which, unlike the United States, openly proclaim their desire to exercise some control over their corporate “nationals” frequently find it impossible to do so’. See Fleur Johns ‘The invisibility of the transnational corporation: An analysis of international law and legal theory’ (1994) 19 *Melbourne University Law Review* 893, 896.

²⁵¹ See generally Dimitra Kokkini-Iatridou and Paul de Waart ‘Foreign Investments in Developing Countries: Legal Personality of Multinationals in International Law’ (1983) XIV *Netherlands Yearbook of International Law* 87.

²⁵² See chapter 4 in this study.

will be shown in chapter 5. The human rights obligations of transnational corporations have been reasserted comprehensively in the recently adopted UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises.²⁵³ These Norms make provision for enforcement mechanisms, which will help to fill the gap in international law.²⁵⁴ If adopted by the UN Commission on Human Rights, the

²⁵³ These Norms were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights (UN Sub-Commission) on 23 August 2003. They are pending further consideration by the Commission on Human Rights. For a discussion of these norms see Carolin Hillemanns 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 4(1) *German Law Journal* available at <<http://www.germanlawjournal.com/print.php?id=330>> (accessed: 30 April 2005).

²⁵⁴ The Norms provide for internal monitoring as an initial step towards their implementation. Each transnational corporation or business enterprise is enjoined to 'adopt, disseminate and implement internal rules of operation in compliance with the Norms' (para 15). They are also required to periodically report on and take other measures fully to implement the Norms including incorporating them into their contracts (para 15). Secondly, the Norms envisage a system of periodic monitoring and verification by the UN, which shall be transparent, independent and allow for the participation of various stakeholders (para 16). The exact form of this process is not yet clear. However, the Commentary on the Norms suggests that the monitoring mechanisms envisaged here could be fulfilled by UN human rights treaty bodies through the creation of additional reporting requirements for states and the adoption of general comments and recommendations interpreting treaty obligations. The Commentary also suggests that UN specialised agencies could also play an important role in this regard. An interesting suggestion relates to a recommendation to the Commission on Human Rights to consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms. In particular, the Norms recommend that the Sub-Commission itself and the sessional Working Group could perform this function. See paras 15-16 of the Norms and their Commentary.

Norms will establish beyond doubt that transnational corporations and other business enterprises are subjects of international law.

7 CONCLUSION

In a nutshell, the concept of subjects of international law does not present any significant theoretical barriers to the recognition of binding human rights obligations of non-state actors. To gain international legal personality, an entity must have capacity to bear direct rights and duties arising from international law. Some commentators on international law insist that in addition to this element, the entity must have treaty-making power, capacity to bring international claims or be sued before an international tribunal, and be a sovereign. This chapter has shown that these additional elements are not valid prerequisites of personality in international law. Rather, they can constitute evidence of personality in respect of certain actors such as the state.



The point has been made that subjects of international law are different, enjoy diverse rights, and are burdened with disparate obligations. While states are without doubt full subjects of international law, a number of other entities of a non-state character may qualify as limited subjects of international law. International organisations, insurgents and NLM are widely considered as subjects of international law. This chapter has also shown that the emerging trend points to an acceptance of NGOs, individuals and transnational corporations as subjects of international law. A significant weakness in international law lies in the fact that while this law increasingly imposes human rights duties on non-state actors, it does not prescribe binding enforcement mechanisms against these actors. This, it is argued, is a gap that needs to be filled. It is not a justification for saying that these actors have no capacity to bear international rights and duties.

Thus far, international humanitarian and criminal law recognises that some of the human rights obligations of non-state actors can be enforced directly against individuals. As noted in this chapter, it is only natural persons who can be prosecuted for committing international crimes. Legal persons cannot be. However, it can still be argued that by prosecuting individuals who head a corporation that is involved in the commission of international crimes, one could also be enforcing the obligations of the corporation. However, this study will also demonstrate that some of the human rights obligations of non-state actors can be enforced through soft law standards. In particular, this chapter intimates that the UN Norms, if adopted as binding standards, will constitute a significant step towards affirming and enforcing the human rights obligations of transnational corporations and other business enterprises. This development must trigger a more concerted and comprehensive examination of the possibility of creating human rights accountability mechanisms for all other non-state actors having international legal personality.

Having dealt with the question of subjects of international law, the next chapter discusses the doctrine of state responsibility. The obligations of non-state actors will largely be enforced through this important doctrine. The strengths and weaknesses of this doctrine will be considered.

Chapter 4

INDIRECT RESPONSIBILITY OF NON-STATE ACTORS IN INTERNATIONAL LAW: THE POTENTIAL AND LIMITS OF THE DOCTRINE OF STATE RESPONSIBILITY

1 INTRODUCTION

The previous chapter has shown that international law still considers states as its primary subjects. However, it was argued that this law has increasingly accepted non-state actors as limited subjects. The last chapter has also demonstrated that, while international law is increasingly imposing human rights obligations on non-state actors, it does not prescribe binding enforcement mechanisms against them. Thus, the human rights obligations of non-state actors will mainly be enforced indirectly through states.

International human rights law imposes a duty on states to protect people from violations of their human rights by other states and non-state actors. Thus, the UN High Commissioner for Human Rights has stressed in recognition of this duty that states 'have responsibilities to ensure that the loss of autonomy does not disproportionately reduce their capacity to set and implement national development

policy'.¹ Through the discharge of this duty, private actors become indirectly accountable for human rights at the international level. They can also be held responsible for human rights at the domestic level.

This chapter demonstrates how the doctrine of state responsibility can be utilised to enhance non-state actor responsibility for human rights. It defines this doctrine as it has developed under the general rules of international law. The recently adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts² are discussed with a particular focus on the responsibility of the state for international wrongs committed by private actors. The applicability of the Draft Articles and general rules of international law on state responsibility to violations of human rights by private actors is also explored. The chapter also surveys international and regional jurisprudence regarding the meaning of the state's obligation to protect human rights. It demonstrates that this duty entails three interrelated obligations: to prevent violations of human rights in the private sphere; to regulate and control private actors; and to investigate violations, punish perpetrators and provide effective remedies to victims. An attempt is made to define the circumstances in which the state could be said to be in violation of these duties. In keeping with the principle of the indivisibility

¹ Commission on Human Rights *Liberalization of trade in services and human rights: Report of the High Commissioner*, UN ESCOR, 54th session, Provisional agenda item 4, Annex, UN Doc E/CN.4/Sub.2/2002/9 (2002) para 9. The High Commissioner further states that '[a] human rights approach emphasises the role of the State in the process of liberalization' and that 'the State holds the primary responsibility for protecting those rights', para 10.

² Draft Articles on Responsibility of States for Internationally Wrongful Acts as contained in *Report of the International Law Commission on the work of its 53rd session* UN Doc A/55/10 (2000) (Draft Articles).

and interdependence of all rights, this chapter will also demonstrate that state responsibility can also arise in respect of violations of economic, social and cultural rights by private actors. The duty to protect human rights falls on both ‘host’ and ‘home’ states — the ‘host’ state being the state in which the private actor is operating, and the ‘home’ state being the state in which the private actor is based. The application of this duty as in relation to host and home states respectively is discussed. Lastly, this chapter will also explore the limitations of the doctrine of state responsibility.

2 THE GENERAL RULES OF INTERNATIONAL LAW ON STATE RESPONSIBILITY

2.1 Definition of state responsibility

State responsibility is an age-old principle of international law that was developed to protect the rights of aliens.³ It arises when a state commits an international wrong against another state.⁴ This rule has now been elevated to the status of a general principle of international law.⁵ In *Chorzów Factory (Germany v Poland) (Merits)*,⁶ the Permanent Court of International Justice defined it not only as a principle of international law but also as ‘a greater conception of law’ involving an obligation to

³ Ian Brownlie *System of the law of nations: State responsibility: Part 1* (Oxford: Clarendon Press, 1983) 9.

⁴ Ian Brownlie *Principles of public international law* (5th ed) (Oxford: Oxford University Press, 1998) 435–6.

⁵ Ibid 436.

⁶ [1928] PCIJ (ser A) No 13.

make reparation for any breach of an engagement.⁷ According to the Court, ‘reparation is therefore the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself’.⁸ The principle of state responsibility emanates from the nature of the international legal system, which relies on states as a means of formulating and implementing its rules, and arises out of the twin doctrines of state sovereignty and equality of states.⁹

The Draft Articles represent an attempt by the International Law Commission to codify international rules on state responsibility. The ILC was created in 1949 with a mandate to draft the articles. However, it did not fulfil its task until 9 August 2001, when it adopted the entire set of Draft Articles. Since the Draft Articles have not been adopted as a treaty, they are clearly not binding. However, the fact that the Draft Articles codify existing case law and state practice in this area has prompted Viljam Engström to contend that they generally provide evidence of established and developing customary international law.¹⁰ Other commentators have even suggested

⁷ Ibid 29. See also *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 23.

⁸ See *Chorzów Factory (Germany v Poland) (Claim for Indemnity)* [1927] PCIJ (ser A) No 8, 21. Judge Huber in *British Claims in the Spanish Zone of Morocco (Spain v United Kingdom)* (1923) 2 RIAA 615, 641 highlighted the significance of the notion of state responsibility: ‘Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met’.

⁹ Malcom Shaw *International law* (5th ed) (Cambridge: Cambridge University press, 2003) 541.

¹⁰ Viljam Engström ‘Who is responsible for corporate human rights violations?’ (2002) available at <<http://www.abo.fi/institut/imr/norfa/ville.pdf>> (accessed: 30 April 2005).

that the Draft Articles could have authoritative force considering that they represent the views of highly recognised publicists in international law.¹¹

In terms of the Draft Articles, state responsibility is incurred when two elements are proved. The first is that there must be conduct consisting of an act or omission, which is attributable to the state under international law. The second is that the conduct must constitute a breach of an international obligation of the state.¹² It is clear therefore that state responsibility is dependent on the link between the state and the wrongful act — the conduct of a non-state actor must qualify as an ‘act of a state’.

2.2 State responsibility for private acts or omissions

It follows from the discussion above that the question of whether a state can be found liable for violations of international law by non-state actors is dependent on the definition of an ‘act of a state’. According to article 3 of the Draft Articles, international law – not internal law – governs the characterisation of an act of the state

¹¹ For a brief survey of the views of prominent academics on the Draft Articles, see David Caron ‘The ILC Articles on State Responsibility: The paradoxical relationship between form and authority’ (2002) 96 *American Journal of International Law* 857, 867.

¹² Art 2 of the Draft Articles. These elements were also specified by the Permanent Court of International Justice in *Phosphates in Morocco (Italy v France) (Preliminary Objections)* [1938] PCIJ (ser A/B) No 74, 28; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3, 30 (‘*Diplomatic and Consular Staff Case*’); *Dickson Car Wheel Company (USA) v United Mexican States* (1931) 4 RIAA 669, 678.

as internationally wrongful.¹³ The Draft Articles articulate a number of rules under which state responsibility can be imputed. Some of them expressly or impliedly envisage the liability of the state for the wrongful acts or omissions of non-state actors.

Firstly, article 5 of the Draft Articles stipulates that the conduct of a person or entity – which is not an organ of the state – ‘empowered by the law of that State to exercise elements of the governmental authority’ can give rise to state responsibility provided that the person was acting in that capacity in the particular instance in issue. Professor James Crawford has submitted that this rule encompasses a wide range of bodies, which are not state organs but are empowered by state law to exercise elements of governmental authority such as public corporations, quasi-public entities, and private companies.¹⁴ Thus, for example, acts or omissions of private security companies contracted to provide security services to prisons, or private airlines exercising delegated powers relating to immigration control or quarantine, may be attributed to the state.¹⁵



¹³ See also *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Poland v Free City of Danzig) (Advisory Opinion)* [1932] PCIJ (ser A/B) No 44, 23; *The S S Wimbledon (Britain v Germany) (Judgment)* [1923] PCIJ (ser A) No 1, 25; *Greco-Bulgarian Communities (Greece v Bulgaria) (Advisory Opinion)* [1930] PCIJ (ser B) No 17, 32.

¹⁴ James Crawford *The International Law Commission's Articles on State Responsibility: Introduction, text and commentary* (Cambridge: Cambridge University Press, 2002) 100.

¹⁵ *Ibid.* In *Hyatt International Corporation v Government of the Islamic Republic of Iran* (1985) 9 Iran-USCTR 72, 94–5, Iran established an autonomous foundation which held property on trust for certain charitable purposes, but the State kept close control of the foundation. The Iran–United States Claims Tribunal held that the foundation was controlled by the Government. Such an entity would be covered by article 5 of the Draft Articles as regards the execution of its charitable functions.

Secondly, in terms of article 8 of the Draft Articles, the conduct of a person or group of persons acting on the instructions of, or under the direction or control of, a state can be attributed to the state in question.¹⁶ Where conduct is authorised by the state, liability is incurred regardless of whether the person to whom authorisation is given is a private individual.¹⁷ It also does not matter whether the conduct involves public functions or governmental activity.¹⁸ What is required is proof of state authorisation. Under this principle, therefore, acts or omissions of non-state actors will give rise to state responsibility as long as it can be proved that such actors were acting on the instructions of, or under the direction and control of, the state.

However, where it is argued that conduct is carried out under the direction or control of a state, the scope for founding state responsibility for acts or omissions of non-state actors is narrower than under article 5 of the Draft Articles. In this case, conduct is attributable to the state if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation.¹⁹ If conduct is merely incidental to the operation, or was carried out in a manner that exceeded the state's direction or control, the state will not be responsible.²⁰

The complainant shoulders the onerous burden of establishing state control. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United*

¹⁶ Article 8 of the Draft Articles.

¹⁷ Crawford, above n 14, 110.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

States of America) (*Merits*),²¹ the Government of Nicaragua alleged before the International Court of Justice that the US was responsible for violations of international law committed by the Contras, a revolutionary rebel force, against the Nicaraguan Government. The latter alleged, among other things, that the US funded the Contras and directed their strategies and tactics. The ICJ did find as a fact that the US planned, directed and supported the activities of the Contras.²² However, it refused to hold that all activities of the Contras were carried out under the *control* of the US. According to the Court, there was ‘no clear evidence of the US having actually exercised such a degree of control in all fields as to justify treating the Contras as acting on its behalf’.²³ The Court took the view that for conduct to give rise to state responsibility, it must be proved that the US ‘had *effective control of the military or paramilitary operations in the course of which the alleged violations were committed*’.²⁴ Such a high threshold for the test of control means that it is practically difficult to find a state responsible for acts or omissions of non-state actors under art 8 of the Draft Articles.

In the recent case of *Prosecutor v Tadic (Appeals Chamber Judgment)*,²⁵ the International Criminal Tribunal for the Former Yugoslavia indicated that a lesser standard of control could be applied depending on the facts of each case.²⁶ It stated

²¹ [1986] ICJ Rep 14 (*Nicaragua Case*).

²² Ibid 58–63.

²³ Ibid 62.

²⁴ Ibid 64 (emphasis added).

²⁵ ICTY IT-94-1-A (15 July 1999) (*Tadic*).

²⁶ Ibid para 117.

that, for purposes of imputing criminal responsibility on state authorities for acts of armed forces allegedly acting under their control, the required level of control would be ‘*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations’.²⁷

Although this case sought to reduce the threshold of control, it can be argued that many wrongful acts of non-state actors might still not be attributed to the state under the proposed lesser standard of state control. For example, financial and other assistance, and advice offered to non-state actors by the state with the knowledge that it might be used, or is used, for committing gross violations of human rights, might not result in the liability of the state.

A separate question on state control relates to whether the conduct of state-controlled or state-owned corporations or enterprises can be imputed to the state. International law is clear on this issue. The rule recognising the separate legal personality of corporations, common in domestic jurisdictions, is also valid in international law.²⁸ Unless such corporations exercise elements of governmental authority, their conduct cannot be attributed to the state. However, the state incurs liability for the corporations that it owns or controls where the veil of incorporation is used as an engine for fraud,²⁹ or where it can be shown that the corporation was

²⁷ Ibid para 145 (emphasis in original).

²⁸ Crawford, above n 14, 112.

²⁹ *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 39.

exercising public powers,³⁰ or being used by the state to achieve a particular purpose.³¹

Under article 9 of the Draft Articles, the conduct of non-state persons or groups exercising elements of governmental authority ‘in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority’. Accordingly, the conduct must relate to the exercise of public functions or governmental authority; there must be absence or default of official authorities; and the circumstances must have justified the exercise of those powers.

Professor James Crawford has suggested that the circumstances under which the state would be found liable under this head are rare. They include situations during a revolution, armed conflict or foreign occupation where regular authorities have been dissolved or are incapable of carrying out their normal duties.³² The case of *Yeager v Islamic Republic of Iran*³³ illustrates the application of the principle under article 9. In this case, certain individuals performed immigration, customs and similar functions at Tehran airport immediately after a revolution. The Iran–United States Claims Tribunal

³⁰ *Oil Field of Texas, Inc v Government of the Islamic Republic of Iran* (1982) 1 Iran–USCTR 347, 356; *Phillips Petroleum Co Iran v Islamic Republic of Iran* (1989) 21 Iran–USCTR 79, 112; *Petrolane, Inc v Government of the Islamic Republic of Iran* (1991) 27 Iran–USCTR 64, 97.

³¹ *Foremost Tehran, Inc v Government of the Islamic Republic of Iran* (1986) 10 Iran–USCTR 228, 240–2.

³² Crawford, above n 14, 114.

³³ (1987) 17 Iran–USCTR 92.

held that the conduct of these individuals, though not explicitly authorised by the Government, was attributable to the Islamic Republic of Iran.³⁴

Article 10(1) of the Draft Articles also provides that '[t]he conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law'. Similarly, '[t]he conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration' amounts to an act of the new state.³⁵ These provisions clearly envisage state responsibility for acts or omissions of non-state actors. As long as a rebellion is successful, all wrongful acts or omissions committed by it or its members are attributed to the new state. However, where the insurrection or rebellion is not successful, the state will not be responsible for violations of international law by the members of the insurrection. In such an instance, the state is only liable if it is guilty of lack of good faith or negligence in suppressing the insurrection.³⁶

Lastly, under article 11 of the Draft Articles, a state may be responsible for conduct which is otherwise not attributable to it where the state acknowledged such conduct or adopted it as its own. Thus, where a state acknowledges or adopts the conduct of private actors, the state will be responsible. For example, in the *Diplomatic and Consular Staff Case*,³⁷ certain militants seized the US embassy and its staff in Iran without the authority of the Iranian Government. However, the Government issued a

³⁴ Ibid 103–5.

³⁵ Article 10(2) of the Draft Articles.

³⁶ *G L Solis (USA) v United Mexican States* (1928) 4 RIAA 358, 361.

³⁷ [1980] ICJ Rep 3.

decree which expressly and effectively approved the conduct of the militants. Furthermore, the Government continued with the occupation of the embassy. It was held — considering the subsequent conduct of the Iranian Government — that it was responsible even for the acts of the militants.³⁸

The thrust of this discussion is that the general rules of international law do recognise that state responsibility can be incurred, not only for violations committed by the state itself and its servants, but also for those committed by non-state actors. However, there must be a sufficient nexus between the state and the acts of the non-state actors for the state to assume liability — the conduct of the non-state actor must constitute an ‘act of a state’.

2.3 The applicability of the general rules of international law on state responsibility to human rights cases

The question as to whether the  general rules of international law on state responsibility have application to human rights violations committed by non-state actors has generated two opposing responses. According to one, propounded by such scholars as Andrew Clapham, these rules ‘should not be ... considered appropriate’³⁹ in the context of, for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). The other response, which the present author also supports, posits that the general rules on state responsibility

³⁸ Ibid 34–7.

³⁹ Andrew Clapham ‘The “drittwirkung” of the *Convention*’ in Franz Matscher et al (eds) *The European system for the protection of human rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 163, 170.

have application to international human rights law. Many scholars including Nicola Jägers, Viljam Engström and Celina Romany, favour this position.⁴⁰

Article 12 of the Draft Articles stipulates that there is a breach of an international obligation when an act of the state ‘is not in conformity with what is required of it by that obligation, regardless of its origin or character’. In *Rainbow Warrior (New Zealand v France)*⁴¹ it was held that ‘any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently, to the duty of reparation’.⁴² Likewise, in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)(Merits)*,⁴³ the ICJ considered it well established that ‘when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect’.⁴⁴ This jurisprudence embraces the view that a violation of an international human rights obligation can give rise to state responsibility. Moreover, Rick Lawson has demonstrated that, in practice, international human rights monitoring bodies apply the

⁴⁰ See, eg, Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002) 145 – 6; Engström (above n 10) 15; Celina Romany ‘State responsibility goes private: A feminist critique of the public/private distinction in human rights law’ in Rebecca Cook (ed) *Human rights of women: National and international perspectives* (Philadelphia: University of Pennsylvania, 1994) 85, 96.

⁴¹ (1990) 20 RIAA 217.

⁴² Ibid 251.

⁴³ [1997] ICJ Rep 3.

⁴⁴ Ibid 38.

general rules of state responsibility to human rights cases, albeit without expressly referring to them.⁴⁵

On the basis of these authorities, human rights law and the general international law principles of state responsibility should be regarded as forming parts of a single whole. They are complementary and mutually reinforcing. As the American Law Institute has observed, the difference in history and in jurisprudential origins between the two ‘should not conceal their essential affinity and their increasing convergence’.⁴⁶ Since the international law principles of state responsibility are general in character,⁴⁷ and the human rights rules are more specific, the latter should take precedence over the former in the event of a conflict.⁴⁸

That said, it is worth noting two limitations of the doctrine of state responsibility with regard to the responsibility of the state for violations of human rights in the private sphere, which partly inform Clapham’s argument. Firstly, it has been shown above that for state responsibility to arise, a connection has to be established between the state and the conduct constituting a violation of international law. This means that

⁴⁵ Rick Lawson ‘Out of control: State responsibility: Will the ILC’s definition of the “act of state” meet the challenges of the 21st Century?’ in Monique Castermans-Holleman et al (eds) *The role of the nation-state in the 21st Century: Human rights, international organisations and foreign policy: Essays in honour of Peter Baehr* (The Hague: Kluwer Law International, 1998) 91, 115.

⁴⁶ *Restatement (third) of foreign relations law*, part VII, introductory note.

⁴⁷ Crawford, above n 14, 124.

⁴⁸ This position is made explicit in art 55 of the Draft Articles, which states that its provisions do not apply ‘where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law’.

many wrongful acts, which constitute violations of human rights by private actors but cannot be said to constitute state action, will not generate international responsibility of the state.⁴⁹ Examples include the looting and destruction by rebel groups of peoples' property, food and shelter; restriction of the availability of essential medicine by pharmaceutical corporations on a discriminatory basis; environmental pollution by MNCs resulting in health complications or death of people; child abuse and forced or child labour.

Secondly, human rights are entitlements of individuals or groups. Many human rights instruments allow individuals or groups to enforce their human rights at an international level. The general international law rules of state responsibility do not recognise the right of individuals or groups to enforce international law. It is only a state that has the right to bring an action against another state for violations of international law.⁵⁰ This limitation can have a negative impact on the enforcement of human rights obligations, especially where the state was complicit in the violations committed by private actors. While consent constitutes a defence to a case of state responsibility, human rights cannot be waived.

Having noted these limitations, the following sections will demonstrate how the doctrine of state responsibility has been defined, expanded and applied within human rights discourse.

⁴⁹ Andrew Clapham *Human rights in the private sphere* (Oxford: Clarendon Press, 1993) 104–5.

⁵⁰ Shaw, above n 9, 541.

3 STATE RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS BY PRIVATE ACTORS

3.1 The state's duty to protect human rights

It is settled that human rights generate three levels of duty for the state: to respect, protect and fulfil human rights.⁵¹ The relevant duty for our purposes is the duty to protect. This duty enjoins the state to take positive action to protect citizens and other people within its jurisdiction from violations that may be perpetrated by non-state actors or other states.

A survey of international and regional human rights instruments, declarations and resolutions assists in defining the nature and scope of this duty. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) enjoins States Parties 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'. The duty to 'ensure' suggests that states have the obligation to take positive steps to guarantee the enjoyment of human rights. The provisions of the ICCPR suggest that this duty has two limbs. The first is the duty to take preventive measures against occurrences of violations of human rights by non-

⁵¹ Asbjørn Eide 'Economic, social and cultural rights as human rights' in Asbjørn Eide, Catarina Krause, & Allan Rosas (eds) *Economic, social and cultural rights: A textbook* (2nd revised ed) (Dordrecht: Martinus Nijhoff Publishers, 2001) 9, 23; Paul Hunt *Reclaiming social rights: International and comparative perspectives* (Aldershot: Ashgate, 1996) 31 – 34.

state actors. The second is the duty to take remedial measures once the violations have occurred.⁵²

The Human Rights Committee (HRC), which monitors compliance by states with this instrument, has acknowledged in its General Comment 6 that '[s]tates have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life'.⁵³ It has also stated that the state 'should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces'.⁵⁴ According to the HRC, states should also take 'specific and effective measures to prevent the disappearance of individuals'.⁵⁵ With regard to the right to privacy, the HRC has stated that this right 'is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'.⁵⁶

The duty to prevent is also applicable to economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the

⁵² See especially *ibid* article 2(2), which provides that States Parties undertake to adopt laws and other measures necessary to give effect to the rights recognised by the ICCPR, and article 2(3), which provides that the States Parties must ensure that persons whose rights have been violated have access to an effective remedy, that access to the effective remedy is determined by competent authorities, and that such remedies are enforced when granted.

⁵³ General Comment No 6 (16) Article 6, adopted by the HRC at its 378th meeting (16th session, 27 July 1982, para 2.

⁵⁴ *Ibid* para 3.

⁵⁵ *Ibid* para 4.

⁵⁶ General Comment No 16 (32), Article 17, adopted by the HRC at its 791st meeting (32nd session), 23 March 1988, para 1.

implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has stated that ICESCR imposes an obligation on States Parties to prevent violations of these rights by private actors. In relation to the right to water, for example, the CESCR has stated that the state has an obligation to prevent third parties from ‘compromising equal, affordable, and physical access to sufficient, safe and acceptable water’.⁵⁷ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights contain a similar interpretation of the obligations of states.⁵⁸

A further obligation implicit in the duty to protect is the obligation to control and regulate non-state actors. The HRC has stated, for example, that states have the duty to provide a legislative framework prohibiting acts constituting arbitrary and unlawful interference with privacy, family, home or correspondence by natural and legal persons.⁵⁹ With respect to the right to privacy, this duty could be fulfilled by regulating ‘the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies’.⁶⁰ Similar statements have been made in respect of the right to freedom of expression.⁶¹

⁵⁷ General Comment No 15 ‘The right to water (arts 11 and 12 of the Covenant)’ adopted by the CESCR at its 29th session, 11-29 November 2002, para 24.

⁵⁸ Adopted at Maastricht, 22–26 January 1997, para 18 (Maastricht Guidelines). Although not legally binding, the Maastricht Guidelines have served as persuasive aids in the interpretation of economic, social and cultural rights.

⁵⁹ General Comment No 16, above n 56, para 9.

⁶⁰ Ibid para 10.

⁶¹ General Comment No 10 (19), Article 19, adopted by the HRC at its 461st meeting (19th session), 27 July 1983, paras 2 – 3.

The CESCR has also stated that states have the duty to ‘ensure that activities of the private business sector and civil society are in conformity with the right to food’.⁶² Accordingly, ‘failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others’ amounts to a violation by states of the right to food.⁶³ In the context of the right to health, the CESCR has stated that the state is obliged to ensure that privatisation ‘does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities’.⁶⁴ The state is enjoined, among other things, ‘to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.’⁶⁵

In the event of the violations occurring, the state has the duty to react to them. The HRC has stated in connection with the right to life that the state should ‘establish

⁶² General Comment No 12 (1999), ‘The right to adequate food (art 11 of the Covenant)’, adopted by CESCR at its 20th session, 12 May 1999, para 27.

⁶³ Ibid para 19.

⁶⁴ General Comment No 14 ‘The right to the highest attainable standard of health (art 12 of the ICESCR)’ adopted by CESCR at its 22nd session, 25 April – 12 May 2000, para 35.

⁶⁵ Ibid. See also General Comment No 5 ‘Persons with Disabilities’ adopted by the CESCR at its 11th session, 25 November 1994, para 11. The duty to protect also requires that vulnerable groups be given special protection. In relation to people with disabilities, for example, the CESCR has stated:

In a context in which arrangements for the provision of public services are increasingly being privatised and in which the free market is being relied upon on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities.

effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons'.⁶⁶

Many other international instruments which contain both civil and political rights and economic, social and cultural rights recognise the obligation of states to ensure the protection of human rights in the private sphere. Key regional human rights covenants contain similar provisions requiring states to prevent and respond to violations of human rights in the private sphere and to regulate non-state actors. The European Convention, for example, requires states to 'secure recognition to everyone within their jurisdiction' of the rights it recognises.⁶⁷ Likewise, the American Convention on Human Rights (American Convention) requires states to 'respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms'.⁶⁸ Although a similar provision is absent in the African Charter on Human and Peoples' Rights (African Charter), the African Commission on Human and Peoples' Rights (African Commission) in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*⁶⁹ interpreted the duty to protect thus: 'Even where it cannot be proved that violations were

⁶⁶ General Comment 6, above n 53, para 4.

⁶⁷ Article 1(1).

⁶⁸ Article 1(1).

⁶⁹ Communication No 74/92 (1995). In this case, the African Commission was faced with allegations against Chad of harassment of journalists by unidentified individuals; and killings, disappearances and torture during the civil war between security services and other groups. The African Commission found Chad to be in violation of the African Charter for, among other things, failing to provide security and stability in the country.

committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders.⁷⁰

It can therefore be concluded that the duty of states to protect individuals or groups from violations of their human rights by non-state actors is now well established in international law. This duty entails an obligation to take such preventive measures as the enactment of legislation, and the establishment of regulatory and monitoring mechanisms aimed at preventing occurrences of human rights violations in the private sphere. The state must also take reactive measures once the violations have taken place. Most importantly, these obligations do not only relate to civil and political rights — they are quite clearly also applicable to economic, social and cultural rights. It is also evident from this discussion that the possibility of founding state responsibility under human rights law is more extensive than under the general rules of international law. Unlike under the latter, where proof of state action is required, responsibility falls on the state for violations of human rights by non-state actors. Through the doctrine of state responsibility, therefore, it is possible to make private actors accountable indirectly for breaching international human rights standards. It is also possible for the state to hold non-state actors directly and indirectly accountable at the domestic level.

3.2 The due diligence test

The preceding discussion demonstrates that the state's obligation to protect the human rights of all individuals within its jurisdiction and under its authority is very broad. This raises the issue of whether a state is responsible for every violation of human rights that occurs in the private sphere. In the landmark case *Velásquez*

⁷⁰ Ibid para 22.

Rodríguez v Honduras,⁷¹ the Inter-American Court of Human Rights (IACHR) held that a state can be held responsible for violations occurring in the private sphere only where it can be shown that it failed to exercise ‘due diligence’ to prevent and respond to the violations. In this case, it was found as a fact that the Government of Honduras had a policy of carrying out or tolerating disappearances of certain persons between 1981 and 1984.⁷² More than 100 persons had been disappeared under similar circumstances during this period.⁷³ Although a procedure for challenging detentions was available, it was shown that it was ineffective in the case of the disappearances, because the detentions took place clandestinely.⁷⁴ The issue before the Court, therefore, was whether the Honduran Government could be held responsible for the disappearances. In finding the Government liable, the Court stated that a human rights violation which is initially not directly imputable to a state can lead to international responsibility of the state ‘not because of the act itself, but *because of the lack of due diligence to prevent the violation or to respond to it*’.⁷⁵ The Court held expressly that ‘the existence of a particular violation does not, in itself, prove the failure to take preventive measures’.⁷⁶ However, the state must

take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its

⁷¹ [1988] Inter-Am Court HR (ser C) No 4.

⁷² Ibid para 76.

⁷³ Ibid.

⁷⁴ Ibid paras 78–81.

⁷⁵ Ibid para 172 (emphasis added).

⁷⁶ Ibid para 175.

jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.⁷⁷

According to the Court, the duty to prevent includes

all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages.⁷⁸

Furthermore, the Court held that the state has the obligation to ‘investigate every situation involving a violation of the rights protected by the Convention’.⁷⁹ While acknowledging that the mere fact that an investigation has not yielded a satisfactory result might not give rise to state responsibility, it held that the investigation must be ‘undertaken in a *serious* manner and not as a mere formality preordained to be ineffective’:



An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not *seriously* investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁸⁰

⁷⁷ Ibid para 174 (emphasis added).

⁷⁸ Ibid para 175.

⁷⁹ Ibid para 176.

⁸⁰ Ibid para 177 (emphasis added).

On the basis of this case, it appears that due diligence relates to the question of whether the steps taken by the state are ‘reasonable’ or ‘serious’. Thus, where the state takes reasonable measures to prevent and react to violations of human rights in private relations, the state will not be held responsible even when the outcome of those efforts is unsatisfactory. In this case, however, the Court held that the procedures in Honduras, although theoretically adequate, were ineffective to carry out the necessary investigations, punish the perpetrators of the violations and provide remedies to the victims and their families.⁸¹

Other international and regional human rights monitoring bodies have since adopted the due diligence benchmark. The African Commission, for example, applied this test in the precedent-setting decision, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.⁸² The plaintiffs complained, among other things, that the state-owned Nigerian National Petroleum Company and Shell Petroleum Development Corporation had been depositing toxic wastes into the local environment and waterways in Ogoniland in Nigeria without putting in place necessary facilities to prevent the wastes from spilling into villages.⁸³ As a result, water and soil contamination brought about serious short-term and long-term health problems such as skin infections, gastrointestinal and reproductive complications.⁸⁴ Further allegations were made in relation to repressive measures such as the destruction of food sources, homes and villages by the military, aimed at quelling

⁸¹ Ibid para 178.

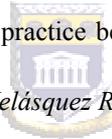
⁸² Communication No 155/96 (2001) (*SERAC Case*).

⁸³ Ibid paras 1–2.

⁸⁴ Ibid para 2.

opposition to the oil companies' activities.⁸⁵ The Ogoni communities were neither consulted in the decisions that affected the development of their land nor did they benefit materially from the oil exploration.⁸⁶ The African Commission found the Nigerian Government to have violated local people's rights to freely dispose of wealth and natural resources, rights to health, a satisfactory environment, shelter and housing, food, and life, in respect of its own acts and omissions and those of the oil companies. It found that the Government had breached its duty to protect the people from damaging acts of the oil companies by failing to control and regulate the activities of these companies and allowing them to deny or violate these rights with impunity. According to the African Commission,

governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties ... The practice before other tribunals also enhances this requirement as evidenced in the case *Velásquez Rodríguez v Honduras*.⁸⁷



Martin Scheinin has argued that the European Court of Human Rights (ECHR) has implicitly adopted this test.⁸⁸ This is apparent in the case of *Osman v United Kingdom*.⁸⁹ Here, the applicants argued that the respondent state had breached article 2

⁸⁵ Ibid paras 7 & 9.

⁸⁶ Ibid para 60.

⁸⁷ Ibid para 59.

⁸⁸ See Martin Scheinin 'State responsibility, good governance and indivisible human rights' in Hans-Otto Sano and Gudmundur Alfredsson (eds) *Human rights and good governance: Building bridges* (The Hague: Martinus Nijhoff Publishers, 2002) 29, 35.

⁸⁹ (1998) VIII Eur Court HR 3124; 29 EHRR 245.

of the European Convention by failing to protect the right to life of Ali and Ahmet Osman, who were subjected to an armed attack by Paget-Lewis, a private individual. The Court held that article 2(1) of the European Convention ‘enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction’.⁹⁰ Thus, the state may be compelled ‘to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual’.⁹¹ Like the IACHR, the ECHR conceded that not every claimed risk to life could entail for the authorities an obligation to take operational measures to prevent that risk from materialising. Due consideration had to be given to ‘the difficulties involved in policing modern societies, the unpredictability of human conduct ... the operational choices which must be made in terms of priorities and resources’ and deference to procedural human rights guarantees.⁹² However, the Court held that, where it is alleged that the authorities have violated their positive obligation to protect the right to life,

it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁹³

⁹⁰ Ibid 3159; 305.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid 3160; 305.

In this case, the Court held that the respondent State was not responsible because the applicants had ‘failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis’.⁹⁴ It is worth noting that the ECHR, like the IACHR, has embraced the view that the ‘reasonableness’ of the measures taken is key to determining compliance by the state with the duty to protect human rights.

As demonstrated by Nicola Jägers and the International Council on Human Rights Policy, international instruments and declarations are increasingly recognising the due diligence standard as a test for determining compliance by states with the obligation to protect human rights.⁹⁵ Article 4(c) of the Declaration on the Elimination of Violence against Women,⁹⁶ for example, provides that states have the duty to ‘[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons’.⁹⁷ The Committee on the Elimination of Discrimination against

⁹⁴ Ibid 3162; 308.

⁹⁵ Jägers, above n 40, 146–7; International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (Versoix: International Council on Human Rights Policy, 2002) 52.

⁹⁶ GA Res 48/104 UN GAOR 48th session, 85th plenary meeting, UN Doc A/48/49 (20 December 1993).

⁹⁷ The Beijing Declaration and Platform for Action adopted by the Beijing Fourth World Conference on Women reaffirmed this principle. See Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, UN GAOR, Annex I, UN Doc A/CONF.177/20/Rev.1 (1995).

Women (Committee on CEDAW) has reaffirmed this principle.⁹⁸ That this standard is also applicable in respect of violations of economic, social and cultural rights by private actors is explicit in the Maastricht Guidelines. They stipulate that states are responsible for violations of economic, social and cultural rights ‘that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors’.⁹⁹

In conclusion, the duty to protect human rights does not mean that the state is responsible for all human rights violations that take place in the private domain. State responsibility is incurred where the state fails to exercise due diligence to ensure that private actors do not commit the violations. Due diligence requires positive steps on the part of the state to prevent the violations, control and regulate private actors, investigate and, where applicable, prosecute and punish occurrences of violations, and provide effective remedies to victims. The jurisprudence of both the IACHR and the ECHR establishes that due diligence is essentially about the reasonableness or seriousness of the measures and steps taken by the state. Thus, the state is responsible for private actions resulting in human rights violations if it fails to take reasonable or serious measures to prevent violations or respond to them.

⁹⁸ According to CEDAW, ‘[u]nder general international law and specific human rights covenants, States May also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’. See General Comment 19 ‘Violence against Women’ adopted by the Committee on CEDAW at its 11th session, 29 January 1992, para 9.

⁹⁹ Maastricht Guidelines, above n 58, para 18.

4 STATE RESPONSIBILITY AND VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Although the principle of the interdependence and indivisibility of all human rights has gained more recognition recently, the applicability of obligations to respect economic, social and cultural rights to non-state actors remains a debatable topic.¹⁰⁰ This is so despite the fact that the latter are more prone to violations by non-state actors than civil and political rights. As mentioned earlier, with increasing privatisation of basic services and reliance on private capital and investment, the protection and fulfilment of the rights to health, water, housing, education, food, a clean and healthy environment and development is dependent on actions and policies of both state and non-state actors. This section seeks to demonstrate that the doctrine of state responsibility also has application to violations of economic, social and cultural rights committed in private relations.



4.1 International human rights law cases

The enforcement of the indirect obligations of private actors at the international level by judicial means has been largely constrained by a lack of recognition of the justiciability of economic, social and cultural rights. ICESCR, which is the main

¹⁰⁰ See, eg, Stuart Woolman 'Application' in Matthew Chaskalson Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional law of South Africa* 10–59. Woolman has argued that economic, social and cultural rights such as 'the rights to property, housing, health care, food, water, social security, education, just administrative action and the rights of children', as enshrined in the Constitution of the Republic of South Africa, are possibly limited to the relationship between the state and individuals. For a similar view, see Halton Cheadle and Dennis Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *South African Journal on Human Rights* 44, 59 – 60. These arguments are addressed in chapter 7.

international human rights treaty on these rights, does not provide for a complaints procedure.¹⁰¹ The same is the case with other conventions that contain economic, social and cultural rights such as the Convention on the Rights of the Child (CRC). The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, providing a complaints' mechanism, was only adopted by the General Assembly on 6 October 1999.

Nonetheless, international human rights monitoring bodies have employed several strategies to make states accountable for violations of these rights by non-state actors. The principal strategy has been to use the judicial powers entrusted to them in respect of civil and political rights under the ICCPR. The HRC has construed article 27 of the ICCPR, which guarantees the cultural rights of peoples belonging to minorities, broadly to find states responsible for violations of economic, social and cultural rights in the private sphere. In the *Länsman* cases,¹⁰² the authors of the communications were reindeer breeders of Sami ethnic origin. They challenged the decision of the Central Forestry Board to sign a contract with a private company in 1989 which would allow

¹⁰¹ However, efforts towards the adoption of an Optional Protocol to ICESCR, recognising the justiciability of economic, social and cultural rights, have reached an advanced stage. On 22 April 2003, the Commission on Human Rights adopted a resolution which, among other things, requested the working group on the Optional Protocol to report to the Commission at its 60th session, and to make specific recommendations on its course of action concerning the Optional Protocol: Commission on Human Rights, Res No 2003/18, Report to the Economic and Social Council on the Fifty-Ninth Session of the Commission: Draft Report of the Commission UN ESCOR, 59th session, Agenda Item 21(b), UN Doc E/CN.4/2003/L.11/Add.3 (2003), para 12.

¹⁰² *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc CCPR/C/52/D/511/1992 (26 October 1994) (*Länsman No 1*); *Jouni Länsman v Finland* Communication No 671/1995 UN Doc CCPR/C/58/D/671/1995 (30 October 1996) (*Länsman No 2*).

the latter to quarry stone in part of an area traditionally owned by them.¹⁰³ The authors argued that the contract would not only allow the company to extract stone but also to transport it through the complex system of reindeer fences, which would disturb their reindeer herding activities.¹⁰⁴ Furthermore, the authors argued that the site of the quarry was a sacred place of the old Sami religion.¹⁰⁵ The HRC held that the quarrying in the amount that had already taken place did not constitute a denial of the authors' right under article 27 to enjoy their own culture.¹⁰⁶ However, it held that economic activities must not be carried out in a manner that infringed article 27 and that the state had a duty to ensure that any expansion of the mining activities in area did not constitute a violation of the authors' rights to enjoy their own culture.¹⁰⁷

In *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*,¹⁰⁸ the author alleged that the Government of Canada had violated the Lubicon Lake Band's right of self-determination and, by virtue of that, its right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own

¹⁰³ *Länsman No 1*, *ibid*, para 2.1; *Länsman No 2*, *ibid*, para 2.1.

¹⁰⁴ *Länsman No 1*, *ibid*, para 2.3–2.5. In *Länsman No 2* it was alleged that the economic viability of reindeer herding continued to decline as a result of the activities of the road construction, which had a negative effect on the enjoyment by the Sami people of the right to culture. *Länsman No 2*, *ibid*, paras 2.6–2.7.

¹⁰⁵ *Länsman No 1*, *ibid*, para 2.6.

¹⁰⁶ *Ibid* para 9.6; *Länsman No 2*, *ibid* n 102, para 10.5.

¹⁰⁷ *Länsman No 1*, *ibid*, para 9.8; *Länsman No 2*, *ibid*, para 10.7.

¹⁰⁸ Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 March 1990).

means of subsistence.¹⁰⁹ The Lubicon Lake Band is a ‘relatively autonomous ... socio-cultural and economic group’ whose members have ‘continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10 000 square kilometres in northern Alberta since time immemorial’.¹¹⁰ The author argued that by allowing the Government of the province of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of corporate interests, Canada was in violation of article 1 of the ICCPR (which recognises the right to self-determination),¹¹¹ and had deprived the Lubicon Lake Band of its means of subsistence.¹¹² The HRC refused to base its decision on article 1,¹¹³ but found that the conduct of the Government threatened the way of life and culture of the Lubicon Lake Band contrary to article 27 of the ICCPR.¹¹⁴

The right to privacy and family life has also been used to hold states responsible for acts of non-state actors that infringe certain economic, social and cultural rights. In *Francis Hopu and Tepoaitu Bessert v France*,¹¹⁵ the authors of the communication claimed that the construction of a hotel complex on the contested site would destroy their ancestral burial grounds — which held an important place in their history, culture and life — and would arbitrarily interfere with their privacy and their family lives, in

¹⁰⁹ Ibid para 2.1.

¹¹⁰ Ibid para 2.2.

¹¹¹ Ibid para 2.3.

¹¹² Ibid.

¹¹³ Ibid paras 13.3 – 13.4.

¹¹⁴ Ibid [32.1]–[33].

¹¹⁵ Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993 (29 July 1997).

violation of articles 17 and 23 of the ICCPR.¹¹⁶ They also claimed that members of their family were buried on the site.¹¹⁷ The HRC held that the construction of the hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy.¹¹⁸ The State Party had not shown that this interference was reasonable in the circumstances, nor that it had duly taken into account the importance of the burial grounds for the authors in deciding to lease the site for the building of the hotel complex.¹¹⁹

Craig Scott has observed, based on the *Länsman* cases, that the jurisprudence of the HRC suggests a cautious approach to the notion of state responsibility for violations of human rights.¹²⁰ According to him, the HRC 'requires a threshold of seriousness of harm before a state's duties to seek to prevent the harm are triggered'.¹²¹ He goes on to contend that, in the HRC's jurisprudence,

the state is not responsible for human rights violations simply because serious harms to human rights occur. Were a result-based responsibility to be found, this would amount to the vicarious liability of the state for the conduct of non-state corporate actors, or ... the equivalent of a form of direct responsibility. The Committee does not appear willing at

116 Ibid paras 2.3 & 3.2.

117 Ibid para 3.2.

118 Ibid para 10.3.

119 Ibid.

120 Craig Scott 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in Asbjørn Eide et al (eds), above n 51, 563, 582.

121 Ibid.

this time to treat states as guarantors of human rights in the private sphere in this strong sense.¹²²

Scott concludes his argument by stating that the HRC has taken the traditional approach of state responsibility in general international law relating to the protection of aliens.¹²³

It is submitted that Scott's view represents a restrictive interpretation of the jurisprudence of the HRC. In the *Länsman* cases, the HRC was confronted with two competing interests, to encourage development and allow economic activity by enterprises on one hand, and to protect the right of minorities to pursue their own culture on the other. It can be argued therefore that, ultimately, the State Party was found not to be liable on the grounds that no violation of this right had occurred, rather than because the violation was not serious. In light of article 2 of the ICCPR, which defines the States Parties' obligations to protect human rights recognised under it, and other cases determined by the HRC, a wider range of acts of non-state actors can give rise to state responsibility under the ICCPR than is the case under the general rules of international law on state responsibility. In *Carlos Dias v Angola*,¹²⁴ for example, the author alleged that he had been harassed and threatened by the State Party's authorities and that his companion had been murdered.¹²⁵ However, the respondent State did not

122 Ibid.

123 Ibid.

124 Communication No 711/1996, UN Doc CCPR/C/68/D/711/1996 (20 March 2000). This case did not deal with economic, social and cultural rights issues.

125 Ibid paras 2 & 13.

take any steps to investigate the allegations or to protect the author.¹²⁶ The HRC held that the State Party was obliged under article 2 of the ICCPR to ‘provide [the author] with an effective remedy and to take adequate measures to protect his personal security from threats of any kind’.¹²⁷ Furthermore, the State Party was ‘under an obligation to take measures to prevent similar violations in the future’.¹²⁸ This interpretation suggests that the jurisprudence of the HRC is not different in any material way from that of the IACHR, the ECHR and the African Commission.

The International Council on Human Rights Policy has observed that the Commission on Human Rights ‘has not yet dealt seriously with allegations of human rights abuses by businesses, though some of its resolutions now refer, almost in passing, to state responsibilities in relation to such abuses’.¹²⁹ A similar observation can be made in respect of the various committees that oversee the implementation of the key international human rights treaties. CESCRC, for example, has on several occasions commented on the adverse effects of structural adjustment programs

¹²⁶ Ibid para 3.

¹²⁷ Ibid para 10.

¹²⁸ Ibid.

¹²⁹ International Council on Human Rights Policy *Beyond Voluntarism*, above n 95, 86.

formulated by the World Bank and the International Monetary Fund.¹³⁰ However, it has refrained from commenting on the responsibility of states implementing the programs where they have resulted in denials of human rights. For example, in its concluding observations on Finland, the CESCR stated:

The Committee encourages the Government to take adequate measures to ensure that the reduction of the budgetary allocations for social welfare programmes does not result in the violation of the State parties obligations under the Covenant. The Committee



¹³⁰ See, eg, CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Egypt* UN ESCOR UN Doc E/C.12/1/Add.44 (12 May 2000), para 10; CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Senegal*, UN ESCOR UN Doc E/C.12/1/Add.62 (28 August 2001), para 10; CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Bolivia* UN ESCOR UN Doc E/C.12/1/Add.60 (10 May 2001), para 9; CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia* UN ESCOR UN Doc E/C.12/1/Add.74 (29 November 2001), para 9; CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Honduras* UN ESCOR UN Doc E/C.12/1/Add.57 (9 May 2001), para 10.

particularly lays emphasis on the need to protect the rights of socially vulnerable groups, such as young families with children, refugees and elderly or unemployed persons.¹³¹

In its concluding observations on the report of Nigeria, the CESCR took note of the extent of devastation occasioned by oil exploration to the environment and quality of life of the people in such areas as Ogoniland.¹³² However, the responsibility of the state was not specified.

Consistent and frequent use of the doctrine of state responsibility in soft law forms of monitoring implementation of human rights, such as the special rapporteur's procedures, state reporting, on-site investigations and country studies, can assist in raising awareness of the indirect responsibility of non-state actors for economic, social

¹³¹ CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Finland* UN ESCOR UN Doc E/C.12/1/Add.8 (4 December 1996), para 21. Similarly, see CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Bulgaria* UN ESCOR UN Doc E/C.12/1/Add.37 (30 November 1999), para 24. CESCR recommended in its concluding observations on Bulgaria's state report that

the State party evaluate the economic reform programmes with respect to their impact on poverty, and make efforts to adjust these programmes in such a way that they adequately respond to the current social needs of the population. The Committee recommends that in negotiations with international financial institutions, the State party take into account its obligations to respect, protect and fulfil all the rights enshrined in the Covenant[.]

¹³² CESCR *Consideration of reports submitted by States Parties under article 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights: Nigeria* UN ESCOR UN Doc E/C.12/1/Add.23 (1 May 1998), para 29.

and cultural rights. It may also serve the useful purpose of clarifying this doctrine even further.

4.2 Regional human rights law cases

The African Charter is one of the few human rights treaties that recognise both civil and political rights, and economic, social and cultural rights in one document, and subject both sets of rights to a complaints procedure. While the state responsibility doctrine is recognised, cases alleging the liability of states for violations of economic, social and cultural rights by non-state actors have rarely been brought before the African Commission. It is only in the *SERAC Case*, mentioned earlier, where a state was found liable for violations of a range of economic, social and cultural rights by oil companies.

The Inter-American Commission on Human Rights and the IACHR have handed down a few decisions addressing state responsibility for violations of economic, social and cultural rights by non-state actors although, like the ICCPR, the American Convention does not expressly recognise the justiciability of economic, social and cultural rights. In *Yanomami v Brazil*,¹³³ the petitioners alleged that the Government had allowed massive penetration of outsiders into the area traditionally inhabited by the Yanomami Indians.¹³⁴ This had devastating physical and psychological consequences for the Indians. Among other things, it was alleged that this occupation caused 'the break-up of their age-old social organization', introduced prostitution among the women, and resulted in many deaths caused by such epidemics as

¹³³ Res 12/85 (5 March 1985), as contained in Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.66 (1984–85).

¹³⁴ *Ibid.*

influenza, tuberculosis, measles and venereal diseases.¹³⁵ The Inter-American Commission on Human Rights found that Brazil had violated the right to life, liberty and personal security; the right to residence and movement; and the right to the preservation of health and well-being¹³⁶ recognised under the American Declaration of the Rights and Duties of Man.¹³⁷ Apart from the facts, the recommendations made by the Inter-American Commission on Human Rights indicate quite clearly that the main issues in the case related to economic, social and cultural rights.¹³⁸ Among other things, the Government was asked to continue to take preventive and curative health measures to protect the lives and health of the Indians exposed to infectious or contagious diseases; and to carry out the programs of education, medical protection and social integration of the Yanomamis in consultation with them and with the advisory service of competent scientific, medical and anthropological personnel.¹³⁹

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*,¹⁴⁰ the Inter-American Commission on Human Rights asked the IACHR to find that Nicaragua had violated the *American Convention* by failing to demarcate the communal lands of the Awas Tingni community; failing to adopt effective measures to ensure the property rights of

135 Ibid.

136 Ibid.

137 OAS Res XXX (1948), as contained in *Basic Documents Pertaining to Human Rights in the Inter-American System*, 17, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992).

138 Res 12/85 (5 March 1985), as contained in Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.66 (1984–5).

139 Ibid.

140 [2001] Inter-Am Court HR (ser C) No 79.

the community to its ancestral lands and natural resources; and by granting a concession on community lands to a corporation without the assent of the community.¹⁴¹ The Awas Tingni community was an indigenous group that eked out a living on family farming and communal agriculture, gathering fruit and medicinal plants, hunting and fishing. It did not have legal title to the land in issue.¹⁴² The Court found that the respondent had been ineffective in preventing the foreign firm from destroying and exploiting the lands, which for years had belonged to the Awas Tingni community. It also held that the state failed to provide an effective remedy for the community. Then, too, it was held that the state had failed to enact a procedure for recognising legal title to land belonging to indigenous people.¹⁴³ Accordingly, the state was found to be in violation of article 25 as read with articles 1(1) and 2 of the American Convention.¹⁴⁴

The ECHR has handled relatively more cases alleging state responsibility for infringement of human rights than the African Commission and the IACHR.¹⁴⁵ The European Convention does not recognise economic, social and cultural rights. However, a number of cases disclosing violations of economic, social and cultural rights have been addressed indirectly under a range of civil and political rights.

141 Ibid para 2.

142 Ibid para 103.

143 Ibid para 127.

144 Ibid para 139.

145 Many cases relating to civil and political rights are reviewed in Clapham, above n 39.

*Costello-Roberts v United Kingdom*¹⁴⁶ dealt with the use of disciplinary punishment in schools. No violation of the right to education was found. However, the Court conceded that the state could not ‘absolve itself from responsibility by delegating its obligations [to secure to the children their right to education] to private bodies or individuals’.¹⁴⁷ Thus, while the treatment complained of in this case was the act of a headmaster of an independent school, the Court held that it was ‘none the less such as may engage the responsibility of the United Kingdom under the Convention’ if it was proved to be incompatible with the European Convention.¹⁴⁸

In *López Ostra v Spain*,¹⁴⁹ the complainant alleged that a plant for the treatment of liquid and solid waste emitted fumes, repetitive noise and strong smells, which made her family’s living conditions unbearable and caused both her and them serious health problems.¹⁵⁰ The Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question.¹⁵¹ However, the municipality allowed the plant to be built on its land and the state subsidised the plant’s construction.¹⁵² It was held that Spain was responsible for failing to secure the right to private and family life under article 8 of the European Convention.¹⁵³

¹⁴⁶ *Costello-Roberts v United Kingdom* (1993) 247-C Eur Court HR (ser A) 50; 19 EHRR 112.

¹⁴⁷ *Ibid* 58; 132.

¹⁴⁸ *Ibid* 58; 133.

¹⁴⁹ *López Ostra v Spain* (1994) 303-C Eur Court HR (ser A) 41; 20 EHRR 277.

¹⁵⁰ *Ibid* 54; 295.

¹⁵¹ *Ibid* 55; 295–6.

¹⁵² *Ibid*.

¹⁵³ *Ibid* 56; 297.

Similarly, in *Guerra v Italy*,¹⁵⁴ a fertiliser factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide, in its production cycle.¹⁵⁵ In 1976, following an explosion at the factory, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped.¹⁵⁶ As a result, 150 people had to be hospitalised on account of acute arsenic poisoning.¹⁵⁷ The ECHR held that Italy was responsible for the infringement of the right to private and family life by failing to act to protect the people from the emissions and explosion.¹⁵⁸

*Association X v United Kingdom*¹⁵⁹ involved a complaint against a vaccination program administered by the Government which had harmful effects on babies including death. The European Commission on Human Rights found no violation by the state for want of evidence that the state had failed to take adequate and appropriate measures to protect life.¹⁶⁰ It was highlighted, however, that ‘[t]he concept that “everyone’s life shall be protected by law” enjoins the State not only to refrain from taking life “intentionally” but, further, to take appropriate steps to safeguard life’.¹⁶¹ Andrew Clapham has submitted that, based on the reasoning of this decision, a state

¹⁵⁴ *Guerra v Italy* (1998) I Eur Court HR 210; 26 EHRR 357.

¹⁵⁵ *Ibid* 216; 359.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid* 228; 360.

¹⁵⁹ (1978) 14 Eur Comm HR 31.

¹⁶⁰ *Ibid* 33–4.

¹⁶¹ *Ibid* 32 (emphasis in original).

could be found in violation of the European Convention ‘should it fail to have adequately controlled the release of lethal medicine onto the market by private pharmaceutical companies’.¹⁶²

In short, although economic, social and cultural rights are not justiciable under ICESCR, the European Convention and the American Convention, this has not prevented the respective enforcement bodies to hold states responsible for violations of what are typically economic, social and cultural rights by private actors. However, as Nicola Jägers has contended, this device is under-utilised, considering the relatively small number of cases in which it was invoked.¹⁶³

5 HOST STATE RESPONSIBILITY

5.1 Definition

The term ‘host state’ is normally used in respect of actors who have links to more than one state. The state in which the violation complained of occurs is called the host state if the actor concerned is based in another state (‘home state’). In this Chapter ‘host state’ is used broadly to refer to the state where the violations occur irrespective of whether the non-state actor is of an international character or not.

The duty to protect human rights has long been governed by the principle of territoriality.¹⁶⁴ This principle obliges the host state to exercise due diligence to prevent and respond to violations of human rights within its territorial boundaries.

¹⁶² Clapham, above n 39, 178.

¹⁶³ Jägers, above n 40, 175.

¹⁶⁴ Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen ‘Transnational state responsibility for violations of human rights’ (1999) 12 *Harvard Human Rights Journal* 267, 267.

Most of the cases discussed above illustrate the operation of the doctrine of host state responsibility in practice. As argued earlier, this doctrine has great potential to enhance the accountability of non-state actors for human rights violations.

5.2 Limitations of the host state approach

However, a number of potential obstacles to the success of the doctrine of host state responsibility in ensuring indirect accountability of non-state actors for human rights can be listed. Firstly, this doctrine relies on a sound domestic legal system that will ensure that non-state actors are accountable for human rights either directly or indirectly. However, some constitutions do not recognise the direct application of human rights. Most states consider legislation, common law and other political and administrative measures as sufficient to guarantee the protection of people within their jurisdiction from violations of their rights by third parties. As will be shown in chapter 6, the Constitutions of South Africa,¹⁶⁵ Ireland,¹⁶⁶ Malawi,¹⁶⁷ Gambia,¹⁶⁸ Cape Verde¹⁶⁹ and Ghana¹⁷⁰ are some of the few recently adopted constitutions that recognise that human rights can bind non-state actors. In other countries such as Germany and Belgium, constitutional and human rights principles may be considered

¹⁶⁵ Constitution of the Republic of South Africa (1996).

¹⁶⁶ Constitution of the Republic of Ireland (1937).

¹⁶⁷ Constitution of the Republic of Malawi (1994).

¹⁶⁸ Constitution of Gambia (1996).

¹⁶⁹ Constitution of the Republic of Cape Verde (1992).

¹⁷⁰ Constitution of the Republic of Ghana (1992).

when determining private law cases.¹⁷¹ Without recognising the direct and indirect application of human rights in the private sphere, legislative and any other measures of protection lose a human rights focus and therefore cannot effectively deal with the human rights problems raised by non-state actors.

Secondly, the operation of the doctrine of host state responsibility is premised on the assumption that the state has the capacity to control and regulate non-state actors. In contemporary times, however, the state has lost much of its capacity to control and regulate certain non-state actors. As mentioned in Chapter 1, globalisation has led to the accumulation of considerable power by non-state actors, and a remarkable corresponding reduction of the competencies of the nation state.¹⁷² The economic power that corporations have at their disposal makes it very challenging for weak states to regulate them. Claudio Grossman and Daniel Bradlow described this problem as follows:



[G]rowth in corporate power raises a significant problem for traditional international law. First, it means that whatever the international legal status of states may be, the sovereign has less power, measured in terms of control over human, natural, financial and other

¹⁷¹ See Clapham, above n 39, 164 – 5.

¹⁷² See Michael W Reisman ‘Designing and managing the future of the state’ (1997) 8 *European Journal of International Law* 409, 409 & 412; Serge Sur ‘The state between fragmentation and globalization’ (1997) 8 *European Journal of International Law* 421, 422; Bennet Freeman ‘Corporate responsibility and human rights’ (2001) available at <<http://www.lse.ac.uk/collections/globalDimensions/seminars/HumanRightsAndCorporateResponsibility/freemanTranscript.htm>> (accessed: 1 May 2005).

resources, than those corporations that it is supposedly regulating. This suggests that in fact the sovereign is no longer ‘master of its own territory’.¹⁷³

With these powers, non-state actors can easily stifle regulation and accountability. As Viljam Engström has argued, ‘[b]y threatening to relocate, [MNCs] can resist any domestic sanctions’.¹⁷⁴

Regulation requires financial and human resources. For under-resourced or developing states, resource constraints present another difficulty for regulating and controlling non-state actors. It has been argued that the resources needed to ensure compliance by MNCs with labour rights far outweigh the resource capabilities of developing countries.¹⁷⁵ In the context of the privatisation of water, it has been estimated that the state could spend about 5-10% of the total operation costs of the service if it were to monitor effectively the private service provider.¹⁷⁶ For longer concessions (15–30 years), problems of monitoring are exacerbated because the



¹⁷³ Claudio Grossman and Daniel Bradlow ‘Are we being propelled towards a people-centered transnational legal order?’ (1993) 9 *American University Journal of International Law and Policy* 1, 8–9 (citation omitted).

¹⁷⁴ Engström, above n 10, 21.

¹⁷⁵ Henry Steiner and Philip Alston *International human rights in context: Law, politics, morals* (2nd ed) (Oxford: Oxford University Press, 2000) 1349.

¹⁷⁶ Greg Ruiters ‘The political economy of public-private contracts: Urban water in two Eastern Cape Towns’ in David McDonald & Greg Ruiters (eds) *The age of commodity: Water privatisation in southern Africa* (London: Earthscan, 2005) 148, 160.

important information regarding the operation of the service is in the hands of the private service provider.¹⁷⁷

Capital in an era of globalisation has become quite mobile — this forces countries to compete for investment opportunities. Unfortunately, lowering human rights standards, for example, in the arena of labour rights, becomes a chief means of attracting investment initiatives.¹⁷⁸ Without uniform international standards of regulation, it is impossible for a state to impose high levels of control and regulation of private actors, which could put it under a disadvantage in terms of investment options. This factor limits the efficacy of the doctrine of host state responsibility. Where a regulatory regime is in place, its efficacy might be undermined by several other factors, including corruption or cooption of state officials. It has been observed that Nigeria, for example, has detailed laws in the sphere of environmental protection that compare favourably with international standards. However, these laws have not been enforced to prevent environmental degradation by oil companies because of corruption and the marked reticence on the part of law enforcement officers to put any pressure

¹⁷⁷ Greg Ruiters (Speech delivered at the seminar on privatisation of basic services, democracy and human rights, University of the Western Cape, South Africa, 2–3 October 2003) as reported in Victoria Johnson and Danwood M Chirwa *Report on the seminar on privatisation of basic services, democracy and human rights* (2003) 7 available at <<http://www.communitylawcentre.org.za/privatisation/documents2003/SeminarReportFinal1.doc>> (accessed: 1 May 2005).

¹⁷⁸ See, eg, Sub-Commission on the Promotion and Protection of Human Rights *Economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights: Preliminary report submitted by J Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission Resolution 1999/8* UN ESCOR, 52nd session, Provisional agenda Item 4, UN Doc E/CN.4/Sub.2/2000/13 (2000), paras 30 – 40.

on oil companies, which are considered to be the backbone of the Nigerian economy.¹⁷⁹

It must be noted that the inability to control and regulate certain private actors is not limited to weak states or developing countries. Both weak and powerful states have been affected by globalisation, which demonstrates that people's lives are, in this day and age, affected by forces that are global in scale and consequences. Walker and Mendlovitz have submitted that

[e]ven the most powerful states recognize the serious global constraints on their capacity to affirm their own national interest above all else ... [T]he organization of political life within a fragmented system of states appears to be increasingly inconsistent with emerging realities.¹⁸⁰

Holding the host state responsible can sometimes constitute an affront to the dictates of justice. Where such powerful private actors as MNCs enrich themselves unjustly from violations of human rights committed with or without the complicity of the government, the injustice of instituting a case against the state alone is plain. This

¹⁷⁹ Godfrey O Odongo *Making non-state actors accountable for violations of socio-economic rights: A case study of transnational corporations in the African context* (LLM Dissertation, University of the Western Cape, 2002) 47 – 8 available at <http://www.up.ac.za/chr/academic_pro/llm1/dissert_b_2002.html> (accessed: 1 May 2005).

¹⁸⁰ Rob Walker and Saul Mendlovitz 'Interrogating state sovereignty' in Rob Walker and Saul Mendlovitz (eds) *Contending sovereignties: Redefining political community* (Boulder: Lynne Rienner, 1990) 1, 11. See Fleur Johns 'The invisibility of the transnational corporation: An analysis of international law and legal theory' (1994) 19 *Melbourne University Law Review* 893. Johns has observed at 896: 'Even those nations which, unlike the United States, openly proclaim their desire to exercise some control over their corporate "nationals" frequently find it impossible to do so'.

is particularly the case with weak states that are prone to control and abuse by powerful corporations, which might even be better endowed with resources.

These limitations and obstacles mean that other forms of fostering the accountability of non-state actors such as voluntary codes of conduct and legally enforceable human rights standards should not be abandoned. The option of holding the home state responsible for violations of human rights committed abroad, in particular, presents itself as an important complementary mechanism of fostering private sector accountability for human rights. The following section considers the legality of this option and its limitations.

6 HOME STATE RESPONSIBILITY

6.1 The recognition of home state responsibility in international law

As mentioned above, states are generally only considered responsible for breaches of human rights within their jurisdiction. Article 2(1) of the ICCPR, for example, provides that a State Party has the duty to respect and ensure the rights enshrined in the ICCPR to all individuals 'within its territory and subject to its jurisdiction'. Ian Brownlie has argued that this principle 'is open to serious question and can operate, if at all, only as a weak presumption'.¹⁸¹ Nicola Jägers and Viljam Engström, after reviewing a range of human rights instruments and cases, have pointed out that there is a move away from the conventional view that human rights bind the state within its

¹⁸¹ Brownlie, above n 3, 165.

territorial frontiers only.¹⁸² Two cases can be cited in support of this view. In *Lilian Celiberti de Casariego v Uruguay*,¹⁸³ the HRC has held that article 2(1) of the ICCPR

does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it ... [I]t would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.¹⁸⁴

This dictum addresses the issue of state responsibility for its own acts. However, it is broad enough to encompass the liability of the state for violations of human rights committed abroad by private actors. The *Nicaragua Case* confirms this position.¹⁸⁵ The violations in this case were committed by a rebel group in Nicaragua, but the suit dealt with the responsibility of the US for these violations.

The significance of the doctrine of home state responsibility cannot be overemphasised. Given the growing north–south advocacy networks, this device can play an important role in ensuring that non-state actors such as MNCs respect the rights of people in developing countries, where regulatory regimes and avenues for obtaining remedies for human rights violations may not be readily available or effective. For example, Nike, a leading footwear manufacturer, recently settled a case out of court in the US and agreed to put money into workplace monitoring programs in

¹⁸² Jägers, above n 40, 166–7; Engström, above n 10, 18.

¹⁸³ Communication No 56/1979 UN Doc CCPR/C/13/D/56/1979 (29 July 1981).

¹⁸⁴ *Ibid* para 10.3.

¹⁸⁵ [1986] ICJ Rep 14, 64.

return for the withdrawal of a case alleging that it had lied about working conditions in its Asian factories.¹⁸⁶

It is interesting to note that certain domestic jurisdictions have started recognising the role of home states in ensuring that corporate nationals respect human rights abroad. In the US, the Alien Tort Claims Act¹⁸⁷ has been invoked to hold corporations directly responsible for human rights wrongs committed outside its territory. This Act is discussed in greater detail in chapter 6. Corporations are also increasingly being sued for wrongs committed abroad in such other countries as Canada, Australia, England and Spain.¹⁸⁸ Unlike in the US, where the suits expressly allege violations of human rights, in England and Australia, the foundation of such actions has been the ‘duty of care’ principle.¹⁸⁹ As will be shown in chapter 6, domestic constitutions have

¹⁸⁶ See BBC News ‘Nike settles “free speech” court case’ (13 September 2003) available at <<http://news.bbc.co.uk/1/hi/world/americas/3106930.stm>> (accessed: 1 May 2005).

¹⁸⁷ Alien Tort Claims Act 28 USC § 1350 (2004) (ATCA).

¹⁸⁸ Halina Ward, Royal Institute of International Affairs, London, *Transnational Litigation ‘Joining Up’ Corporate Responsibility?* (2000) <<http://www.dundee.ac.uk/cepmlp/journal/html/vol7/article7-19.html>> at 1 May 2004; Dinah Shelton, *Remedies in International Human Rights Law* (1999) 89–90; Mandy Macdonald, International Restructuring Education Network Europe, Netherlands, *Controlling Corporate Wrongs: The Liability of MNCs: A Report of the International IRENE Seminar on Corporate Liability and Workers’ Rights* (2000) available at <<http://www.indianet.nl/irene.html>> (accessed: 1 May 2005).

¹⁸⁹ Here, a private actor will be liable if it is proved that it owed a duty of care to the plaintiffs, breached that duty, and the breach caused the injury complained of. In a case alleging environmental pollution by a company, which resulted in various health hazards, Byrne J of the Supreme Court of Victoria, Australia, held that in his view:

increasingly adopted the notion of direct and/or indirect horizontal application of

[I]t is not at all improbable to suppose that the law imposes a duty of care in favour of persons who may use the water downstream as a food source or for a livelihood. The magnitude of the potential danger to the environment, which may be caused by such conduct *imposes a heavy responsibility on the defendant in such a case ... in terms of the ambit of the duty of care.*

See *Dagi v The Broken Hill Proprietary Company Ltd (No 2)* [1997] 1 VR 428, 456–7 (emphasis added). This case is discussed in Scott (above n 120120) 590–2. The case of *Connelly v RTZ Corporation plc* [1998] AC 854 is an illustration of the application of the duty of care principle to cases alleging violations by private actors committed abroad. In this case, the plaintiff was domiciled in Scotland. He commenced proceedings in England against the defendants alleging that he had contracted cancer of the larynx because of their failure to provide a reasonably safe system of work affording protection from the effects of uranium ore dust. The injury was sustained in Namibia where the plaintiff had worked for the second defendant (a subsidiary of the first defendant). The first defendant, which was incorporated in England, sought to have the action dismissed for *forum non conveniens*, arguing that Namibia was the appropriate forum for the trial of the case. The House of Lords rejected this application on the grounds that the complexity of the case demanded that it be tried with financial assistance and expert evidence, which would not be available to the plaintiff in Namibia. In *Lubbe v Cape plc* [2000] 4 All ER 268, the defendant corporation was incorporated in England. The plaintiffs (of which there were more than 3000) sued for damages for personal injuries sustained as a result of exposure to asbestos and its related products while working as employees of the defendant's subsidiaries in South Africa. Only one of the plaintiffs was British, the rest were South African. As in *Connelly v RTZ Corporation plc*, the House of Lords held that, in the circumstances, lack of means in South Africa to support the prosecution of the case was a compelling ground for refusing to dismiss the case for *forum non conveniens*. Both of these cases established that violations of human rights committed abroad by English corporations could be the subject of proceedings brought in England, seeking common law remedies. The main obstacle is proving that the host state is not a better forum for the case. Thus far, the House of Lords has accepted lack of means in the host state to support the prosecution as a ground for assuming jurisdiction over such cases.

human rights. All these mechanisms can be used by home states to enforce human rights obligations of non-state actors.

6.2 Limitations of the home state approach

Like the host state device, the home state doctrine of state responsibility has its limitations. To begin with, the liability of the home state arises only if it is proved that the home state exercised physical control over the private actor concerned,¹⁹⁰ rather than due diligence to prevent or respond to a violation. Thus, for example, the ICJ in the *Nicaragua Case* did not find the US responsible for violations of international humanitarian law and human rights law committed in Nicaragua because of the lack of evidence that the US directed or enforced the perpetration of the acts of the Contras. This decision was made in the presence of evidence that the US financed, organised, trained, supplied and equipped the Contras, selected its military or paramilitary targets, and planned the whole operation.¹⁹¹



US courts have adopted a similarly high threshold for determining the responsibility of corporations for violations of human rights committed outside the US. As will be shown in Chapter 6, proof of state complicity is a prerequisite for a non-state actor to be found liable under ATCA in relation to such general acts as torture, arbitrary detention and destruction of property. For these infringements, US

¹⁹⁰ According to Brownlie, above n 3, 165:

In general terms ... the test is that of physical control and not sovereignty ... The state is under a duty to control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state.

¹⁹¹ *Nicaragua Case* [1986] ICJ Rep 14, 58–63.

courts require the plaintiff to establish the existence of a considerable amount of cooperation between the government and the non-state actor concerned.¹⁹² In other words, the non-state actor must have exercised control over the state actor, or participated in the commission of the acts complained of.

Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen have observed that the control test as defined in the *Nicaragua Case* is ‘extraordinarily high’ and that, if taken literally, ‘it would ... serve as a death knell for the principle of state responsibility’.¹⁹³ Likewise, Dinah Shelton has criticised such a high standard as follows:

The Nicaragua and Cyprus decisions, together with the general language of obligation imposed on States to protect and promote the human rights of those within their territory and subject to their jurisdiction, suggest that efforts to impose liability on States for providing assistance to other States engaged in systematic human rights violations will have limited results in the absence of the elaboration of new normative standards ... The responsibility of other States for furthering or assisting in the commission of the violations generally is not contemplated. The interdependence of modern States suggests that the more limited obligations are insufficient to ensure full implementation of human rights guarantees.¹⁹⁴

This benchmark excludes many forms of complicity of the home state in the commission of violations, such as offering assistance, and aiding and abetting. It is

¹⁹² Lucinda Saunders ‘Rich and rare are the gems they war: Holding De Beers accountable for trading conflict diamonds’ (2001) 24 *Fordham International Law Journal* 1402, 1458–9.

¹⁹³ Gibney et al, above n 164, 284–5.

¹⁹⁴ Dinah Shelton ‘State responsibility for covert and indirect forms of violence’ in Katherine Mahoney and Paul Mahoney (eds) *Human rights in the Twenty-First Century: A global challenge* (Dordrecht: Martinus Nijhoff Publishers, 1993) 265, 271.

impossible, for example, to hold a home state responsible for advice given by its specialised agencies to countries on state policies with full knowledge that it will result in violations of human rights.¹⁹⁵ It might also be difficult to hold a state that renders financial or other assistance to terrorists accountable for the terrorists' violations of human rights.

Many other factors conspire to constrain the efficacy of the principle of home state responsibility. Firstly, states are not keen on controlling their corporations operating outside their jurisdiction. This unwillingness is largely attributable to the absence of uniform law relating to regulation of private actors in international law. Home states are particularly reluctant to regulate their corporations in a manner that puts them at a disadvantage in the host state where no similar level of regulation is applicable to other corporations.¹⁹⁶ The US Government has responded to the increasing suits against corporations under ATCA by proposing to limit its ambit.¹⁹⁷ Even for those states that are willing to control non-state actors, problems of effective control over

¹⁹⁵ Shadrack Gutto 'Violation of human rights in the Third World: Responsibility of states and TNCs' in Frederick Snyder and Surakiart Sathirathai (eds) *Third World attitudes toward international law* (Dordrecht: Martinus Nijhoff Publishers, 1987) 275, 287. In noting the inadequacy of the accountability of specialised agencies giving advice to developing countries, Shadrack Gutto has argued at 287: 'To the extent that governments adopt and rely on advises [sic] and assistance given by these "non-productive" specialised institutions it is crucial that proper systems of accountability be developed'.

¹⁹⁶ Engström, above n 10, 22.

¹⁹⁷ See, eg, the arguments advanced in the Brief for the US as Respondent Supporting Petitioner and the Reply Brief for the US as Respondent Supporting Petitioner, *Sosa v Alvarez-Machain* (9th Cir) (No 03-339).

certain actors such as MNCs, cited in respect of host state responsibility, are also valid here.¹⁹⁸

With regard to MNCs, the identification of the home state presents other problems. These actors work in a complex web of relationships that renders the identification of a parent company or its nationality difficult.¹⁹⁹ As part of attempts to avoid this problem, US courts in deciding cases under ATCA have adopted the ‘minimum contact test’ as a standard for assuming jurisdiction over a corporation.²⁰⁰ This test involves an assessment of the degree of contact of the defendant corporation with the forum state as well as the relatedness of the contacts to the claim at hand.²⁰¹ Under this test, problems associated with identifying a home state of a MNC may be avoided. However, enforcement of decisions passed may be difficult if the corporation has few or no assets in the state.

A highly sensitive issue raised by the notion of home state responsibility is that of respect for state sovereignty. Subjecting non-state actors operating abroad to legislation of their home state often meets with resistance from host states alleging infringement of the principle of state sovereignty. This problem has been raised

¹⁹⁸ See, eg, Silvia Danailov ‘The accountability of non-state actors for human rights violations: The special case of transnational corporations’ (1998) 25 available at <http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf> (accessed: 1 May 2005). Silvia Danailov has argued that ‘no State today is capable of controlling adequately the phenomenon of the TNC on its own’.

¹⁹⁹ See generally Dimitra Kokkini-Iatridou and Paul de Waart ‘Foreign investments in developing countries: Legal personality of multinationals in international law’ (1983) XIV *Netherlands Yearbook of International Law* 87.

²⁰⁰ See generally, Saunders (above n 192); *International Shoe v Washington* 326 US 310, 316 (1945).

²⁰¹ Saunders, above n 192, 1457.

against US courts when dealing with claims under ATCA. In relation to the apartheid lawsuits in US courts against South African companies, Nelson Mandela, for example, is reported to have said: ‘South Africans are competent to deal with issues of reconciliation, reparation and transformation among themselves without outside interference, instigation or instruction’.²⁰²

Lastly, it is trite in international law that an international enforcement body cannot hear a case alleging a violation of human rights before the complainant exhausts all local remedies.²⁰³ This means that a complainant has to exhaust the local remedies of the home or host state first before approaching the international forum. The cost implications of this procedure are obviously enormous for individual plaintiffs.

7 CONCLUSION

The doctrine of state responsibility can play a considerable role in fostering compliance by private actors with human rights. A host state, according to this doctrine, is under an obligation to exercise due diligence to prevent violations of human rights in the private sphere, and to control and regulate non-state actors. Where such violations occur, it is enjoined to respond to them by investigating them, punishing the culprits, or providing effective remedies to victims. This duty, it has been shown, is also applicable to economic, social and cultural rights.

Not only is the host state responsible for protecting human rights, but home states also have the obligation to ensure that their nationals, and other actors over whom they have control, respect human rights abroad. The recognition of home state

²⁰² ‘Mandela criticizes apartheid lawsuits’ (2003) available at <<http://www.dispatch.co.za/2003/08/26/southafrica/bmadib.htm>> (accessed: 1 May 2005).

²⁰³ Shaw, above n 9, 202–3.

responsibility is particularly important given that non-state state actors violating human rights abroad can be sued in their home states.

Both the host state and home state doctrines of responsibility have limitations. As this chapter has demonstrated, such limitations range from a lack of capacity or political will of states to control corporations, and possible interference with the doctrine of state sovereignty to a lack of a uniform domestic framework for regulating and controlling non-state actors. Some of these limitations can be rectified but others are inherent in the doctrine of state responsibility itself. For example, this chapter has shown that the standard of control applied for the purposes of finding a state responsible for acts of third parties needs revision. Flexibility should be permitted so that states that assist third parties with the full knowledge that the assistance will be used for perpetrating violations can be held responsible. The standard adopted in *Doe v Unocal*²⁰⁴ is instructive in this regard. In this case, the plaintiff alleged that Unocal, a private corporation, hired the military to provide security for its project on gas exploitation, which was undertaken jointly with the US government.²⁰⁵ The military forced villagers to work and entire villages to relocate for the benefit of the project.²⁰⁶ While forcing villagers to work and relocate, the military also committed acts of violence.²⁰⁷ It was argued that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortious acts.²⁰⁸ On

²⁰⁴ *Doe v Unocal* 2002 WL 31063976 (9th Cir, 2002) (*Doe v Unocal Court of Appeal Judgment*).

²⁰⁵ *Doe v Unocal* 963 F Supp 880 (CD Cal 1997) 883.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid* 885.

18 September 2002, the US Court of Appeals for the Ninth Circuit reversed the District Court's decision,²⁰⁹ which dismissed the lawsuit against Unocal. The Court of Appeals held that the District Court was wrong in determining that the plaintiffs had to show that Unocal controlled the Burmese military's actions in order to establish Unocal's liability.²¹⁰ Rather, the plaintiffs need only to demonstrate that Unocal gave practical assistance or encouragement knowing that it was or would be used for in perpetrating the abuses.²¹¹ A positive feature of the Appeal Court's judgment is that it adopted a lesser standard for determining liability for actions of a third party. Under this standard assistance given with the full knowledge that it will be used in committing human rights violations will give rise to responsibility of the party giving the assistance.

Secondly, recognising the justiciability of economic, social and cultural rights in domestic constitutions and their application to non-state actors would go along way towards enhancing non-state actors' accountability for human rights. Without such recognition and judicial remedies, the obligations of non-state actors in relation to these rights will remain obscure and difficult to enforce. In addition, this chapter has shown that that the home state approach is expensive. Enhancing the north-south networks among human rights activists and practitioners would ensure that violations of human rights by corporations in weak states do not go unpunished.

²⁰⁹ *Doe v Unocal Court of Appeal Judgment* (above n 204).

²¹⁰ *Ibid* 15 fn 32.

²¹¹ *Ibid* 14. In February 2003, the Court of Appeals decided to rehear the appeal before a panel of eleven judges. *Doe v Unocal* 2003 WL 359787 (9th Cir 2003) (*Doe v Unocal Court of Appeal Order*).

However, other limitations are insurmountable. For example, the problem of state control over non-state actors has become particularly acute in the era of globalisation and it may be difficult to address without recognising some obligations of these actors. Issues relating to possible interference with another state's sovereignty when one state controls its nationals abroad cannot easily be avoided. So too is the fact that where a non-state actor is well endowed with resources, punishing a state for human rights violations committed by the non-state actors would occasion injustice.

In conclusion, these limitations underscore the significance of other approaches aimed at enhancing direct private sector responsibility for human rights whether through voluntary or binding norms. Clearly, the doctrine of state responsibility can play a role in enforcing indirect obligations of non-state actors but it is not the panacea to the problem of non-state actors and economic, social and cultural rights.

The next chapter examines the role of voluntary codes of conduct and other soft law mechanisms in ensuring that non-state actors comply with their human rights obligations.

Chapter 5

DIRECT RESPONSIBILITY OF NON-STATE ACTORS THROUGH SOFT LAW AND VOLUNTARY MECHANISMS

I INTRODUCTION

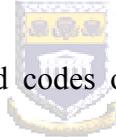
The previous chapters have demonstrated that international law is increasingly recognising that non-state actors have obligations in relation to human rights. Such obligations can be enforced against these actors indirectly through the doctrine of state responsibility or directly through international criminal law. This chapter demonstrates that the international human rights obligations of non-state actors may also be enforced directly against these actors through a range of soft law mechanisms in international law or through voluntary procedures adopted by or for these actors. Voluntary codes of conduct essentially constitute an acknowledgment by non-state actors that they have human rights obligations. However, this chapter seeks to demonstrate that they must not be treated as a substitute for binding standards.¹ Consequently, this chapter will not only

¹ For example, the United States Council for International Business (USCIB), while criticising the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms) has stated that business was committed to operating in ‘a responsible and sustainable manner’. This commitment is achieved by ‘respecting the human rights and civil liberties of employees, customers, suppliers and the community in which they operate’. United States Council for International Business ‘Talking points on the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”’ available at <<http://209.238.219.111/USCIB-text-Talking-Points.htm>> (accessed: 1 May 2005). For similar comments

investigate the role that these standards can play in ensuring that non-state actors comply with human rights standards but it will also highlight some of the key limitations of these standards.

The chapter begins with a brief history of voluntary standards. Their types are then discussed. This discussion will be followed by an account for the proliferation of these norms especially after the 1990s. After examining the contribution that voluntary initiatives can play and their limitations in advancing the accountability of non-state actors for economic, social and cultural rights, this chapter will then analyse critically the efficacy of the key international soft law mechanisms for monitoring compliance by non-state actors with their human rights obligations.

2 THE EVOLUTION OF CODES OF CONDUCT



The history of corporate ethics and codes of conduct goes as far back as Roman times.² However, the forerunners to modern codes of conduct were only articulated after

see also International Chamber of Commerce & International Organisation of Employers 'Joint views of the IOE and ICC on the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights"' available at <<http://209.238.219.111/IOE-ICC-views-UN-norms-March-2004.doc>> (accessed: 1 May 2005). The Norms were adopted by the Sub-Commission on the Protection and Promotion of Human Rights on 13 August 2003. They are discussed in section 9 below.

² Mark B Baker 'Private codes of conduct: Should the fox guard the henhouse?' (1993) 24 *University of Miami Inter-American Law Review* 399, 406.

the Second World War.³ As noted in chapter 1, the first set of international codes aimed at regulating MNCs and other business enterprises were adopted in response to the demand by developing countries for the restructuring of the international economic order and the regulation of these actors.⁴ They included the OECD Guidelines for Multinational Enterprises adopted in 1976 under the auspices of the Organisation for Economic Co-operation and Development (OECD) and the Tripartite Declaration on International Investment and Multinational Enterprises and Social Policy (ILO Tripartite Declaration) adopted in 1977 under the auspices of the International Labour Organisation (ILO). As will be shown below, these initiatives remain as key international soft law mechanisms for addressing human rights and other issues raised by MNCs and other business enterprises. The business sector also responded by adopting voluntary codes of conduct. As mentioned in chapter 1, the International Chamber of Commerce, for example, adopted the Guidelines for International Investment in 1972. The UN took efforts aimed at the elaboration of a code of conduct by forming the Centre on Transnational Corporations (UNCTC) in 1974. However, and as noted in chapter 1, the code did not come to fruition due to disagreements on its nature, form and content.⁵

³ See generally Rhys Jenkins *Corporate codes of conduct: Self-regulation in a global economy* (Geneva: Technology, Business and Society Programme Paper No 2, April 2001) 1 – 6.

⁴ Peter Hansen & Victoria Aranda ‘An emerging international framework for transnational corporations’ (1990/1991) 14 *Fordham International Law Journal* 881, 885.

⁵ See Seymour J Rubin ‘Transnational corporations and international codes of conduct: A study of the relationship between international legal cooperation and economic development’ (1995) 10 *American University Journal of International Law and Policy* 1275, 1284 – 9.

The 1970s also saw some companies especially those from the US adopting their own voluntary codes in response to the growing negative publicity about scandals committed by those companies.⁶ Some of these codes were initiated by actors that were external to the companies that adopted them. A commonly cited example is the Sullivan Principles for South Africa adopted in 1977 by 12 US corporations working in South Africa.⁷ These Principles were named after Reverend Leon H Sullivan, who was a pastor of the Zion Baptist Church in Philadelphia and a member of the board of directors of General Motors Corporation.⁸ Reverend Sullivan believed that the Principles would ‘promote programs that could have a significant impact on improving the living conditions and quality of life for the non-white population of South Africa, and [would] be a major contributing factor in the end of apartheid.’⁹ He proposed the Principles after his first proposal to the Board of Directors of General Motors Corporation that American companies disinvest in South Africa in protest to the apartheid policies failed to command support from the other members of the Board.¹⁰ The second notable code was the MacBride Principles adopted

⁶ Most of these scandals related to bribery and other questionable payments. See Jenkins, above n 3, 3 – 4.

⁷ These Principles stipulated commitments to non-discrimination at work and providing good conditions of work to its employees including training programmes especially for black employees, and to exert influence to end apartheid in South Africa.

⁸ Jorge F Perez-Lopez ‘Promoting international respect for workers rights through business codes of conduct’ (1993) *Fordham International Law Journal* 1, 6.

⁹ Quoted in Perez-Lopez, *ibid*, 6.

¹⁰ *Ibid*. See also Douglass Cassel ‘Corporate initiatives: A second human rights revolution?’ (1996) 19 *Fordham International Law Journal* 1963, 1970.

in 1986.¹¹ Modelled closely on the Sullivan Principles, the MacBride Principles were also aimed at US corporations, doing business in Northern Ireland. They were proposed as part of efforts aimed at combating systematic practices of anti-Catholic discrimination, which were believed to be perpetuated by many US owned companies operating in Northern Ireland.¹² Other codes of this kind included the Slepak Principles, the Miller Principles and the Macquidora Standards of Conduct.¹³ These codes, especially the Sullivan Principles, have influenced the development of many other codes worldwide.¹⁴

However, the proliferation of corporate codes of conduct is closely associated with the globalisation era. According to Rhys Jenkins, the phenomenon of globalisation, which had contributed to the loss of interest by governments in statutory regulation in the 1980s, presented new concerns about the business sector.¹⁵ The improved communication networks, which it facilitated, enhanced the flow of information with the result that human rights abuses committed by corporations around the world could easily be disseminated and reach a wider audience within a shorter period than was the case

¹¹ They were initiated, proposed and launched by the Irish National Caucus in 1984. These Principles are available at <http://www.irishnationalcaucus.org/MacBride/The%20MacBride%20Principles.htm> (accessed: 30 April 2005).

¹² See Perez-Lopez, above n 8, 10.

¹³ Discussed in Perez-Lopez, above n 8. See also Elisa Westfield 'Globalisation, governance and multinational enterprise responsibility: Corporate codes of conduct in the 21st Century' (2002) 42 *Virginia Journal of International Law* 1075.

¹⁴ See Perez, above n 8.

¹⁵ Jenkins, above n 3, 7 – 8.

previously.¹⁶ Globalisation also expanded the horizons for civil society mobilisation and concerted efforts. Consequently, a wider range of stakeholders including NGOs, trade unions, environmental groups, and consumers from both the North and the South than in the 1970s were able to drive campaigns for corporate accountability in the 1990s in a more co-ordinated fashion as part of efforts at countering the globalisation movement.¹⁷

However, unlike in the 1970s where the call was for a binding international regulatory framework, these campaigns focussed on the adoption of non-binding corporate codes of conduct.¹⁸ As noted in chapter 1, this change in approach was motivated by ‘the failure of governments to protect labour rights in the past, and the growing hostility of governments and business to statutory forms of regulation’.¹⁹ It also reflected a loss of confidence on the adoption of binding standards occasioned by the failure of governments to agree on the UN Code of Conduct for TNCs.²⁰



A notable feature of many codes developed in the 1990s is that they contain commitments by corporations to a wider range of issues relating to the environment,

¹⁶ Ibid. See also Neil Kearney ‘Corporate codes of conduct: The privatised application of labour standards’ in Sol Picciotto & Ruth Mayne (eds) *Regulating international business: Beyond liberalisation* (London: MacMillan Press Ltd, 1999) 205, 208.

¹⁷ Ruth Mayne (ed) *Regulating international business: Beyond liberalisation* (London: MacMillan Press Ltd, 1999) 235, 239 – 240. See also Jem Bendell *Barricades and boardrooms: A contemporary history of the corporate accountability movement* (Geneva: UN Research Institute for Social Development, 2004) 23 – 27.

¹⁸ Ibid 239.

¹⁹ Ibid 239.

²⁰ Ibid.

labour standards and, to a limited extent, human rights.²¹ As will be shown later, this trend is also reflected in the revisions made to the OECD Guidelines and the ILO Tripartite Declaration in 2000 and 1998 respectively. In addition to these, the UN General Secretary proposed a Global Compact in 1999, which asks companies to integrate a set of principles including human rights into their operations.²²

The UN Sub-Commission on the Promotion and Protection of Human Rights adopted the UN Norms on 26 August 2003.²³ These Norms are yet to be adopted by the UN Commission on Human Rights but, as will be shown below, they depart from all other previous international efforts in that the UN Sub-Commission clearly intended them to have a binding effect and enforcement mechanisms. One may therefore say that the UN Norms attempt to tilt the balance in favour of more binding standards for non-state actors, especially MNCs.²⁴



This discussion therefore highlights that corporations have since the 1960s come to recognise that they have some obligations towards other stakeholders than simply their shareholders. Corporate codes of conduct signify a formal commitment by these actors to complying with certain minimum standards of corporate behaviour. Attempts have also been made to adopt standards for business conduct at an intergovernmental level. While

²¹ See Errol P Mendes 'The five generations of corporate codes of conduct and their impact on corporate social responsibility' available at < <http://www.cdp-hrc.uottawa.ca/publicat/five.html>> (accessed: 30 April 2005).

²² For details on the Global Compact see section 8.3 below.

²³ UN ESCOR, 55th Sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

²⁴ For details on the UN Norms see section 9 below.

most of these international mechanisms have largely relied on voluntarism, a move towards the development of more authoritative standards for these actors seems to be developing. The next section provides an overview of the various types of codes of conduct.

3 DEFINITION AND TYPES OF CODES OF CONDUCT

Corporate codes of conduct are a set of principles, which define the ethical standards, values and business practices the adhering company wishes to follow in its operations.²⁵ The form the codes take varies widely. Some contain very general principles while others can be quite detailed and specific. The content of the codes also varies widely.

However, it is possible to classify them according to the actor(s) who adopt them. Using this methodology, six categories of corporate codes of conduct can be identified. As this section is only introductory, limited preliminary comments will be made on the strengths and weaknesses of these types of codes. The first category is that of internal corporate codes. Companies unilaterally adopt these codes. Most of the corporations that have codes of conduct have headquarters in the United States or the United Kingdom.²⁶

²⁵ Jean-Paul Sajhau 'Business ethics in the textile, clothing and footwear (TCF) industries: Codes of conduct' (International Labour Office, Sectoral Activities Programme, Working Paper, SAP 2.60/WP.110) available at < <http://www.ilo.org/public/english/dialogue/sector/papers/bzethics/>> (accessed: 30 April 2005).

²⁶ Silvia Danailov 'The accountability of non-state actors for human rights violations: The special case of transnational corporations' (1998) available at <http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf> (accessed: 30 April 2005) 45. See also ILO 'Corporate codes of conduct' available at < <http://www.Itcilo.it /actrav/actrav-english/telearn/global/ilo/code/main.htm#Number%20of%20codes> >

Since they are adopted by corporations unilaterally, these codes lack legitimacy in the eyes of other stakeholders.

The second category is that of ‘model codes’. These are developed by other actors than the adhering corporation itself such as NGOs,²⁷ trade unions²⁸ and trade associations.²⁹ They outline principles on which corporations can base their own codes.

The advantage of model codes is that they stipulate ideal standards, which, if observed, (accessed: 30 April 2005). Examples of these codes include Levi-Strauss’ Terms of Engagement and Guidelines, and Reebok’s Human Rights Product Standards.

²⁷ Among the popular codes developed by NGOs or individuals are the ‘Human Rights Principles for Companies’ adopted on 1 January 1998 by Amnesty International, available at <<http://web.amnesty.org/library/index/engACT700011998?open&of=eng-398>> (accessed: 30 April 2005); the Global Sullivan Principles of Social Responsibility, developed by Rev Leon Sullivan in 1997 based on the Sullivan Principles mentioned above, available at <http://globalsullivanprinciples.org/new_page_2.htm> (accessed: 30 April 2005); and the MacBride Principles.



²⁸ Eg the ICFTU/ITS Basic Code of Labour Practice adopted in 1997 by the International Confederation of Free Trade Unions (ICFTU). It includes principles on labour rights. See ICFTU’s website at <<http://www.icftu.org/displaydocument.asp?Index=991209513&Language=EN>> (accessed: 30 April 2005); and the Model Framework Agreement, adopted by the International Federation of Building and Wood Workers to encourage companies to adopt codes of conduct that include international labour standards. This Agreement is available at <http://homepage.iprolink.ch/~fitbb/Prtect.%20&.%20Prom.%20Wrkrs%20Rights/Series__Framewrk_agrmnt.htm> (accessed: 30 April 2005).

²⁹ Eg the Danish Industry’s ‘Industry and human rights’, which stipulates some principles to guide Danish companies trading with countries that have a reputation for committing human rights violations, the British Toy and Hobby Association Code, adopted by the British Toy and Hobby Association in 1995 as amended in 1997; the Bangladesh Garments Manufacturers and Exporters Code and the Kenya Flower Council Code.

could ensure greater corporate accountability. Amnesty International's Human Rights Principles for Companies has been acclaimed as 'the most comprehensive and progressive guidelines for regulating TNCs' activities towards human rights' of all model codes.³⁰ A major weakness of model codes lies in the fact that they are often drafted without the participation of corporations. As a result, their practical significance is open to question and very few companies adopt them.³¹ In order to induce corporations to adopt the model codes, some NGOs use a 'product labelling scheme', whereby companies that follow the model code are certified and given labels to append on their products as evidence to consumers that those corporations respect high social and ethical standards.³² While this is a commendable strategy, some have criticised it on the grounds that the certification processes are complicated, not transparent and allow for



³⁰ Danailov, above n 26, 48.

³¹ See Jenkins, above n 3, 27.

³² Mark B Baker 'Tightening the toothless vise: Codes of conduct and the American Multinational enterprise' (2001) 20 *Wisconsin International Law Journal* 89, 129. Eg the 'Social Accountability 8000' (SA8000). SA8000 defines a set of auditable standards and an independent auditing process for the protection of workers' rights. It lays down principles on child labour, compensation, discrimination, forced labour, working hours, health and safety, and freedom of association, and disciplinary practices. SA8000 is available at < <http://www.cepaa.org/SA8000/SA8000.htm>> (accessed: 30 April 2005). The RUGMARK label purports to give an assurance that no illegal child labour was employed in the manufacture of a carpet or rug. RUGMARK's principles are available at <<http://www.rugmark.org/>> (accessed: 30 April 2005).

corporations that do not have good human rights records to obtain labels attesting to the contrary.³³

‘Multi-stakeholder codes’ constitute the third category. Unlike the codes adopted by unilaterally by the companies or model codes, ‘multi-stakeholder codes’ are negotiated among various role players including, but not always all of them, corporate representatives, NGOs, trade unions and government representatives. An example of such codes is the Ethical Trade Initiative Base Code,³⁴ and the ‘Child Labour: A Charter by European Social Partners in the Footwear Industry.’³⁵ Such codes have an advantage over internal and model codes in that they are drafted with the participation of all relevant stakeholders.

The fourth category is that of government codes, representing the codes that are initiated or adopted by the government unilaterally or bilaterally. An example of this type of a code is the Model Business Principles adopted by the US government under Bill Clinton’s administration in 1995. This initiative sought to encourage corporations to

³³ Adele Blackett ‘Global governance, legal pluralism and decentred state: A labour law critique of codes of corporate conduct’ (2001) 8 *Indiana Journal of Global Legal Studies* 401, 415 – 416.

³⁴ Developed by the Ethical Trade Initiative, an alliance of companies in the United Kingdom, trade union organisations and non-governmental organisations (NGOs), committed to working together to identify and promote good practice in the implementation of codes of labour practice, including the monitoring and verification of the observance of code provisions. The Code is available at <http://www.ethicaltrade.org/Z/lib/ppp/ppp_en.shtml> (accessed: 30 April 2005).

³⁵ Signed on 22 September 1997 by the European Trade Union Committee: Textiles, Clothing and Leather (ETUC: TCL) and EURATEX, the European employers' organisation for textiles and clothing to show their commitment to promoting basic human rights in the workplace.

adopt codes of conduct along the principles enunciated in the Model Principles.³⁶ Some states have attempted to promote voluntary corporate standards through legislative means. For example, in 2000 a Senator in the US, Cynthia McKinney, introduced the Corporate Code of Conduct Bill in Congress.³⁷ It sought to require nationals of the United States that employ more than 20 persons in a foreign country to implement a Corporate Code of Conduct with respect to the employment of those persons, and for other purposes.³⁸ Such nationals would not only have to ‘comply with internationally recognised worker rights and core labor standards’ but also with ‘minimum international human rights standards’.³⁹ Unlike the Model Principles, the Act includes such incentives for companies that followed its principles in their operation as preferences in the award of contracts and the provision of certain foreign trade and investment assistance.⁴⁰ It also lays down some reporting requirements and provisions for the establishment of a possible regulatory authority as a means of monitoring the implementation of its provisions.⁴¹

³⁶ The Model Principles outlined commitments to guarantee workplace health and safety, responsible environmental protection and practices, and fair employment practices including avoidance of child and forced labour and discrimination. See the US Department of Commerce, International Trade Administration ‘Model Business Principles’ available at <<http://www.itcilo.it/actrav/actrav-english/telearn/global/ilo/guide/usmodel.htm>> (accessed: 30 April 2005).

³⁷ See Blackett, above n 33, 1104.

³⁸ See the Preamble to the US Corporate Code of Conduct Bill.

³⁹ Section 3 of the US Corporate Code of Conduct Bill.

⁴⁰ Section 4 of the US Corporate Code of Conduct Bill.

⁴¹ Sections 7 and 8 of the US Corporate Code of Conduct Bill.

Unfortunately, the Bill was not endorsed by Congress and has not yet been reintroduced. On 6 September 2000, Senator Vicki Bourne introduced a similar bill, the Corporate Code of Conduct Bill 2000 into the Australian Senate.⁴² The Bill sought to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations, which employ more than 100 persons in a foreign company.⁴³ On 5 October 2000 the Senate referred the provisions of the Bill to the Parliamentary Joint Statutory Committee on Corporations and Securities for inquiry and report by a stipulated date. The Parliamentary Committee duly reported on 1 June 2001 and suggested a range of amendments to the Bill.⁴⁴ Like the US Bill, this one has also not been reintroduced yet. In view of the doctrine of state responsibility discussed in the preceding chapter, the state could go a long way in discharging its international obligations to prevent and redress human rights violations by private actors within and outside its territory by promoting corporate standards. However, these standards must not be used to undermine any existing or the development of binding international and domestic standards.

The fifth category represents those standards developed by international organisations such as international financial institutions (IFIs) or export credit agencies (ECAs). These

⁴² See Surya Deva 'Corporate Code of Conduct Bill 2000: Overcoming hurdles in enforcing human rights obligations against overseas corporate hands of local corporations' (2004) 8 *Newcastle Law Review* 87.

⁴³ Section 3 of the Australian Corporate Code of Conduct Bill 2000.

⁴⁴ The Parliament of the Commonwealth of Australia 'Report on the Corporate Code of Conduct Bill 2000' available at < http://www.aph.gov.au/senate/committee/corporations_ctte/corp_code/report/report.pdf> (accessed: 30 April 2005).

are different from internal codes because the latter are applied to the corporations own operations while those adopted by IFIs and ECAs are intended for application to both the activities of the IFIs/ECAs themselves and other actors. IFIs are public international organisations that provide loans, guarantees and/or insurance to corporations and states in furtherance of trade and investment in developing countries.⁴⁵ ECAs are public agencies that provide financial and financial risk management services to domestic private corporations that engage in the promotion of exports to and investment in developing countries.⁴⁶ Both the IFIs and ECAs have been reluctant to incorporate human rights into their operations⁴⁷ but some of these have taken some positive steps in that regard. For example the Export Development Canada has adopted a ‘Code of Business Ethics’ in 1999, which states that the agency values human rights and their protection, while the Export Credit Guarantee Department, a United Kingdom ECA, has adopted ‘Business Principles’ stating that the agency will take into account social, environmental and human rights impacts of project or investment proposal when deciding whether to support those projects or not.⁴⁸ An interesting procedure which has attracted considerable attention is the World Bank’s Inspection Panel established in 1993. What is unique about this procedure is that it is the first accountability mechanism to be set up by an international organisation allowing non-state actors to hold the organisation accountable for its failures

⁴⁵ The NGO Working Group on ECD *Risk, responsibility and human rights: Taking a rights based approach to trade and project finance* (Ottawa: Halifax Initiative Coalition, 2004) 1 – 2.

⁴⁶ Ibid 2.

⁴⁷ See chapter 1 in this study.

⁴⁸ See The NGO Working Group on ECD, above n 45, 9.

in its operations.⁴⁹ Given this uniqueness and the fact that it has been lauded as a potential model for other international organisations, we discuss this procedure later in this chapter. The standards adopted by IFIs and ECAs can serve dual purposes: Firstly, to ensure that the other actors with whom they have business relations do not embark on projects that will likely result in human rights violations, and secondly to ensure that these institutions themselves abide by their own human rights obligations especially the obligation not to be complicit in human rights violation.

The last category is that of international codes. These are developed at regional or international levels. An example of a regional code is the European Code of Conduct on Arms Exports, adopted on 11 June 1998 by the Foreign Ministers of the European Union Member States, and the OECD Guidelines. International codes of conduct include the ILO Tripartite Declaration, the UN Norms, and the UN Global Compact. A universal or regional code of conduct may serve a range of important purposes. It may prepare the ground for corporate voluntary initiatives. This would eliminate competition dilemmas, which companies that shoulder more social responsibilities face. It may also form the basis for criticising those corporations that adopt codes that fall short of the universally agreed standards of corporate behaviour. Moreover, it would reduce the burden on corporations to follow the many model codes with disparate contents that have mushroomed. International and regional codes could have a significant influence on

⁴⁹ Sabine Schlemmer-Schulte 'The World Bank Inspection Panel: A model for other international organisations?' in Niels M Blokker & Henry G Schermers (eds) *Proliferation of international organizations: Legal issues* (The Hague: Kluwer Law International, 2001) 483, 484 – 485.

corporate behaviour much in the same way as international human rights law has influenced the development of domestic norms.

It can therefore be seen that codes of conducts are of different types and are adopted by different actors. A preliminary point made in this discussion is that the manner in which a code is adopted is very critical to the genuineness of the actor's commitment to the standards it professes. If the process of adoption and implementation does not involve other or a wide range of relevant stakeholders, the legitimacy of the code will be diminished.

4 WHY DO CORPORATIONS ADOPT VOLUNTARY CODES OF CONDUCT?

It must be pointed out that the business sector has rejected the stance that corporations and other enterprises have social responsibilities to other stakeholders than shareholders until recently.⁵⁰ In the 1960s, the Nobel Prize winning economist, Milton Friedman, provided the philosophical justification for such denials. He argued that 'doing good' was the responsibility of government, not of corporations. According to him: 'there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud'.⁵¹

⁵⁰ See George A Steiner *Business and society* (New York: Random House Inc, 1975) 160 – 162.

⁵¹ See Milton Friedman 'The social responsibility of business is to increase its profits' *The New York Times Magazine* 13 September 1970. Available at < <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>> (accessed: 30 April 2005).

Social responsibilities have also been resisted on the basis that companies have no special skills in social matters.⁵² The fact that the principal objective of business is to make profits renders them ‘philosophically and emotionally unfit to deal with social problems’.⁵³ Others have argued that the defects in the economy are responsible for the pressure on companies to assume social responsibilities.⁵⁴ According to them, the solution to this problem therefore lies in improving the environment for competition, not in forcing business to shoulder social responsibilities.⁵⁵ There are also those who have argued as a ground for rejecting corporate social responsibilities that the latter have additional cost implications to a business, with a huge effect on the competitiveness of the business.⁵⁶

The recent proliferation of corporate codes of conduct must therefore be regarded as shift towards an acceptance that corporations do have social responsibilities. This shift is the result of a combination of many factors. Principal among them is the realisation that without them the pressure for binding obligations would be unstoppable.⁵⁷ Rhys Jenkins, for example, has argued that companies have historically adopted ‘some kind of code as the lesser of two evils’.⁵⁸ Likewise Craig Forcese has submitted that:

⁵² Steiner, n 50 above, 161.

⁵³ Ibid.

⁵⁴ Ibid 162.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Baker, above n 2, 414.

⁵⁸ Jenkins, above n 3, 9.

Study after study suggests that most modern human rights codes have been introduced and policed by corporations, not so much in response to a management commitment to corporate social responsibility, but largely in reaction to external pressures. These pressures include developments in trade law, litigation in US courts, and consumer and shareholder activism.⁵⁹

Thus, apart from the international codes which were adopted to diffuse the pressure for binding obligations, Levi Strauss, for example, became one of the first corporations to adopt a code of conduct in 1992 following revelations about its use of child labour in China and bad practices of its contractors in Saipan in the Pacific.⁶⁰ Shell and BP Amoco also included human rights in their policies as a result of the negative publicity they received about their complicity in human rights violations in Nigeria and Colombia respectively.⁶¹

While pressure has certainly played a part in changing the stance of corporations to accept that they have certain obligations to other stakeholders than their shareholders, it can also be argued that this change has also been influenced by the realisation that it is no longer tenable for businesses to ignore social responsibilities if their ultimate objective of making profits is to be achieved. In an era where consumer awareness is increasing,⁶² corporations are finding it increasingly difficult to ignore the impact of their unethical behaviour or conduct that has a negative impact on human rights. There has also been

⁵⁹ Craig Forcese *Human rights codes of conduct* (L'Association Des Economistes Quebecois (ASDEC) 1999) 79, 82.

⁶⁰ Kearney, above n 16, 210.

⁶¹ Jenkins, above n 3, 8.

⁶² *Ibid* 14 – 15.

increased NGO activity around business and human rights so much that major human rights violations committed by business may no longer go unnoticed. The negative publicity that a company can receive may have serious consequences on their profits.

Jean-Paul Sajahau has argued:

The construction of a positive public image, in which the concept of the socially responsible employer has acquired a new importance, is a long-term and increasingly more complex task in which management teams are much more involved in the past. An enterprise's image is now an asset which must be protected and developed to the maximum. In the textile and footwear sectors, a company's public image is particularly important and often determines a decision whether the public will buy its goods.⁶³

Companies are therefore adopting codes of conduct in order to raise their profile in the eyes of consumers.⁶⁴ State encouragement through providing incentives to corporations that follow certain ethics and corporate standards and the product labelling schemes mentioned earlier have also contributed to the proliferation of codes of conduct.

Apart from these factors, it must be noted that voluntary codes of conduct have a number of advantages over binding regulations from a company's perspective. Governmental or international regulation is more expensive and restrictive than self-

⁶³ See Sajahau, above n 25.

⁶⁴ According to Mark Baker:

A well drafted code can increase the good will of MNEs, making host countries more willing to enter into business with them. This increase in business will help MNEs expand in the more competitive international market place and bring greater returns to MNEs and their shareholder's.

See Baker, above n 2, 418.

regulation.⁶⁵ It also has the effect of removing the flexibility and freedom that corporations have in formulating the codes and in deciding it should contain and the means of its implementation.⁶⁶ These factors would lead companies to prefer corporate codes of conduct to binding regulation.

There could be more reasons to explain the shift away from the idea that corporations do not have obligations to society generally beyond making profits for the shareholders. What is significant is that these actors have increasingly come to recognise that they have certain duties to the community, customers and other stakeholders.

However, corporate codes and other voluntary initiatives, as will be shown below, can complement (but not substitute) legally binding norms in many respects.

5 THE ROLE OF CODES OF CONDUCT IN ADVANCING PRIVATE SECTOR ACCOUNTABILITY FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS



Corporate codes of conduct have an important role to play in ensuring that private actors are accountable for economic, social and cultural rights. As shown in the previous chapter, the duty of the state to protect human rights requires it to take many other measures than legislative ones. Encouraging voluntary codes of conduct constitutes one of those measures. In particular, these codes may be used as a double-edged sword for critiquing the conduct of corporations. Where a company adopts a code that is limited in scope, it may be criticised by reference to model codes or international codes that are

⁶⁵ Steiner, above n 50, 164.

⁶⁶ Baker, *ibid*, 415.

more expansive in scope.⁶⁷ Conversely, the adoption of a ‘meaningful code’ also provides activists with a weapon for criticising the company’s conduct if it fails to live up to its commitments as expressed in the code.⁶⁸

Codes of conduct may be of use both where the horizontal application of human rights is recognised and where it is not. Where it is recognised, codes of conduct may assist in developing the precise obligations of private actors, which remains unresolved to date. Furthermore, codes deal with many other issues that are not directly linked to human rights or economic, social and cultural rights. They may also stipulate commitments to standards that fall beyond the scope of the currently recognised ones in domestic and international law. If fully implemented, such codes may operate to fill the gaps left by the formal regimes of regulation.⁶⁹ They may be particularly useful where the domestic legal system is dysfunctional, ineffective or oppressive. The Sullivan Principles can be cited as an example here. As noted above, US corporations adopted these principles, which signified these companies’ commitment to non-discrimination in their employment policies in the context of state sponsored apartheid in South Africa. Where the horizontal application of human rights is not recognised, codes of conduct may operate as a major means of monitoring the socio-economic rights obligations of corporations.

⁶⁷ Jenkins, above n 3, 28.

⁶⁸ Ibid.

⁶⁹ See Bob Hepple ‘The importance of law, guidelines and codes of conduct in monitoring corporate behaviour’ in Roger Blanpain (ed) *Multinational enterprises and the social challenges of the XXIst Century* (London: Kluwer Law International, 2000) 3, 5.

Some practical evidence (although limited and far between) exists showing that they have generated positive benefits for stakeholders. According to Jenkins, working conditions in the Gap's Mandarin factory in El Salvador, the Kimi garment factory in Honduras and Nike's factories in Vietnam improved and greater respect for the right to organise by these companies occurred since the companies adopted voluntary codes of conduct.⁷⁰ Others have shown that some corporations went as far as pulling out their operations out of countries where human rights were 'pervasively violated'.⁷¹

It is therefore clear that codes of conduct have a role to play in ensuring that non-state actors are accountable for human rights.

6 THE LIMITS OF CORPORATE CODES OF CONDUCT

As argued above, corporate codes of conduct must be regarded as a complementary means to, and not a substitute for, binding human rights norms for non-state actors. For one thing, the term 'non-state actors' embraces a wider range of actors than corporations or MNCs. Thus far, it is mainly multinational corporations that have taken the lead in adopting codes of conduct containing commitments to address social issues.⁷² Smaller firms have not shown similar enthusiasm for them. Even with the multinational corporations, the adoption of codes is sector-oriented. According to the OECD survey, codes are more common among firms dealing with trade, textile, extractive, chemical,

⁷⁰ See Jenkins, above n 3, 28.

⁷¹ Cassel, above n 10, 1973.

⁷² See Sajhau, above n 25.

and mechanical products industries.⁷³ Rhys Jenkins has demonstrated further that codes dealing with labour issues are most commonly found in the sectors of garments, sports goods, toys and retailing.⁷⁴ These sectors, he argues, involve well-known brands and the supply of consumer goods.⁷⁵ Codes dealing with environmental issues are found mostly in chemical, forestry, oil and mining industries.⁷⁶ Although not generally consumer-oriented, these industries also involve well-known brands and can have a huge environmental impact.⁷⁷ The driving force behind the adoption of codes of conduct in these sectors would therefore appear to be the need to protect the company's image, which is critical to sustaining or enlarging its clientele. In short, codes of conduct are adopted by so few of the private actors that they cannot fully address the issue of private sector accountability for human rights generally and economic, social and cultural rights particularly.



Secondly, there is no uniform standard for developing codes of conduct. As a result, they take various forms and cover disparate issues. According to the OECD, the most frequently mentioned issues in codes of conduct relate to environmental stewardship and labour relations.⁷⁸ The other issues covered, not as frequently as these, are bribery,

⁷³ OECD 'Codes of corporate conduct: Expanded review of their contents' (2001) 7 available at <<http://www.oecd.org/dataoecd/57/24/1922/656pdf>> (accessed: 30 April 2005).

⁷⁴ Ibid

⁷⁵ Jenkins, above n 3, 27.

⁷⁶ See OECD, above n 73, 7.

⁷⁷ Ibid

⁷⁸ OECD, above n 73, 8.

consumer protection, information disclosure, science and technology and taxation.⁷⁹ According to the OECD, the percentage of the codes that makes an explicit reference to human rights is only 25.⁸⁰ Those that mention human rights mainly deal with workers' rights, which are also defined in a rather limited fashion. In making this point Neil Kearney has observed:

Despite pressure from unions and NGOs that codes of conduct contain, at minimum, the core ILO standards, most codes introduced unilaterally by companies are often less than what is demanded by national law and international labour standards, but typically will include references to the non-use of forced labour and child labour and to the implementation of reasonable health and safety standards. Some include a reference to the payment of minimum wage levels, but, to date, very few have included a commitment to recognising the right of workers to organise and bargain collectively. Until recently no company has made a commitment to the payment of a living wage.⁸¹

It can be argued that the absence of a comprehensive and binding international human rights framework for the private sector is partly responsible for the lack of a uniform approach in the standards set by corporate codes. The idea of corporate codes forms part of the broader concept of corporate social responsibility. The latter is a notion that has eluded a commonly agreed definition.⁸² It is a concept rooted in a philanthropic tradition, which posited that social responsibility was a 'moral obligation and a personal

⁷⁹ Ibid.

⁸⁰ Ibid 10.

⁸¹ Kearny, above n 16, 209.

⁸² See Canadian Democracy and Corporate Accountability *An overview of issues* (Canadian Democracy and Corporate Accountability Commission, 2001) 2.

responsibility of the leader of the company'.⁸³ It was not until the 1970s that some writers began to argue that businesses should make a greater contribution to the quality of life of people than by simply providing goods and services.⁸⁴ With the emergence of the large corporations, and media and NGOs with global reach that recent definitions of CSR suggest that corporations have a moral obligation to contribute to social and environmental welfare beyond what is required by charity. According to Sandra Waddock:

Today, a corporate philanthropy, volunteer, or community relations programme is no longer sufficient to reassure stakeholders that a company is being responsible. Indeed the terminology has shifted to reflect the changing scope of demands on companies, from the “do good” stuff of philanthropy that used to characterise corporate “social” responsibility, to new terms that encompass corporate strategies and practices, including corporate citizenship, corporate responsibility, and stakeholder engagement.⁸⁵

The World Business Council for Sustainable Development (WBCSD) has defined CSR as ‘[T]he commitment of business to contribute to sustainable economic

⁸³ Benedicte Bull ‘Corporate social responsibility: A development solution in Latin America’ (Unpublished paper, on file with author, presented to the XXIV International Congress of the Latin American Studies Association in Dallas, Texas) 2 – 3.

⁸⁴ Ibid 3.

⁸⁵ See Sandra Waddock ‘What will it take it to create a tipping point for corporate responsibility?’ (unpublished paper on file with author) 7.

development, working with employees, their families, the local community and society at large to improve their quality of life.’⁸⁶

Similarly, the European Commission has stated that ‘CSR is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stake-holders on a voluntary basis.’⁸⁷

Despite the expansion in the scope of CSR, the exact scope of social responsibilities of corporations remains unclear. There are also other views within the business sector, which, while acknowledging that companies have social responsibilities, hold that those social responsibilities must be managed in order to benefit the company.⁸⁸ Most notably, the various definitions of CSR do not make any explicit reference to human rights generally and economic, social and cultural rights particularly. Due to this lack of clarity in the definition and conceptual basis of CSR, the extent to which corporations can bear social responsibilities and how these can be translated into non-binding human rights obligations to be reflected in a code of conduct is difficult.

Another problem with corporate codes of conduct relates to the fact that their adoption and implementation is largely dependent on public pressure.⁸⁹ As one commentator has

⁸⁶ WBCSD ‘Corporate social responsibility’ available at < <http://www.wbcd.ch/templates/TemplateWBCSD1/layout.asp?type=p&MenuId=MzI3&doOpen=1&ClickMenu=LeftMenu>> (accessed: 30 April 2005).

⁸⁷ EU ‘Promoting a European framework for corporate social responsibility’ (Green Paper, 2001) available at < http://europa.eu.int/comm/employment_social/soc-dial/csr/greenpaper_en.pdf> (accessed: 30 April 2005) 8.

⁸⁸ See Brendan G O’Dwyer ‘Conceptions of corporate social responsibility: The nature of managerial capture’ (Unpublished paper on file with author) 9 – 12.

⁸⁹ See section 4 above in this chapter.

observed that voluntary codes ‘are usually a response to the real or perceived threat of public pressures... [O]nce the code is in place, the initial pressure that led to its creation may dissipate, which could cause compliance to taper off.’⁹⁰ Thus, it has been suggested, for example, that the failure of the UN Code of Conduct was the result of the decline in pressure for its adoption during the 1980s and early 1990s.⁹¹ The fact that it is mostly the corporations involved in the sectors where consumer pressure is strong that have adopted corporate codes also supports this contention. Given that they are voluntary in nature, their implementation may not be guaranteed in a context where public pressure is not present.

Last, but not the least, the credibility and effectiveness of corporate codes are crucially undermined by a lack of implementation mechanisms. The UN Committee on Economic, Social and Cultural Rights (CESCR),  which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has stated pointedly that ‘rights and obligations demand accountability: Unless supported by a system of accountability, they become more than window dressing’.⁹² Many codes of conduct do not contain provisions for independent monitoring and verification.⁹³

⁹⁰ Quoted in Forcese, above n 59, 82.

⁹¹ Baker, above n 2, 411 – 412.

⁹² See CESCR ‘Statement on poverty’ UN Doc.E/C.12/2001 para 14.

⁹³ According to Forcese: ‘A more recent and larger study suggests that only 1/3 of US companies with codes included language in their codes concerning monitoring. If past patterns are any indication, even fewer of these companies rely on independent monitoring. In Canada, meanwhile, only 14% of the respondent firms in the 1996 Canadian Lawyers Association survey reported use of independent monitoring.’ See Forcese, above n 59, 82.

Independent monitoring requires that persons or organisations other than the company that has adopted the code monitor its implementation on an on-going basis. Verification involves a process of checking both compliance with the code and implementation mechanisms including the on-going monitoring performed by the company.⁹⁴ According to the OECD:

A majority of codes (66% of all codes and 71% of all company codes) mention some type of monitoring procedure. *These are predominantly internal systems.* In the case of company codes, internal monitoring is often described as being part of the regular management process, with managers being responsible for ensuring, as part of their regular duties, that the standards are being observed.⁹⁵

Only 45% of the codes surveyed by the OECD make reference to disclosure of data on the organisation's performance in relation to the standards stipulated in the code.⁹⁶ 29% of all codes and about half of the 32 stakeholder codes reviewed by the OECD contain provisions relating to reporting of performance to external stakeholders.⁹⁷ Internal monitoring is not sufficient to guarantee compliance with the standards stated in the codes. As Sarah Cleveland has commented, it 'smells of the fox minding the chicken

⁹⁴ See Dwight W Justice 'The new codes of conduct and the social partners' available at <<http://www.somo.nl/monitoring/related/justice-d-w.htm>> (accessed: 30 April 2005).

⁹⁵ OECD, above n 73, 26 (emphasis added).

⁹⁶ Ibid 27.

⁹⁷ Ibid 28.

coop and serious questions arise regarding the extent to which code violations will be disclosed'.⁹⁸

The forgoing discussion demonstrates that the contribution that corporate codes of conduct can make to address the human rights issues raised by non-state actors is limited. It has shown that the idea of voluntary standards itself inherently limits the effectiveness of these standards.

However, some proposals can be made to improve their efficacy. As noted earlier, a code of conduct must be legitimate in the sense that it must be formulated and implemented in a participatory manner involving all relevant stake holders. Legitimacy is critical given that codes of conduct are voluntary.⁹⁹ The principle of the indivisibility, interdependence and interconnectedness of all rights must underpin these standards. As is clear from the above discussion, most codes do not incorporate any or a wide range of human rights principles in their provisions. Codes of conduct must protect and promote all human rights including economic, social and cultural rights implicated by the acts and omissions of the non-state actor concerned.¹⁰⁰ More particularly, the content of the codes

⁹⁸ Sarah Cleveland 'Global labour rights and the Alien Tort Claims Act (1998) 76 *Texas Law Review* 1533.

⁹⁹ See Richard Howitt 'Report on EU standards for European enterprises operating in developing countries: Toward a European Code of Conduct' in Blanpain (ed), above n 69, 67-69. Speaking specifically in relation to codes addressing labour rights, Neil Kearney has submitted similarly that the content of the code and the process by which it is determined and implemented must involve and empower the workers covered by it'. See Kearney, above n 16, 211.

¹⁰⁰ See Ingrid MacDonald 'Are corporate codes of conduct worth the paper they are written on?' (Unpublished speech of 22 July 2002, on file with author).

must also be developed having regard to the key internationally agreed corporate guidelines like the OECD Guidelines, the ILO Tripartite Declaration and the UN Norms. This will not only signify the seriousness of the adhering actor to the code but also address the concern that corporations adopt these codes voluntarily simply as public relations exercises. It is also important for the codes to make provision for monitoring compliance and remedies to victims when the code is violated. While very few corporations provide for internal monitoring as shown above, ‘self-assessment, no matter how well applied, will not deliver credibility.’¹⁰¹ It may therefore be important for the corporation to submit to some form of independent monitoring. This could be a body composed of both the corporation’s representatives and other relevant stakeholders. It could also be a body established in terms of domestic legislation, an international agreement or other international mechanism such as the OECD’s National Contacts Points discussed later in this chapter.



7 THE WORLD BANK INSPECTION PANEL

7.1 Introduction

The foregoing sections dealt mainly with codes of conduct adopted by corporations. The aim of this section is to show that codes of conduct are not relevant to corporations only. They are also relevant to the activities of other non-state actors such as NGOs and international organisations. This section focuses on the World Bank Inspection Panel. The latter was established by a decision of the Executive Directors of the International

¹⁰¹ See Kearney, above n 16, 214.

Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) in 1993.¹⁰²

The World Bank Inspection Panel has been heralded as ‘conceptually almost unique’ in that it combines ‘the possibility of access of individuals and private groups to rights in international law’ with ‘the opportunity to question the activities of international organisations.’¹⁰³ According to Ellen Hey, the establishment of the Panel departs from the dominant perspective, which regards the states as the principal actors in international law by recognising that the relationship between an individual or groups and an international organisation is ‘directly relevant in international law’.¹⁰⁴ The Panel has also been considered as a possible model for other international organisations to emulate as a means of enhancing the accountability of these actors to individuals and groups affected by the activities of these actors.¹⁰⁵ These remarks are understandable given that although international organisations are formed by states, these actors often act independently such that it is often difficult to attribute their conduct to member states.¹⁰⁶ Daniel Bradlow has

¹⁰² See International Bank for Reconstruction and Development International Development Association Resolution 93 – 10, & Resolution IDA 93 – 6, adopted on 22 September 1993, reprinted in (1995) 34 *International Legal Materials* 520.

¹⁰³ Richard E Bissell ‘Recent practice of the Inspection Panel of the World Bank’ (1997) 91 *American Journal of International Law* 741.

¹⁰⁴ Ellen Hey ‘The World Bank Inspection Panel: Towards the recognition of a new legally relevant relationship in international law’ (1997) *Hofstra Law and Policy Symposium* 61, 73.

¹⁰⁵ Eg see Schlemmer-Schulte, above n 49.

¹⁰⁶ Hey, above n 104, 64 – 65.

submitted two grounds on which the accountability of international organisations through member states is problematic:

The first is that member states may have no interest in acting on behalf of the nonstate actors. This is particularly likely to be the case where the member state, even if reluctantly, is a partner in policy making with the international organization. Second, the member state, even if it wishes to hold the international organization accountable, may have no real capacity to do so. That may be because the state is heavily dependent on the financial and technical resources that it receives from the international organization or because the state may not be able to act through the control structure in the international organisation to make the organisation accountable.¹⁰⁷

It must also be remembered that international organisations enjoy immunity from domestic courts.¹⁰⁸ The Inspection Panel, therefore, provides a rare opportunity for holding an international organisation directly accountable to other non-state actors.

However, it must be noted that the Panel essentially constitutes a self regulatory mechanism that seeks to monitor compliance of the Bank's activities with its own policies. It is not established in terms of international law. It is a voluntary mechanism comparable to corporate codes of conduct having a monitoring mechanism.

7.2 An overview of the Inspection Panel

The Inspection Panel was established for the purpose of 'providing people directly and adversely affected by a Bank-financed project with an independent forum through which

¹⁰⁷ Daniel D Bradlow 'The accountability of international organizations to non-state actors' (1998) *American Society of International Law Proceedings* 359, 360.

¹⁰⁸ Ibid.

they can request the Bank to act in accordance with its own policies and procedures.’¹⁰⁹ It was created with the objective of bringing greater public accountability to World Bank lending amidst growing pressure from civil society calling for transparency and more accountability on the part of the Bank.¹¹⁰

The Inspection Panel is composed of three inspectors of different nationalities from the Bank’s member states.¹¹¹ The President of the bank nominates the members in consultation with the Executive Directors.¹¹² A member can serve only one term of 5 years.¹¹³ In order to guarantee their independence, staff of the Bank cannot be appointed as members of the Panel until after two years have elapsed since their service ended in the Bank Group.¹¹⁴ A member of the Panel may also not be employed by the Bank Group following the end of their service.¹¹⁵ While there has been some concern that the Bank appoints the members of the Panel without the participation of civil society, some

¹⁰⁹ Resolution 93-10 & Resolution IDA 93-6, above n 102.

¹¹⁰ Dana L Clark *A citizen’s guide to the World Bank Inspection Panel* (2nd ed) (Washington DC: Centre for International Environmental Law, 1999) 3; David Hunter ‘Using the World Bank Inspection Panel to defend the interests of project-affected people’ (2003) 4 *Chicago Journal of International Law* 201, 204.

¹¹¹ *Ibid* para 2.

¹¹² *Ibid*. In terms of para 4 of these Resolutions (above n 102), a member of the Panel is selected on the basis of ‘their ability to deal thoroughly and fairly with requests brought to them, their integrity and independence from the Bank’s Management, and their exposure to developmental issues and to living conditions in developing countries.’

¹¹³ *Ibid*.

¹¹⁴ *Ibid* para 5.

¹¹⁵ *Ibid* para 10.

commentators from civil society have observed that the Panel has generally been ‘strong, independent and credible’ to the affected communities.¹¹⁶

The Panel is not a judicial body. Rather it is an investigative body.¹¹⁷ It may receive requests for inspection from any affected party in the territory of the borrower.¹¹⁸ The affected party must not be a single individual but could be any two or more persons with common interests or concerns who are in the borrower’s territory.¹¹⁹ The request must asset in substance that a serious violation by the Bank of its operational policies and procedures has or is likely to have a material adverse effect on the requester.¹²⁰ It is clear therefore that the Panel does not address matters alleging violations of international law by the Bank. It instead focuses on the Banks own policies. While the Bank has been reluctant to accept that it has human rights obligations, it has adopted internal policies, some of which make some brief references to human rights or can be construed broadly to mean that the Bank has committed itself indirectly to certain minimum human rights standards. Examples of such operational directives include the Operational Directive on

¹¹⁶ Hunter, above n 110, 208 210.

¹¹⁷ Maurizio Ragazzi ‘Introductory note’ 34 *International Legal Materials* 503.

¹¹⁸ Resolution 93-10 & Resolution IDA 93-6, above n 102, para 12.

¹¹⁹ See World Bank: Conclusions of the Second Review of the World Bank Inspection Panel April 20, 1999 para 9(a), reprinted in (2000) 39 *International Legal Materials* 249.

¹²⁰ Ibid para 9(b). Other admissibility criteria include that the request must have been brought to Managements attention before submitting it to the Panel, the matter must not be related to procurement, the related loan must not have been closed or substantially disbursed, and the Panel must not have previously made a recommendation on the subject matter. See para 9(c)-(f).

Involuntary Resettlement, the Operational Directive on Indigenous Peoples, and the Operational Directive on Poverty Reduction.¹²¹

Once a complete request for inspection that satisfies the admissibility criteria has been received, the Panel registers the claim and forwards the claim to the Bank's Management.¹²² The Panel has the obligation to review Management's response and make a recommendation to the Board of Executive Directors as to whether a full investigation into the claim should be undertaken.¹²³ Once the Board authorises the investigation, the Panel will proceed with the investigation. At the end, the Panel produces a report, which must be submitted to the Board and the President.¹²⁴ The report is required to focus on whether there is a serious Bank failure to observe its operational policies and procedures with respect to project design, appraisal and/or



¹²¹ Discussed in Sigrun Skogly 'The position of the World Bank and the International Monetary Fund in the human rights field' in Raija Hanski & Markku Suski (eds) *An introduction to the international protection of human rights: A textbook* (2nd ed) (Turku/Åbo: Institute for Human Rights, Åbo Academi University, 1999) 231, 234 – 235. See also Genoveva H Uriz 'The application of the World Bank standards to the oil industry: Can the World Bank group promote social responsibility?' (2002) *Brooklyn Journal of International Law* 77, 85. For example, the Operational Directive on Indigenous People states that 'the Bank's broad objective towards indigenous people, as for all the people in its member countries, is to ensure that the development process fosters full respect for their dignity, human rights, and cultural uniqueness.'

¹²² Resolution 93-10 & Resolution IDA 93-6, above n 102, para 16.

¹²³ *Ibid* para 19.

¹²⁴ *Ibid* para 22.

implementation.¹²⁵ The Bank's Management has the obligation to reply to the findings of the Panel and submit its report to the Board.¹²⁶ In this report, Management is supposed to address the Bank's failures and possible Bank remedial efforts and action plans agreed between the borrower and the Bank in consultation with the requesters of the inspection.¹²⁷ The Panel's report and the Bank's management's report form the basis on which the Board of Directors makes a decision.¹²⁸

According to Dana Clark, the Inspection Panel has both direct and indirect effects.¹²⁹ As regards the former, while the Panel's findings are recommendatory only, claimants can 'generally expect an Action Plan that should lead to improvements over the long term.'¹³⁰ Clark submits further that filing a claim generally results in heightened Bank compliance with policies even where the investigation is carried out or not as this process puts the Bank under pressure to monitor their projects more closely.¹³¹ The indirect effects are that the Panel offers an opportunity for affected communities to raise their

¹²⁵ See World Bank: Conclusions of the Second Review of the World Bank Inspection Panel April 20, 1999, above n 119, para 13.

¹²⁶ Resolution 93-10 & Resolution IDA 93-6, above n 102, para 23.

¹²⁷ See World Bank: Conclusions of the Second Review of the World Bank Inspection Panel April 20, 1999, above n 119, para 15.

¹²⁸ Resolution 93-10 & Resolution IDA 93-6, above n 102, para 23.

¹²⁹ Clarke, above n 110, 17 – 18.

¹³⁰ *Ibid* 117.

¹³¹ *Ibid*.

concerns about the Banks funded projects directly with the Bank itself.¹³² Furthermore, the media attention that the requests for investigations receive pressurises the Bank to take action to remedy any possible infringements of their own policies.¹³³ Most commentators agree that the Inspection Panel is valuable in practice.¹³⁴

However, the procedure has a few shortcomings. Firstly as noted above, the World Bank has been reluctant to accept that it has human rights obligations. This has meant that the human rights content of their policies whose implementation is the *ratione materiale* of the Inspection Panel is very limited. A related point is that the Bank has been selective of the human rights that it promotes. Typically, the Bank refuses to consider political dimensions of human rights but allegedly focuses its efforts on promoting economic, social and cultural rights.¹³⁵ This operates to limit the scope the

¹³² Ibid.



¹³³ Ibid 118.

¹³⁴ See Schlemmer-Schulte, above n 49, 530. Hunter, above n 110, 210; See generally also Richard E Bissell 'Recent practice of the Inspection Panel of the World Bank' (1997) 91 *American Journal of International Law* 741 (discussing some of the requests for investigations registered by the Bank).

¹³⁵ The World Bank has stated that:

Except in situations where the violation of human rights has created conditions hostile to the effective implementation of projects or has other adverse economic consequences, or where there are international obligations relevant to the Bank, such as those mandated by binding decisions of the U.N. Security Council, the World Bank does not take into account the political dimensions of human rights in its lending decisions Consistent with the Articles of Agreement, the focus of the Bank's efforts in the area of human rights is on those rights that are economic and social in nature.

Panel's investigations and undermines the notion of interdependence of rights because the political environment often has direct links to the enjoyment or implementation of economic, social and cultural rights. Secondly, David Hunter has contended that the short-term benefits that arise from the added attention brought by filing a request for an investigation do not necessarily bring about long terms sustainable benefits.¹³⁶ This is often the case because, as a voluntary mechanism, the Panel's effectiveness is largely dependent on public pressure, and once that pressure dissipates, the momentum for action on the part of the Bank diminishes as well.¹³⁷ This point is even more valid considering that the remedies that can be granted when violations have been found are not clearly specified. As noted above, the Board of Executive Directors has unfettered discretion regarding what action should be taken to remedy a breach. While some of the Panel's findings have resulted in the Bank cancelling the project at hand,¹³⁸ the Panel does not have a supervisory jurisdiction over action plans aimed at redressing threatened and actual violations where the Board decides to proceed with the project.¹³⁹ Lastly, the procedure does not make provision for the awarding of compensation where the impugned project results in actual direct injury to identifiable individuals or groups.

World Bank *Governance: The World Bank's Experience* (World Bank; 1994) 53.

¹³⁶ Hunter, above n 110, 210.

¹³⁷ Ibid.

¹³⁸ Skogly, above n 121, 240.

¹³⁹ Dana L Clark 'The World Bank and human rights: The need for greater accountability' (2002) 15 *Harvard Human Rights Journal* 205, 218 – 219.

7.3 Interim conclusion

It can be concluded that World Bank Inspection Panel is a unique procedure in that it provides an opportunity for an international organisation to be held directly accountable for its own policies. Some of the Bank's policies directly or indirectly make reference to human rights especially economic, social and cultural rights. This procedure therefore makes it possible for the World Bank to be held directly accountable to other non-state actors for these rights. The Panel, it has been shown, is a voluntary mechanism established unilaterally by the Bank. However, it operates quite independently from the Bank's management and has proved to be quite valuable to resolving the concerns of individuals and groups affected by the Bank's projects in a context where international law fails to make international organisations adequately accountable. While this procedure could serve as a useful model for other international organisations, the foregoing discussion has demonstrated that, as a voluntary mechanism, the Panel has some limitations, which justify the need for an international framework of accountability for international organisations. The effectiveness of this procedure could be improved significantly if its subject matter were to be extended to cover the compliance of the Bank's operations with international law generally; if the remedial action were to include compensation; and if the Panel were given power to oversee the implementation of the action plans issued by the Board of Directors.

8 INTERNATIONAL INITIATIVES

As mentioned earlier, states have adopted a few international guidelines for corporate behaviour. The oldest of these are the OECD Guidelines and the ILO Tripartite

Declaration. The significance of these documents lies in the fact that they were negotiated and adopted at an intergovernmental level. As will be shown below, the ILO Tripartite Declaration in particular was adopted with the participation of non-state actors. Both documents, as will become clear below, have become a reference point for developing standards for MNCs and other business enterprises. More recently, the UN Secretary General launched the UN Global Compact embodying nine principles that corporations are asked to abide by in their operations.¹⁴⁰ In addition, the UN Sub-Commission on Human Rights adopted the UN Norms. All these international efforts can be classified as soft law mechanism of monitoring compliance of non-state actors with their international obligations. Soft law consists of international instruments ‘that are not binding but are nevertheless declaratory of aspirational norms of international behavior.’¹⁴¹ According to Christine Chinkin, such norms include those that have been articulated in non-binding form; contain vague and imprecise terms; emanate from bodies lacking international lawmaking authority; are directed at non-state actors whose practice cannot constitute customary international law; lack any corresponding theory of responsibility; or are based solely upon voluntary adherence.¹⁴² Thus, soft law norms may ‘guide the interpretation, elaboration, or application of hard law’, constitute evidence of hard law, exist

¹⁴⁰ For example, when developing the UN Norms, the Sub-Commission relied heavily on these standards. See section 9 below.

¹⁴¹ Richard L. Williamson Jr ‘Hard law, soft law, and non-law in multilateral arms control: Some compliance hypothesis (2003) 4 *Chicago Journal of International Law* 59, 63.

¹⁴² Christine Chinkin ‘Normative development in the international legal system’ in Dinah Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (Oxford: Oxford University Press, 2000) 21, 30.

concurrently with hard law obligations or indeed ‘serve as a source of relatively hard obligations through acquiescence or estoppel’.¹⁴³ These norms could also crystallise into treaty or customary international law.

This part therefore seeks to discuss the provisions and enforcement mechanisms of the international initiatives on corporate standards. The discussion will focus on both the merits and demerits of these international standards with a view to demonstrating that, while voluntary standards have a role to play in ensuring non-state actors’ accountability for human rights, they cannot substitute the value of binding standards.

8.1 The OECD Guidelines

8.1.1 *Introduction and background*

The OECD is an organisation comprising 30 member countries predominantly from the West in a geopolitical sense.¹⁴⁴ Its chief objective is the promotion of policies aimed at securing sustainable economic growth for its members and expansion of free trade

¹⁴³ See Jose E Alvarez ‘New dispute settlers: (Half) Truths and consequences’ (2003) 38 *Texas International Law Journal* 405, 421. See also Chinkin, *ibid*, 30 – 31.

¹⁴⁴ Originally composed of European and North American members, the OECD has since expanded its membership to include Japan, Australia, New Zealand, Finland, Mexico, Korea and four former communist states in Europe: the Czech Republic, Hungary, Poland and the Slovak Republic. Non-members can also subscribe to OECD agreements and treaties. There are currently about 70 non-member countries including Brazil, China, and many others from the least developed countries in Africa and elsewhere. See ‘Overview of the OECD: What is it? History? Who does what? Structure of the organisation?’ available at <http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html> (accessed: 30 April 2005).

globally. The OECD was the first regional (geopolitically) organisation to address the issue of corporate responsibility at an international level. It adopted the OECD Guidelines for Multinational Enterprises (OECD Guidelines) in 1976 as part of the Declaration on International Investment and Multinational Enterprises.¹⁴⁵ The OECD Guidelines are a set of recommendations containing principles and standards of good practice addressed by the member states to multinational enterprises.¹⁴⁶ By adhering to the Guidelines, the member states aim to ‘encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress’ and ‘to minimise the difficulties to which their various operations may give rise’.¹⁴⁷ All enterprises operating in the territories of the adhering country are supposed to observe the Guidelines wherever they operate while taking into consideration the particular circumstances of each host state.¹⁴⁸



¹⁴⁵ See para 1 of the Declaration. The Declaration was adopted in 1976. Apart from requiring multinational enterprises to observe the Guidelines wherever they are operating, the Declaration requires the adhering governments to provide national treatment to foreign owned enterprises, to strengthen co-operation in the field of international direct investment, and to avoid or minimise the imposition of conflicting requirements on multinational enterprises.

¹⁴⁶ Para I(1) of the OECD Guidelines: Revision 2000 available at < www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html> (accessed: 30 April 2005).

¹⁴⁷ See OECD *The OECD Guidelines for Multinational Enterprises: Revision 2000* 17 available at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> (accessed: 30 April 2005).

¹⁴⁸ Para I(2) of the OECD Guidelines: Revision 2000.

8.1.2 *Content*

Since their adoption in 1976, the OECD Guidelines have undergone several revisions. The last revision took place in 2000. This review is distinguishable by the far-reaching changes it introduced. Of particular importance is the new provision which states that enterprises should ‘Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’¹⁴⁹

This provision suggests that enterprises are expected to observe international, regional and domestic human rights obligations of the state where they operate. The Commentary on the Guidelines supports this interpretation. While recognising that enterprises play a role where corporate conduct and human rights intersect, it states that ‘MNEs are encouraged to respect human rights not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments.’¹⁵⁰ According to the Commentary, not only are the human rights obligations of the government concerned relevant with regard to the duties enterprises are expected to observe, but also the Universal Declaration of Human Rights.¹⁵¹ In view of the Guidelines and its Commentary, therefore, enterprises are generally expected to operate in accordance with both civil and political rights and economic, social and cultural rights. One may therefore say that the Guidelines as revised in 2000 lend support to the notion of the

¹⁴⁹ See part II(2) of the OECD Guidelines: Revision 2000.

¹⁵⁰ See the Working Party on the OECD Guidelines for Multinational Enterprises *The OECD Guidelines for Multinational Enterprises: Test, commentary and clarifications* (Paris: OECD, 2001) 12.

¹⁵¹ *Ibid.*

interdependence and indivisibility of all rights, and that non-state actors raise problems that transcend the traditional divides between rights.

Other changes were made to the part dealing with employment and industrial relations. Previously, the Guidelines made provision for, among other things, the respect of employees' rights to representation and of access to information, the observance of standards of employment and industrial relations applicable in the host country, the employment of and training of local people. The 2000 Revision included provisions calling upon enterprises to 'contribute to the effective abolition of child labour' and 'the elimination of all forms of forced or compulsory labour'.¹⁵² Furthermore, it refined the principle requiring enterprises not to 'discriminate against their employees with respect to employment or occupation'.¹⁵³ It also included a provision obligating enterprises to 'take adequate steps to ensure occupational health and safety in their operations'.¹⁵⁴ Other changes were introduced to the part dealing with the environment requiring enterprises to establish and maintain a system of environmental management appropriate to the enterprise.¹⁵⁵ Apart from these areas, the OECD Guidelines address issues relating to information disclosure, bribery, consumer interests, science and technology, competition, and taxation, which are indirectly linked to the protection of economic, social and cultural rights.

¹⁵² See part IV(1) (b) & (c) of the OECD Guidelines: Revision 2000.

¹⁵³ See part IV (1) (d) of the OECD Guidelines: Revision 2000.

¹⁵⁴ See part IV(4)(b) of the OECD Guidelines: Revision 2000.

¹⁵⁵ See part V of the OECD Guidelines: Revision 2000.

8.1.3 *Implementation*

The OECD Guidelines are voluntary. However, they contain three mechanisms for monitoring their implementation. The first are the National Contact Points (NCPs). According to the Decision of the OECD Council of 2000, adhering countries are required to set up NCPs, whose responsibility is to undertake promotional activities, handle inquiries and discuss with the parties concerned on all matters covered by the Guidelines.¹⁵⁶ The NCP may be a senior government official or a government office headed by a senior official.¹⁵⁷ It may also be organised as a co-operative body including representatives of other government agencies.¹⁵⁸ Representatives of the business community, employee organisations and other interested parties may also be included.¹⁵⁹ NCPs are required to meet annually to share their experiences and report to the Committee on International Investment and Multinational Enterprises (CIMI).

The latter is the second monitoring body, composed of representatives of member states, whose responsibility is to periodically or at the request of an adhering country hold exchanges of views on matters covered by the Guidelines and the experience gained in their application.¹⁶⁰ Such exchange of views may also be held with representatives of

¹⁵⁶ Decision of the Council on the OECD Guidelines for Multinational Enterprises, adopted by the Council at its 982nd Session on 26 – 27 June 2000.

¹⁵⁷ Ibid

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

non-adhering countries.¹⁶¹ The CIMI is also responsible for clarifying the Guidelines.¹⁶² In effect, it acts as a final authority regarding the interpretation of the Guidelines.¹⁶³ The clarification is provided as required. However, the CIMI is precluded from reaching any conclusions on the conduct of individual enterprises.¹⁶⁴ The last monitoring body consists of the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC). Their mandate includes holding consultations with the NCPs on issues concerning the Guidelines. They can also raise these issues with the CIME. In addition, they have the responsibility to inform their member federations about the Guidelines' development and seek their input in the Guidelines' follow-up procedures.¹⁶⁵

8.1.4 *Contribution*

According to Fabrizio Pagani, significant progress has been made to promote the use of the OECD Guidelines since they were revised in 2000.¹⁶⁶ Among other things, the Guidelines have been translated into more than 25 languages; thousands of non-OECD

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ See Joachim Karl 'The OECD Guidelines for Multinational Enterprises' in Michael K Addo (ed) *Human rights standards and the responsibility of transnational corporation*, (The Hague: Kluwer Law International, 1999) 89, 94.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 93.

¹⁶⁶ See Fabrizio Pagani 'OECD instruments on corporate governance, integrity and responsibility' (2003) 7(1) *Mediterranean Journal of Human Rights* 143.

web pages deal with the Guidelines, and they are mentioned in many international agreements and declarations including the EU-Chile Association Agreement.¹⁶⁷ Pagani also cites evidence of practical successes of the Guidelines, including their contribution to the resolution of the resettlement problem in Zambia, and improved labour management in outsourcing operations in Guatemala and respect of human rights around the gas pipeline in Myanmar.¹⁶⁸ The OECD Guidelines have also become a reference point by international organisation and other initiatives on corporate social responsibility including the UN Global Compact, the Caux Principles for Business, and the Global Sullivan Principles.¹⁶⁹ Given the important historical role that the Guidelines have played in shaping the concept of corporate social responsibility, and the fact that the 30 members of the OECD produce two-thirds of the world's goods and services,¹⁷⁰ it is encouraging that the Guidelines have included an explicit mention of human rights.

However, the human rights component in the OECD Guidelines remains underdeveloped. Save for some few ILO principles incorporated in the employment section, the Guidelines mention human rights only once in a single clause in the general policies section and its Commentary dedicates less than a paragraph to them. The other limitation relates to the obvious fact that their applicability is limited to enterprises of the

¹⁶⁷ Ibid 153.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid 152.

¹⁷⁰ See OECD 'Overview of the OECD: What is it? History? Who does what? Structure of the organisation?' available at < http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html> (accessed: 30 April 2005).

adhering states although other countries may now endorse them.¹⁷¹ Perhaps their major weakness lies in their implementation. As noted above, the monitoring provisions does not make any provision for condemning non-compliant enterprises or for the provision of incentives for compliance. Where violations can be proved, it is also not possible under the Guidelines to obtain relief or reparations. Before the 2000 revision, some commentators reported loss of interest in the Guidelines by some stakeholders such as trade unions and some member states.¹⁷² Furthermore, it was reported that the NCPs were not effective in their operations and that those multinational enterprises, which had any knowledge of the Guidelines, paid little or no attention at all to the Guidelines.¹⁷³

Nicola Jägers has suggested that renewed interest in the Guidelines has occurred since the 2000 review.¹⁷⁴ Procedural guidance has been given and business and employee's organisations¹⁷⁵ and NGOs may now lodge complaints with the NCPS, which is now mandated to issue a statement containing 'appropriate recommendations' regarding the implementation of the Guidelines.¹⁷⁶ The confidentiality principle, which affected the

¹⁷¹ See above n 144 and the accompanying text.

¹⁷² See Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002) 108.

¹⁷³ Ibid.

¹⁷⁴ Ibid 109.

¹⁷⁵ See OECD's Procedural Guidance in The OECD Guidelines: Revision 2000.

¹⁷⁶ Ibid part I (C)(3).

effectiveness of the monitoring mechanisms of the Guidelines, has also been amended.¹⁷⁷

In its consideration of reports from NCPs and submissions from an adhering country or an advisory body, the CIME may also make recommendations.¹⁷⁸

However, more improvement could be made to the Guidelines. The clause on human rights included in the 2000 Review needs further elaboration so as to provide clearer guidance on the nature of the obligations of corporations. It must also specify the rights that these actors are expected to respect. The enforcement mechanisms need further elaboration. There is need to make provision for representatives of other relevant stakeholders to serve on the NCP and CIME. Lastly, provision should be made for the granting of remedies against offending corporations where a violation is found.

8.2 The ILO Tripartite Declaration



8.2.1 *Background*

The ILO Tripartite Declaration is one of the earliest international declarations addressing the question of corporate responsibility for human rights. As mentioned earlier, it was developed as a response to the increasing pressure for a regulatory framework for multinational enterprises to govern their relations with host states. As labour and other social issues formed part of that growing concern, the ILO felt the need to act. A tripartite meeting of experts was organised in October-November 1972 on the

¹⁷⁷ According to the Procedural Guidelines, *ibid*, part I(C)(4b), the NCP will: ‘After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.’

¹⁷⁸ See the Procedural Guidelines, *ibid*, II(3).

‘Relationship between multinational corporations and social policy’ to consider the possible action by the ILO.¹⁷⁹ A follow-up meeting was held in May 1976, which recommended the development of a voluntary and non-binding tripartite declaration of principles concerning multinational enterprises and social policy.¹⁸⁰ At the ILO’s tripartite World Employment Conference held in June 1976, the issue of multinational enterprises was also discussed. The Workers’ group and the Group of 77 (developing countries) advocated for the adoption of a Convention while the employers displayed preference for a tripartite declaration that would be voluntary.¹⁸¹ The outcome was that a small working group was appointed to draft a non-binding declaration, which was approved by the ILO’s Governing Body in November 1977 as the ‘ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises’. Since its adoption, the Declaration has been revised once in 2000 to incorporate the principles contained in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.¹⁸²

¹⁷⁹ See ILO ‘Tripartite Declaration: History’ available at <<http://www.ilo.org/public/english/employment/multi/history.htm>> (accessed: 30 April 2005).

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² This Declaration was adopted in June 1998 to signify a renewal of the Members’ commitment to the fundamental principles and rights at work including freedom of association and effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

8.2.2 *Content and implementation mechanisms*

The primary purpose of the Declaration is to ‘encourage the positive contribution which multinational enterprises can make to economic and social progress’ on the one hand and to minimise and resolve the difficulties to which their various operations may give rise on the other hand.¹⁸³ The principles are recommended directly to governments, employers and workers’ organisations of home and host countries, and multinational enterprises.¹⁸⁴ Being an ILO instrument, the Declaration contains detailed principles, which predominantly address rights relating to employment promotion; equality of opportunity and treatment; security of employment; training; wages, benefits and conditions of work; minimum age of employment, safety and health and industrial relations. These rights are socio-economic in nature and are directly affected positively or negatively by the activities, policies and actions of private actors.

Although its special focus is on labour and employment rights, the Declaration contains an important principle regarding other rights and economic, social and cultural rights in particular. It states that all parties concerned with the Declaration should not only ‘respect the sovereign rights of States, obey the national laws and regulations’ but also ‘give due consideration to local practices and respect relevant international standards’.¹⁸⁵ In addition, the Declaration states that the parties concerned should:

¹⁸³ See para 2 of the ILO Tripartite Declaration.

¹⁸⁴ See para 4 of the ILO Tripartite Declaration.

¹⁸⁵ See para 8 of the ILO Tripartite Declaration.

Respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation and its principles according to which freedom of expression and association are essential to sustained progress.¹⁸⁶

This provision means that multinational enterprises are directly accountable and responsible for all human rights. Unlike the OECD Guidelines and the Global Compact, which do not specify the human rights non-state actors are accountable for or adopt a selective approach, this Declaration clearly states that they should respect the UDHR and the corresponding Covenants, meaning the ICCPR and the ICESCR.

Like the OECD Guidelines, the Tripartite Declaration is voluntary but it has some monitoring mechanism. The first are periodic surveys conducted to monitor the effect being given to the Declaration by the MNEs, governments, and employers and workers' organisation. A detailed questionnaire is sent out occasionally by the ILO office to member states (currently 175), and national employers and workers' organisations to provide information on their experience gained in implementing the Declaration.¹⁸⁷ Based on the responses received, the ILO Governing Body makes some recommendations.¹⁸⁸ The process works more or less like the reporting procedure under international treaties, the difference being that the ILO drives the process with regard to the Declaration. It determines what years the survey should cover and all member States are considered. The results of the survey provide 'example's of good practices, insights

¹⁸⁶ Ibid.

¹⁸⁷ See generally ILO 'Multinational Enterprises and Social Policy: Follow-up surveys' available at <<http://www.ilo.org/public/english/employment/multi/folupover.htm>> (accessed: 30 April 2005).

¹⁸⁸ Ibid.

into new trends, and practical experiences',¹⁸⁹ which are important for all the parties concerned. Seven follow-up surveys have been conducted to date; the last covered the period between 1996-1999.¹⁹⁰

The second one is the procedure for interpreting the Guidelines. This mechanism was adopted in November 1980 by the ILO Governing Body and revised in 1986. Its purpose is to 'interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, arising from an actual situation' between parties to whom it is commended.¹⁹¹ Thus, this request for an interpretation is triggered by a concrete dispute. The request may be made by the government of a member state acting on its initiative or at the request of a national organisation of employers or workers; a national organisation of employers or workers; and an international organisation of employers or workers on behalf of a representative national affiliate.¹⁹²

The requests have to satisfy admissibility criteria.¹⁹³ Once they get admitted the ILO Office drafts a draft reply. The draft reply must then be considered and approved by the

¹⁸⁹ See ILO *A guide to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (Geneva: ILO, 2002) 27.

¹⁹⁰ The report is available at < <http://www.ilo.org/public/english/employment/multi/folupover.htm>> (accessed: 30 April 2005).

¹⁹¹ See para 1 of the Procedure for the Examination of Disputes Concerning the Application of the Tripartite declaration of Principles concerning Multinational Enterprises and Social Policy by Means of Interpretation of its Provisions (Tripartite's Procedure).

¹⁹² Para 5 of the Tripartite's Procedure.

¹⁹³ Para 4 of the Tripartite's Procedure.

Committee on Multinational Enterprises before the Governing Body receives it for final approval.¹⁹⁴ Unlike the OECD implementation procedure, once the Governing Body approves the reply, it is open to the public. It is forwarded to the parties concerned and published in the Official Bulletin of the ILO.¹⁹⁵

8.2.3 *Contribution*

The significance of the ILO Tripartite Declaration lies in its tripartite nature. Not only was it developed in consultation with all the parties it speaks to including business enterprises and employer's organisations, its implementations mechanisms also allows for the participation of all these actors. Thus, although voluntary, the declaration constitutes a potent acknowledgement on the part of business enterprises that they have human rights obligations including economic, social and cultural ones. Its principles make reference to human rights in the most explicit and detailed terms.

It is clear however that all the parties to which it is commended have not put the declaration to much use. Apart from co-operating with the ILO as regards the follow-up reviews, very few requests for its interpretation have been brought. Thus far, the Governing Body has decided only five cases.¹⁹⁶ Of these, two were submitted by a government while the remaining three were submitted by international organisations of workers on behalf of representative national affiliates.¹⁹⁷ Besides, while the interpretation

¹⁹⁴ Paras 7 & 8 of the Tripartite's Procedure.

¹⁹⁵ Para 9 of the Tripartite's Procedure.

¹⁹⁶ See ILO 'Multinational enterprises and social policy: Tripartite Declaration, implementation procedure' available at < <http://www.ilo.org/public/english/employment/multi/dispute.htm>> (accessed: 30 April 2005).

¹⁹⁷ Ibid.

procedure is critical, its effect is undermined by the fact that it does not include a mandate to hold a respondent responsible for violating the Declaration's principles. The Governing Body has no powers to make findings on infringements of the Declaration, to grant relief to victims of the infringements, or shame the perpetrators of the infringement. These limitations could be responsible for the apparent lack of interest by civil society organisations in using the procedures under the Declaration as a means of enhancing private sector responsibility for economic, social and cultural rights. Since it focuses on labour and employment rights, it is also inconceivable that its could be developed much further in relation to other important economic, social and cultural rights implicated by business operations.

It is therefore clear that this procedure also needs improvement. While the procedure for periodic surveys needs to be maintained, the interpretative procedure must be broadened to include complaints alleging violations of the Declaration. The Governing Body must be empowered to make findings on such disputes and make recommendations regarding reparations to victims and measures to be taken to redress the violations.

8.3 The UN Global Compact

8.3.1 Background and content

The UN Secretary-General Kofi Annan proposed 'a global compact of shared values and principles, which will give a human face to the global market'¹⁹⁸ at the World

¹⁹⁸ See the Speech of the UN Secretary General Kofi Annan to the World Economic Forum (Press release SG/SM/6881) available at <<http://www0.un.org/News/Press/docs/1999/19990201.sgsm6881.html>> (accessed: 30 April 2005).

Economic Forum held in Davos, Switzerland on 31 January 1999. The operational phase of this initiative was launched in July 2000 at the UN Headquarters in New York.

The Global Compact asks companies to contribute to a ‘more sustainable and inclusive global market’ by embracing, supporting and enacting a set of core values in the areas of human rights, labour standards, and environmental practices.¹⁹⁹ It initially stipulated nine principles²⁰⁰ derived from the UDHR, the ILO Declaration on

¹⁹⁹ Ibid.

²⁰⁰ The nine principles are:

Human Rights

Principle 1: Business should support and respect the protection of internationally proclaimed human rights within their sphere of influence;

Principle 2: make sure that they are not complicit in human rights abuses.



Labour standards

Principle 3: Business should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: effective abolition of child labour; and

Principle 6: eliminate discrimination in respect of employment and occupation.

Environment

Principle 7: Business should support a precautionary approach to environmental challenges;

Principle 8: Undertake initiatives to promote greater environmental responsibility; and

Principle 9: Encourage the development and diffusion of environmentally friendly technologies.

Fundamental Principle and Rights at Work, and the Rio Declaration of the UN Conference on Environment and Development.²⁰¹ Two of these principles relate directly to human rights. The first stipulates that ‘Businesses should support and respect the protection of internationally proclaimed human rights within their spheres of influence’ while the second states that businesses should ‘make sure that they are not complicit in human rights abuses’. Four more principles address labour issues, which incorporate some of the human rights principles defined by ILO. The last three principles address environmental issues. During the first Global Compact Leaders Summit, held on 24 June 2004 at UN Headquarters in New York, the Secretary-General announced the addition of a tenth principle against corruption.²⁰²

The Global Compact is essentially a ‘network’ of stakeholders²⁰³ with the UN acting as its convenor and facilitator. The principal objective of operating as a network is to ‘facilitate cooperation and collective problem solving between different stakeholders’.²⁰⁴ Apart from the Global Compact Office, which is based at the UN headquarters in New

Available at <http://www.unglobalcompact.org/Portal/?NavigationTarget=/roles/portal_user/aboutTheGC/nf/nf/theNinePrinciples> (accessed: 30 April 2005).

²⁰¹ See the Speech of the UN Secretary General, above n 198. See also ‘The nine principles’ at <<http://www.unglobalcompact.org/Portal/Default.asp>> accessed on 30 May 2004.

²⁰² This principle related to ‘The promotion and adoption of initiatives to counter all forms of corruption, including extortion and bribery.’

²⁰³ UN Global Compact Office *How the Global Compact works: Mission, actors and engagement mechanisms* (New York: Global Compact Office, 2003) 6.

²⁰⁴ *Ibid* 1.

York, four UN Agencies act as the ‘guardians of the compact’s principles’.²⁰⁵ They are the Office of the High Commissioner for Human Rights, the ILO, the United Nations Development Programme, and the United Nations Environment Programme. Other participants in the network include:

- ‘Companies, whose actions, (the Compact) seeks to influence’;
- ‘labour, in whose hands the concrete process of global production takes place’;
- ‘civil society organisations, representing the wider community of stakeholders’;
- and
- ‘governments, who defined the principles on which the initiative is based.’²⁰⁶

As is the case with all codes of conduct, the Global Compact is voluntary. It does not set out any regulatory framework for companies let alone stipulate any enforcement or monitoring mechanisms to ensure its observance.²⁰⁷ It instead relies on ‘the enlightened self interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles’ upon which it is based.²⁰⁸

Participation in the Global Compact is open to all companies. Once a company indicates its intention to participate to the UN Secretary General it is expected to integrate

²⁰⁵ Ibid 6.

²⁰⁶ See *Guide to the Global Compact: A practical understanding of the vision and nine principles*, 5, available at <http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/unge_html_content/Public_Documents/gcguide.pdf> (accessed: 30 April 2005).

²⁰⁷ Ibid 4.

²⁰⁸ Ibid.

the ten principles into its operations, to promote the Global Compact, and to publish in its annual report or similar documents a description as how it has been supporting the Compact.²⁰⁹

Central to the achievement of its objectives are four mechanisms of engagement. The first of these is dialogue. The Global Compact facilitates policy dialogues aimed at facilitating ‘mutual understanding and joint efforts among business, labour and NGOs in solving key challenges of globalisation working with governments and the UN’.²¹⁰ These dialogues focus on specific issues relating to the broader topic of globalisation and corporate citizenship and are held each year.²¹¹ The second mechanism is learning. It seeks to encourage companies to report on their practices. Companies are urged to provide case studies and analyses of corporate practices to be shared with others. These are posted on the Global Compact’s web portal. The third mechanism is that of facilitating local networks at international, regional and local levels in order to ensure that the principles are widely disseminated and implemented, and to facilitate sharing of information.²¹² The last mechanism is that of supporting partnership projects between companies, and UN Agencies and civil society organisations that are involved in meeting the UN development goals.²¹³

²⁰⁹ UN Global Compact Office, above n 203, 2.

²¹⁰ Ibid 5.

²¹¹ See *Guide to the Global Compact: A practical understanding of the vision and nine principles*, above n 206, 8.

²¹² Ibid.

²¹³ Ibid.

8.3.2 *Contribution*

A recent study into the impact of the Global Compact has described the latter as ‘the largest voluntary corporate citizenship network of its kind’.²¹⁴ It demonstrates that by 30 April 2004, the Compact had 1 457 official participants.²¹⁵ By 30 June 2004, the number had grown to 1 698. With more than 1 100 of these being companies, the Global Compact far exceeds the level of participation, which other initiatives of a similar nature such as the Global Reporting Initiative (387 participants) and the SA8000 (353 participants) have attracted.²¹⁶ Although most of the participants are relatively concentrated in Europe, the study establishes that the Global compact also has a strong presence in developing countries.²¹⁷ Apart from mere participation, the study demonstrates that the Compact has signalled a continued engagement with corporate citizenship.²¹⁸ It has accelerated policy change and also revealed practices taking place in local affiliates of multinational companies.²¹⁹ The study estimates that almost half of the survey respondents said they changed their corporate policies in relation to the nine principles, with 34 % reporting that the Global Compact was a significant driver of these changes.²²⁰ As regards its

²¹⁴ McKinsey & Company *Assessing the Global Compact's impact* (2004) 9.

²¹⁵ *Ibid* 10.

²¹⁶ *Ibid*.

²¹⁷ *Ibid* 11.

²¹⁸ *Ibid* 3.

²¹⁹ *Ibid* 4.

²²⁰ *Ibid* 4.

impact on civil society and governments, the study suggests that the Global Compact has contributed to increased effectiveness of UN interactions with business and spurred collaboration among and raised the profile of UN agencies and their partners through their participation and leadership in local networks.²²¹

However, the successes of the Global Compact cannot be taken too far. For one thing, this initiative has inherent flaws that affect its efficacy. The first two principles, which deal with human rights, are quite vague. The statements that business ‘should support and respect the protection of internationally proclaimed human rights within their sphere of influence’ and that business should ‘make sure that they are not complicit in human rights abuses’ do not specify the exact human rights which business should support and respect. This lack of clarity is more likely to affect economic, social and cultural rights than civil and political rights given that the latter have continued to be contested rights. Apart from the fact that the Global Compact is expressly stated to be voluntary and unenforceable, the nine principles, as mentioned earlier, are derived from declarations, which have weak legal force in international law.²²² This means that the conceptual framework of the Global compact is inherently weak. Unlike the Compact’s principles on human rights, those relating to child labour are quite specific. However, they represent very few principles applicable to private actors as established by ILO standards and at least the ILO Tripartite Declaration. The three principles relating to the environment are as vague

²²¹ Ibid 7.

²²² It is widely considered that some rights in the UDHR have become part of international law. However, it is still unclear whether this assertion is also valid as regards its provisions relating to economic, social and cultural rights. See chapter 3 in this study, section 5.2.

as the human rights principles. The lack of conceptual clarity means that corporations have a wide margin of appreciation regarding the interpretation of these principles and their application, which has implications on the seriousness and efficacy of the whole initiative.

Other commentators have argued that successes of the Global Compact measured in terms of numbers of participation hide the reality on the ground. For example, John Pace has submitted that:

... the Global Compact needs to be approached with caution. In the first place, the corporate culture of maximisation of profits is still regarded as overriding any other value in many corporations... Secondly, among those who have expressed commitment to the Global Compact, there are several who have yet to make this commitment meaningful in a real, working sense. Thirdly, the composition of large corporations, made up of multiple business units makes it virtually impossible for the commitment made by the top directorate to translate itself in practical action on the ground; many such business units are autonomous and not bound by the commitment made by the top direction. Fourthly, making the commitment is always tempting for its public relations potential, with the risk that the Global Compact serves as a convenient advertising tool to the detriment of any meaningful action.²²³

It is also worth noting that while the Global Compact has attracted considerable patronage from companies, arguably due to its voluntary nature and lack of any monitoring mechanisms, it has failed to elicit similar support from civil society organisations. Among the popular NGOs with global reach that are formal participants include Human Rights Watch, Amnesty International and the International Confederation

²²³ John Pace 'The Global Compact – Fact or fiction?' (2003) 7(1) *Mediterranean Journal for Human Rights* 127, 135.

of Free trade Unions (ICFTU).²²⁴ Even these organisations are not overenthusiastic with the Global Compact.²²⁵ They have criticised the Global Compact on several grounds including that it does not incorporate any form of control to ensure that the corporations carry out their commitments, and that the nine principles are vague and not obligatory.²²⁶ Some civil society organisations have been reluctant to participate for reasons ranging from the fact that the Global Compact undermines the UN's original mandate and authority, and legitimises the dominance of multinational corporations to the fact that membership is open even to those corporations with bad human rights records.²²⁷

²²⁴ See 'Participants' available at <<http://www.unglobalcompact.org/Portal/Default.asp>> (accessed: 30 April 2005).

²²⁵ See generally Hanna Rådberg *The Global Compact initiative: A partnership between the United Nations and corporations* (2001) available at <http://www.svenskaekodemiker.se/docs/uppsats/hanna_radberg_gci.PDF> (accessed: 30 May 2004).

²²⁶ Jeremy Hobbs et al 'Letter to Louise Fréchette raising concerns on UN Global Compact' available at <http://web.amnesty.org/pages/ec_briefings_global_7April03> (accessed: 30 April 2005).

²²⁷ The Alliance for a Corporate-Free UN, for example, has argued:

In the case of the Global Compact, dozens of corporations, many known for their poor social and environmental records have agreed to follow nine human rights, labour rights and environmental principles. But there is no monitoring adherence to these principles and no enforcement. The UN should not be picking sides in the active debate over corporate globalisation. Allowing the International Chamber of Commerce and its large members to dominate UN's approach to business means that the UN has effectively endorsed the current dominant version of globalisation. The UN should not endorse the WTO vision of corporate globalisation, but rather be a counterbalance to it. As supporters of the United Nations, we

These concerns highlight the inadequacies of the Global Compact. It is submitted that this mechanism needs to be linked to other efforts within the UN aimed at developing more authoritative standards for corporations such as the UN Norms. Significantly, the Global Compact needs to address the question of the legitimacy of the Compact given that it is mostly companies that participate in it.

8.4 Conclusion

The preceding discussion demonstrates that international codes have a role to play in ensuring that the human rights and other obligations of non-state actors are fulfilled. While these standards are voluntary, the fact that they are adopted as declarations or by UN bodies gives them some legal force in international law as soft law norms. However, their contribution is limited by the fact that they are based on voluntarism. It has also been shown that these mechanisms also fail to specify the rights that corporations and other actors must be bound by in a more and detailed fashion. Crucially, it has also been shown that these mechanisms could be made more effective if they could be amended to make provision for more realistic enforcement mechanisms including a system of complaints with a mandate to shame a violator and grant remedies where there is a finding of an infringement of the principles. With such improvements, it can be hoped that these soft

are concerned that corporate partnerships programmes at the UN will compromise the UN's image, values and integrity.

Quoted in Hana Rådberg, above n 225, 24. For similar views see Kenny Bruno & Joshua Karliner 'Tangled up in blue: Corporate partnerships at the United Nations' available at < <http://corpwatch.radicaldesigns.org/article.php?id=996>> (accessed: 30 April 2005).

law mechanisms will eventually lead to the development of more binding standards. As the next section demonstrates, such development seems to be in sight.

9 TOWARDS A BINDING MECHANISM FOR MNCs: THE UN NORMS

9.1 Introduction

The UN Sub-Commission on the Promotion and Protection of Human Rights (UN Sub-Commission) adopted the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights on 23 August 2003.²²⁸ As already noted above, an earlier effort by the UN to adopt a Code of Conduct for Transnational Corporations was abandoned in 1992 due to a lack of consensus on the nature, content and status of the Code. The Norms are therefore a result of the renewed interest by the UN to address the issues raised by the relationship between business and human rights.

The Norms are the outcome of a number of years work by the Sessional Working Group established by the UN Sub-Commission at its 50th session on 28 August 1998 with a mandate to examine the working methods and activities of transnational corporations.²²⁹ Its initial mandate was three years, which was renewed for another three-year period in

²²⁸ See UN Doc E/CN.4/Sub.2/2003/12/Rev.2 available at < http://ap.ohchr.org/documents/dpage_e.aspx?s=58> (accessed: 30 April 2005).

²²⁹ See the Sub-Commission on the Protection and Promotion of Human Rights' Resolution 1998/8 of 28 August 1998 available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/02f03447db7e5f5a80256672005778e8?Opendocument>> (accessed: 30 April 2005).

2001.²³⁰ At its first session in August 1999, the Sessional Working Group decided to consider developing a code of conduct for companies based on human rights standards.²³¹ However, consensus was later reached within the Working Group that the use of an entirely voluntary system of adoption and implementation of human rights codes of conduct was not enough.²³² Thus, in 2001 the Sub-Commission entrusted the Working Group with the mandate to contribute to the drafting of binding norms concerning human rights and transnational corporations.²³³ In terms of this resolution, the Working Group was asked to analyse the possibility of establishing a monitoring mechanism that allowed for the application of sanctions and awarding of compensation for infringements and damage caused by transnational corporations.²³⁴ The change from developing a voluntary

²³⁰ See Sub-Commission on Protection and Promotion of Human Rights' Resolution 2001/3 of 15 August 2001 available at <<http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/82bbe29e5fd91f2cc1256ab0004a114a?Opendocument>> (accessed: 30 April 2005).

²³¹ See UN Sub-Commission on the Promotion and Protection of Human Rights *Realisation of economic, social and cultural rights: The question of transnational corporations* Report of the sessional working group on the working methods and activities of transnational corporations on its first session, 12 August 1999, UN Doc E/CN.4/Sub.2/1999/9. By the year 2000, a draft code had already been produced. See Working paper prepared by Mr. David Weissbrodt 'Principles relating to the human rights conduct of companies' available at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4c9f4b9319945428c125691b00438fdf/\\$FILE/G0013862.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4c9f4b9319945428c125691b00438fdf/$FILE/G0013862.pdf)> (accessed: 30 April 2005).

²³² See UN Doc E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 para 21.

²³³ See para 4 (c) & (d) of the Sub-Commission on the Protection and Promotion of Human Rights' Resolution 2001/3 of 15 August 2001.

²³⁴ *Ibid* para 4(d).

code to drafting principles that would be binding or be further developed into binding norms raised concerns on the terminology of the principles.²³⁵ The present title of the Norms reflects the desire on the part of the UN Sub-Commission to create binding obligations for corporations and other business enterprises.²³⁶ The process leading to their adoption by the Sub-Commission was transparent and allowed input from a wide variety of stakeholders.²³⁷

9.2 Content and implementation

The UN Norms constitute a restatement of existing binding and non-binding standard for business enterprises. In drafting its provisions, the Working Group considered a range of international and regional instruments and declarations on human rights, the Global Compact, the OECD Guidelines, the ILO Tripartite Declaration, and corporate and model codes of conduct.²³⁸



²³⁵ See UN Doc E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 paras 28-30 available at <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c36e5786f8a59264c1256bdc0033102b/\\$FILE/G0213895.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c36e5786f8a59264c1256bdc0033102b/$FILE/G0213895.pdf)> (accessed: 30 April 2005).

²³⁶ Ibid.

²³⁷ See Carolin Hillemanns 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 4(1) *German Law Journal* available at <<http://www.germanlawjournal.com/print.php?id=330>> (accessed: 30 April 2005).

²³⁸ See paras 2-8 of the Preamble to the Norms. See also David Weissbrodt 'Draft human rights code of conduct for companies with source materials' UN Doc E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1 (25 May 2000).

The UN Norms recognise at the outset that business enterprises have responsibilities in relation to all human rights. In its Preamble, it is expressly acknowledged that human rights are universal, indivisible, interdependent and interrelated.²³⁹ In para 12, the Norms provide explicitly that:

Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights.

Other rights and obligations which the Norms require corporations to respect and fulfil include the right to equal opportunity and non-discriminatory treatment, the right to security of persons, rights of workers, the obligation to respect national sovereignty and human rights, obligations with regard to consumer protection, and obligations with regard to environmental protection.²⁴⁰ The Norms acknowledge clearly that the primary responsibility to fulfil these rights rests with states.²⁴¹ However, they recognise at the same time that transnational corporations and other business enterprises have the obligation ‘within their sphere of activity and influence’ to ‘promote, secure the

²³⁹ See para 12.

²⁴⁰ See paras 2 – 14.

²⁴¹ See para 1 of the Norms.

fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law'.²⁴²

In their current form, the UN Norms contain provisions for their implementation, which is in keeping with the UN Sub-Commission's desire to create binding norms as mentioned above. The Norms provide for internal monitoring as an initial step towards their implementation. Each transnational corporation or business enterprise is enjoined to 'adopt, disseminate and implement internal rules of operation in compliance with the Norms'.²⁴³ They are also required to periodically report on and take other measures fully to implement the Norms including incorporating them into their contracts.²⁴⁴ Secondly, the Norms envisage a system of periodic monitoring and verification by the UN, which shall be transparent, independent and allow for the participation of various stakeholders.²⁴⁵ The exact form of this process is not yet clear. However, the Commentary on the Norms suggests the monitoring envisaged here could be fulfilled by UN human rights treaty bodies through the creation of additional reporting requirements for states and the adoption of general comments and recommendations interpreting treaty obligations.²⁴⁶ The Commentary also suggests that UN specialised agencies could also play an important role in this regard.²⁴⁷ An interesting suggestion relates to a

²⁴² Ibid.

²⁴³ See para 15 of the Norms.

²⁴⁴ Ibid.

²⁴⁵ See para 16 of the Norms.

²⁴⁶ See para 16(b) of the Commentary.

²⁴⁷ Ibid.

recommendation to the Commission on Human Rights to consider establishing a group of experts, a special rapporteur, or working group of the Commission to receive information and take effective action when enterprises fail to comply with the Norms.²⁴⁸ In particular, the Sub-Commission itself and the sessional Working Group could perform this function.²⁴⁹

Thirdly, the Norms seek to impose an obligation on enterprises to undertake periodic human rights impact assessments of their activities. According to para 16 of the Norms, ‘transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms’.²⁵⁰ The Commentary states that before a transnational corporation embarks on a major initiative or project, it shall ‘to the extent of its resources and capabilities, study the human rights impact of that project in the light of these Norms’.²⁵¹ The idea of human rights impact assessment is novel in comparative human rights law. However, it is quite well entrenched in environmental law and has proved to be a powerful tool in efforts aimed at protecting the environment.²⁵² It can serve an equally useful role in preventing human rights violations. Finally, the Norms state that transnational corporations and other business enterprises should provide ‘prompt, effective and adequate reparation’ victims

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Para 16(I) of the Commentary.

²⁵² See generally The Working Group on EDC above n 45.

of non-compliance with the Norms.²⁵³ Unlike under the Global Compact, the OECD Guidelines, and the ILO Tripartite Declaration, the Norms anticipate the naming and condemnation of corporations that infringe them and also their liability to make reparations, tender restitution, pay compensation and contribute to the rehabilitation of the victims of non-compliance with the Norms.²⁵⁴

The foregoing discussion demonstrates that the UN Norms mark a radical departure from previous international efforts addressing the obligations of non-state actors in international law in many respects. Firstly, UN Sub-Commission clearly had in mind the intention of creating obligations of multinational corporations and other business enterprises that would be binding and enforceable. Secondly, the Norms go a long way in specifying not only the rights which these actors would be bound by but also the obligations in relation to those rights.  The rights so recognised are wide ranging transcending the traditional categories of rights. Thirdly, the Norms make provision for monitoring mechanisms that recognise the significance of both internal self regulation and external monitoring. Lastly, the Norms make provision for the participation of various stakeholders in their implementation.

9.3 Legal status of the UN Norms

The UN Norms are neither a declaration nor a treaty. After their adoption by the Sub-Commission in 2003, they were submitted to the Commission on Human Rights for their consideration at its March-April session in 2004. At this session, the Norms received an

²⁵³ See para 18 of the Norms.

²⁵⁴ Ibid.

overwhelming support from civil society organisations.²⁵⁵ Expectedly, leading business organisations and some influential opposed their adoption.²⁵⁶

The Commission expressed its appreciation to the Sub-Commission for its work in preparing the Norms.²⁵⁷ It confirmed that it accords the issue of the responsibilities of transnational corporations and related business enterprises in relation to human rights with importance and priority.²⁵⁸ It requested the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards on the issue, to identify outstanding issues, consult with relevant stakeholders and to submit a report to the Commission at its 65th session in order for the Commission to identify options for strengthening standards on the responsibilities of transnational corporations and other business enterprises with regard to human rights and possible means of implementation.²⁵⁹ However, it affirmed that the Commission did not



²⁵⁵ See ‘Statement of support for the UN Human Rights Norms for Business’ delivered at the 60th Session of the Commission on Human Rights, 15 March – 23 April 2004, Geneva, available at < <http://www.escr-net.org/EngGeneral/unnorms2.asp>> (accessed: 30 April 2005).

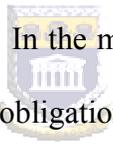
²⁵⁶ Including the ICC, USCID, IOE, United States, the United Kingdom, Egypt, India and Saudi Arabia. See Frances Williams ‘Company norms “must be on UN rights agenda”’ *Financial Times* (London, England), 8 April 2004, 9.

²⁵⁷ Resolution 2004/116, E/CN.4/2004/L.11/Add.7.

²⁵⁸ *Ibid* para (a).

²⁵⁹ *Ibid* para (b).

request the Norms and that, as a draft proposal, they have no legal standing and therefore that the Sub-Commission should not perform any monitoring function.²⁶⁰

Despite the Commission's statement that that the Norms have no legal force currently, the Commission's decision heralded better prospects for the development of binding standards for corporations. According to David Weissbrodt and Muria Kruger, it can still be maintained that the UN Norms in their current form have some legal force as soft law norms on par with recommendations of UN treaty monitoring bodies or Charter based bodies.²⁶¹ They also argue that the Norms have some legal authority because they constitute a restatement of legal principles applicable to corporations with a possibility of them becoming more binding in future.²⁶² It may be added that by not throwing out the Norms altogether, the Commission ensured that the issue of private sector responsibility for human rights remains on its agenda.  In the meantime, the Norms constitute the most elaborate statement of the human rights obligations of corporations, which will serve as a benchmark for voluntary initiatives adopted by corporations and other stakeholders. They

²⁶⁰ Ibid para (c).

²⁶¹ David Weissbrodt and Muria Kruger 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 97 *American Journal of International Law* 901, 913 – 914. Examples of such recommendations include the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the Working Group on Arbitrary Detention UN Doc E/CN.4/2000/4, Annex 2 (1999); Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons adopted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/RES/1998/26.

²⁶² Weissbrodt and Kruger, *ibid*, 915

also highlight the need within the existing implementation mechanisms of international and regional human rights to focus on the monitoring of business enterprises.

10 CONCLUSION

This chapter has demonstrated that codes of conduct have become a vital means through which non-state actors especially MNCs and other business enterprises discharge their human rights obligations. The adoption of these codes by these actors marks a shift away from a paradigm whereby corporations refused to accept that they had social responsibilities to other stakeholders than their shareholders. It also establishes a trend towards an acknowledgement by these actors that they have human rights obligations. Corporate codes of conduct can play a significant role in ensuring corporate accountability for human rights especially in the context where the horizontal application of human rights is not yet legally recognised or where the a legal system is ineffective or does not respect human rights. However, it has also been argued that since these standards are voluntary, their contribution is limited and can therefore not preclude the usefulness of legally binding standards. Among other weaknesses, this chapter has noted that corporate codes have been adopted by very few private actors, are not uniform or do not have similar content, they rarely recognise economic, social and cultural rights, and their implementation mechanisms are weak. It is therefore argued that greater effort must be made to enhance the legitimacy and effectiveness of these codes by involving civil society in both their formulation and implementation. Not only must their content include commitments to a wider range of human rights, the implementation mechanisms must make provision for both internal self- and independent monitoring.

While the question of codes of conduct is often closely associated with corporations, this chapter has shown that some international organisation also can adopt internal policies that express commitments to human rights standards. It has discussed the procedure of the World Bank Inspection Panel, which seeks to hold the World Bank accountable to non-state actors for its own policies. This procedure is novel in international law given the lack of direct accountability mechanisms for international organisations. Adopted due to pressure from civil society for greater accountability on the part of the Bank, the Inspection Panel is unique in that it is quite independent from the Bank and it offers an opportunity to persons affected by the Bank's activities to raise their concerns with the Bank. The procedure has proved to be quite productive in practice in that certain projects were cancelled after investigations revealed violations of the Bank's policies and others were significantly revised. This procedure can serve as a model for other international organisation and corporations generally especially regarding the independence of the panel. But its shortcomings are also worth noting. Key among them are that the Bank's policies have limited human rights content, the effectiveness of the procedure largely depends on public pressure since it does not have a mechanism of monitoring the enforcement of the recommendations and action plans made, and there is no remedy to victims for direct harm suffered as a result of an infringement of the Banks policies.

In recognition of the role that international standards play in influencing domestic standards, this chapter has also discussed four key international mechanisms of holding non-state actors accountable for human rights. These include the ILO Tripartite Declaration, the OECD Guidelines and the UN Global Compact. These mechanisms

present an opportunity for holding these actors directly responsible in international law. Since they are adopted as declarations or by UN bodies, they have the status of soft law in international law and can lead to the development of hard law norms. The strengths and weaknesses of these mechanisms have been discussed. The effectiveness of these mechanisms can be improved significantly if they were to define their standards more clearly to indicate the human rights and the accompanying obligations that these actors should be bound by and if they made provision for more realistic enforcement mechanisms that is independent and has a mandate to shame a violator and provide remedies to victims of violation of these standards.

A significant development regarding the possibility of the evolution of binding human rights obligations for private actors is represented by the adoption by the UN Sub-Commission of the UN Norms. Although not yet adopted as a treaty or declaration, the Norms highlight the point that binding international human rights standards are critical to ensuring that non-state actors are held accountable for human rights.

The next chapter demonstrates that domestic constitutions are increasingly recognising that non-state actors are bound by constitutional rights.

Chapter 6

COMPARATIVE CONSTITUTIONAL PRACTICES REGARDING THE APPLICATION OF HUMAN RIGHTS TO NON-STATE ACTORS

1 INTRODUCTION

As shown in chapter 2, the conventional view is that constitutional rights have no application to private actors. It was argued in that chapter that this traditional position has no sound theoretical justification and that a move away from it to accept the application of these rights to non-state actors can be defended philosophically. Chapters 3 – 5 have shown that international law recognises that non-state actors have human rights obligations. These obligations may be enforced against private actors indirectly through the doctrine of state responsibility or directly through international criminal law and soft-law mechanisms for MNCs and other business enterprises.

This chapter discusses some of the emerging domestic practices regarding the application of human rights to non-state actors. It seeks to demonstrate that domestic constitutions are increasingly recognising that non-state actors are bound by constitutional rights.

The Constitutions of five countries (United States, Canada, Germany, Ireland and South Africa) will be discussed in this chapter. The US Constitution is one of the oldest constitutions, whose lifespan extends over a period of 200 years. The Canadian Constitution is a relatively recent one adopted in 1982. However, both these Constitutions are typically traditional in the sense that they do not recognise

economic, social and cultural rights,¹ tend to limit the conception of duties generated by human rights to negative obligations,² and do not permit the application of rights to non-state actors.³ This chapter aims to demonstrate that even those constitutions that can be classified as conventional, they impliedly recognise that non-state actors have obligations in relation to constitutional rights. The Constitution of Germany has been chosen not only because it recognises some socio-economic rights albeit to a limited

¹ Although the Constitution of the United States itself does not have any socio-economic rights provisions, some American state courts have protected socio-economic rights indirectly through interpreting civil and political rights broadly. See Craig Scott & Patrick Macklem 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 50 – 51; for Canada see Elizabeth Drent 'Privatisation of basic services in Canada: Some recent experiences' (2003) 4(4) *ESR Review* 16 18 (noting also that the jurisprudence of the Canadian Supreme Court suggests that it is possible for these rights to be protected indirectly).



² For the US see, *United States v Cruikshank* 92 U.S. 514, 554 – 55, 318 (1875). For Canada see *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 595 (*Dolphin* cited to S.C.R.).

³ For the US see, for example, *Shelley v Kraemer* 334 U.S. 1; *DeShaney v Winnebago County Department of Social Services* 489 U.S. 189, 196 (1989) (rejecting that state officials violated the Constitution when they failed to protect a child from imminent danger, since the government normally has no positive duties to protect citizens from private harm); for Canada see *Dolphin* at 595, holding that '[A] *Charter of Rights* is designed to bind governments, not private actors. This is the nature of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the state and those between governmental organs' citing K Swinton 'Application of the *Canadian Charter of Rights and Freedoms*' in WS Tarnopolsky & G-A Beaudoin (eds) *The Canadian Charter of Rights and Freedoms – Commentary* (Toronto: Carswell, 1982) 44 – 55.

extent,⁴ but also because of the jurisprudence it has generated regarding the relevance of constitutional rights in the private sphere. German constitutional law is well known for what has come to be called the ‘doctrine of *drittwirkung*’ (third party effect of basic rights).⁵ This doctrine has been in application for more than half a century and has been adopted by a range of other countries including Italy, Spain, Switzerland and Japan,⁶ and the European Court of Human Rights.⁷ Thus, the German Constitution represents those constitutions that do not accept full horizontal application but recognise that human rights have a role to play in the structuring of the private sphere. The Constitutions of Ireland and South Africa are relatively recent constitutions which are quite progressive. These Constitutions are discussed here for a number of

⁴ The German Constitution recognises the right to property and inheritance (article 14), freedom of choice in the exercise of a trade or profession (article 12), freedom to form and join trade associations and unions (article 9), right to education (article 7) and the right of the family (article 6). In addition, article 20 of the Constitution defines Germany as a ‘social federal state’ and article 28(1) requires the state to adopt a constitutional regime faithful to ‘the principles of republican, democratic, and social government based on the rule of law’. It has been submitted that the effect of articles 20 and 28(1) is to place ‘social rights on the same constitutional footing as civil rights.’ See Donald P Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2ed) (Durham & London: Duke University Press, 1997) 241 (citing Erhard Denninger et al, 1984).

⁵ See Andrew Clapham ‘The “Drittwirkung” of the *Convention*’ in Franz Matscher, R St John Macdonald and Herbert Petzold (eds) *The European system for the protection of human rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 163.

⁶ Aharon Barak ‘Constitutional human rights and private law’ in Daniel Friedmann & Daphne Barak-Erez (eds) *Human rights in private law* (Oxford: Hart Publishing, 2001) 13, 22. For Japan see also Michael J Horan ‘Contemporary constitutionalism and legal relationships between individuals’ (1976) *International and Comparative Law Quarterly* 848, 864 – 866.

⁷ Clapham, above n 5.

reasons. Not only do they contain economic, social and cultural rights,⁸ but they both also permit the application of all human rights to non-state actors.⁹ While these Constitutions were adopted by a developed country and a developing country respectively they both are potential models of full horizontality. It must be noted that the South African Constitution is not the only African Constitution that recognises the horizontal application of human rights. As noted in chapter 4, African constitutions adopted since the 1990s have increasingly permitted the application of human rights to non-state actors. Examples include the Constitutions of Malawi, The Gambia, Cape Verde and Ghana.¹⁰ However, the jurisprudence on these Constitutions is difficult to

⁸ The Irish Constitution recognises such socio-economic rights as the right to education, family protection and the right to property. See articles 41 – 43. Other provisions relating to socio-economic rights are guaranteed as directive principles of social policy in article 45. The South African Constitution recognises almost all socio-economic rights. See generally Sandra Liebenberg ‘The Interpretation of Socio-Economic Rights’ in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional law of South Africa* (Cape Town: Juta & Co Ltd 2004) 33-i.

⁹ See sections 5 & 6 below.

¹⁰ Article 18 of the 1990 Constitution of Cape Verde provides that ‘Constitutional norms regarding rights, liberties and guarantees shall bind all public and private entities and shall be directly enforced’. Section 12(1) of the Constitution of Ghana (1992) and section 15(1) of the Constitution of Malawi (1994) contain a similar provision. They both provide similarly that:

The (fundamental) human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies, and where applicable to them, by all natural and legal persons (in Ghana), and shall be enforceable by the courts (as provided for in this Constitution).

access, hence the choice of South Africa as a case study representing the emerging norms for non-state actors in African and developing countries.¹¹

2 THE UNITED STATES

As mentioned earlier, the American Constitution is emblematic of traditional constitutions in the sense that it is intended to apply to the state only. The human rights provisions under this Constitution have no application to private actors. In *United States v Cruikshank*,¹² for example, the Supreme Court of America stated that ‘the Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of laws; but the provision does not ... add anything to the rights which one citizen has under the Constitution against another.’¹³ This position has been encapsulated in what has come to be popularly known as the state action doctrine.



It is often argued that constitutional rights should not apply to non-state actors because to allow them do so would amount to giving judges ‘enormous constitutional power without any concomitant constitutional guidance.’¹⁴ This section seeks to critique this contention by showing that, while the Constitutional position in the US

Section 5(1)(b) of the Constitution of The Gambia provides that a person who alleges that ‘any act or omission of any person or authority is inconsistent with or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.’

¹¹ An attempt was also made to include a civil law based domestic system, but the author’s limited understanding of French and Spanish presented barriers to this effort.

¹² *United States v Cruikshank*, above n 2, 554 – 55.

¹³ *Ibid.*

¹⁴ Barak, above n 6, 17.

limits the application of human rights to non-state actors, such pieces of legislation as the Alien Tort Claims Act 1789 have wide horizontal application. Interestingly, it will be shown that the provision in this Act, which has generated substantial jurisprudence on the application of international human rights to non-state actors, is itself as brief as constitutional provisions often are. This section therefore seeks to highlight the fact denying the application of constitutional rights to non-state actors on the ground that the question of non-state actors' responsibility for these rights raises policy issues which must be resolved by the legislature or the executive has less practical value in certain circumstances.

2.1 The state action doctrine

According to American constitutional theory, private actors are not bound by constitutional rights unless the conduct of those actors qualifies as 'state action'. In *Virginia v Rives*,¹⁵ for example, the Supreme Court of America held that 'the provisions of the Fourteenth Amendment of the Constitution ... all have reference to State action exclusively, and not to any action of private individuals'.¹⁶ This principle was reiterated in the *Civil Rights Cases*, where it was held that 'it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.'¹⁷

On a literal interpretation, these judicial pronouncements mean that an act infringing human rights perpetrated by a state actor may attract a constitutional remedy while the same act, if perpetrated by a private person, will not.

¹⁵ 100 U.S. 313 (1879).

¹⁶ Ibid 318.

¹⁷ 109 U.S. 3 11 (1883).

The jurisprudence on state action defies coherence and its parameters have generated a long drawn-out academic debate.¹⁸ However, some principles within the maze of this jurisprudence are settled.¹⁹ For example, conduct of state officials and employees amounts to state action.²⁰ This is the case even where the conduct in question is contrary to public policy or state law or amounts to abuse of authority.²¹ Secondly, the application of substantive law to grant civil remedies constitutes state action.²² These principles clearly affirm the traditional position that human rights bind the state only.

However, American Courts have also held that the conduct of a non-state actor may be subject to constitutional rights if it is proved such conduct constitutes 'state action'. Under this doctrine, private conduct may constitute state action where it is regulated directly by government. In *Jackson v Metropolitan Edison Co*, the Supreme Court held that 'a sufficiently close nexus between the State and the challenged action of the required entity' must be established for the action of the latter to be treated as

¹⁸ See Ronna G Schneider 'The 1982 state action trilogy: Doctrinal contraction, confusion, and a proposal for change' (1985) 60 *Notre Dame Law Review* 1150 (noting that 'the Court has struggled to give predictable meaning to the deceptively simple clause "State action"'); Charles L Black 'Foreword: "State action," equal protection and California's proposition' (1967) 81 *Harvard Law Review* 69, 95 (observing that 'The field is a conceptual disaster area; most constructive suggestions come down, one way or another, to the suggestion that attention shift from inquiry after "state action" to some other inquiry altogether').

¹⁹ See Henry C Strickland 'The state action doctrine and the Rehnquist Court' (1991) 18 *Hastings Constitutional Law Quarterly* 587, 645.

²⁰ *Ibid.*

²¹ *Ibid* 597 – 9.

²² *Ibid* 599 – 600.

that of the state itself.²³ The required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state.²⁴ A private decision will also amount to state action if exercised under the coercive power of the state or where the latter has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.²⁵ The case of *Peterson v City of Greenville, S.C.*²⁶ represents an instance where the state regulation rule was applied. In this case, the appellants were black boys and girls who had been convicted of trespass for sitting at store lunch counter. In their appeal to the Supreme Court against their conviction, they argued that they had been deprived of the equal protection of the laws secured to them against state action by the Fourteenth Amendment. The evidence in this case established that the only reason for excluding the appellants was their race.²⁷ The Supreme Court held that since an ordinance passed by a city authority, a state agent, required restaurant facilities to be operated on a desegregated basis, the decision of the owner of a private restaurant in deciding to exclude the defendants did precisely what the city law required and, therefore, that decision amounted to state action.²⁸ Thus, private conduct was in this instance held to be subject to the equal protection clause and therefore binding on the non-state actor.

²³ 415 U.S. 912, 94 S.Ct. 1407 U.S., 1974.

²⁴ Ibid; *Flagg Bros. Inc. v Brooks* 436 U.S. 157 – 161, 98 S.Ct. 1733 - 36

²⁵ *Blum v Paretsky* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534.

²⁶ 373 U.S. 244 (1963).

²⁷ Ibid 247.

²⁸ Ibid 248.

Acts performed by a non-state actor with the participation or involvement of the state ‘through any arrangement, management, funds or property’ may also constitute state action.²⁹ In *Burton v Wilmington Parking Authority*,³⁰ an application was made for an injunction to restrain the operator of a restaurant located within a parking building from refusing to serve the appellant solely because he was black.³¹ The parking building was owned by the Wilmington Parking Authority, an agent of the State of Delaware.³² The appellant argued before the Supreme Court that the refusal abridged his rights under the Equal Protection clause in the Fourteenth Amendment.³³ The Supreme Court stated that ‘private conduct abridging individual rights does no violence to the equal protection clause unless to some extent the state in any of its manifestations has been found to have become involved in it.’³⁴ In this case, the Court found that there existed a peculiar relationship between the restaurant and the parking authority.³⁵ Among other things, the government agency not only maintained the building, of which the restaurant was part, and benefited from the financial success of the restaurant, but the restaurant was also operated as an integral part of a public building devoted to a parking service.³⁶ It was therefore held that since the State had

²⁹ *Cooper v Aaron* 1958, 358 U.S. 14.

³⁰ 365 U.S. 715.

³¹ *Ibid* 716.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid* 722.

³⁵ *Ibid* 724.

³⁶ *Ibid*.

put itself in a position of interdependence with the restaurant it was a joint participant in the challenged activity, which on that account, could not have been considered as so purely private as to fall outside the scope of the Fourteenth Amendment.³⁷ Thus, a discriminatory conduct performed by a non-state actor was in this case held to be subject to the equal protection clause, making the actor liable for violating the right in question.

Private conduct in which there is no state involvement may also constitute state action if it relates to functions or powers normally exercised by the government. In *Marsh v Alabama*,³⁸ the Supreme Court was asked to decide whether a state could impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management.³⁹ The town in question was owned by the Gulf Shipbuilding Corporation. The appellant, a Jehovah's Witness who had been convicted for distributing religious literature without a permit, argued that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings without violating her freedoms of the press and religion.⁴⁰ The State responded that the mere fact that all the property interests in the town were held by a single company meant that the company had power, enforceable by a state statute, to abridge these freedoms.⁴¹ The Supreme Court held that, since the town did not function differently from any other town and that its community shopping centre was

³⁷ Ibid 725.

³⁸ 326 U.S. 501.

³⁹ Ibid 502.

⁴⁰ Ibid 503-4.

⁴¹ Ibid 505.

freely accessible and open to the people in the area and those passing through, the managers appointed by the corporation, which owned the town, could not curtail the liberty of press and religion of those people.⁴² In essence, running a town was considered as a public function. Thus, the fact that in this case the town was owned and run by a private corporation did not render the Fourteenth Amendment irrelevant to the conduct of the corporation in this regard. In this case, therefore, a non-state actor was found liable for violating the right to equality.

It has also been held that a decision by the state to deny judicial or other intervention in enforcing racially restrictive covenants is state action. This rule was applied in the controversial decision of *Shelley v Kraemer*.⁴³ This case concerned the enforcement of an agreement signed between 39 owners of property in a specified residential area. The agreement contained a restrictive covenant excluding black persons from occupying any property in that residential area as owners or tenants.⁴⁴ The respondents were parties to this agreement and owners of some property in this residential area. They brought a suit asking for an order restraining the petitioners, who were black people and had bought property in this residential area without knowledge of the restrictions, from taking possession of the property.⁴⁵ The question before the Supreme Court was whether the equal protection clause of the Fourteenth Amendment inhibited judicial enforcement by state courts of restrictive covenants based on race or colour.⁴⁶ The Court stated that restrictive agreements such as the

⁴² Ibid 507-9.

⁴³ Above n 3.

⁴⁴ Ibid 4.

⁴⁵ Ibid 4-7.

⁴⁶ Ibid 8.

ones in question on their own could not be regarded as a violation of any rights as long as the purposes of the agreements were effectuated by voluntary adherence to their terms.⁴⁷ However, the same was not true, the court held, in respect of similar agreements whose purposes are secured by judicial enforcement by state courts.⁴⁸ It stated that the rule that the action of state courts and of judicial officers in their official capacities constitutes state action as a 'long established' proposition.⁴⁹ Thus, it held that in granting judicial enforcement of restrictive agreements, the state denied petitioners the equal protection of the laws.⁵⁰

These decisions demonstrate that despite the strong adherence to the traditional conception of rights as injunctions against the state, American Courts impliedly recognise that private conduct may be subject to constitutional rights in certain circumstances. The American jurisprudence is similar in some respects to the doctrine of state responsibility in international law discussed in chapter 3. Under both doctrines, a conduct of a non-state actor could be restricted by human rights if it constitutes state action and some of the rules on the imputation of conduct of a non state actor to the state are similar. The difference is that under international law, it is the state that is held responsible while under the state action doctrine it is the non-state actor that is sued and held responsible for the violation. Unless the conduct of a non-state actor can be classified as state action, the non-state actor cannot be constrained by constitutional rights. This means that many acts of non-state actors

⁴⁷ Ibid 13.

⁴⁸ Ibid.

⁴⁹ Ibid 14.

⁵⁰ Ibid 20.

would not be subject to constitutional scrutiny. Examples include private acts that are committed without the participation, encouragement, control or direction of the state.

It must also be observed that the state action doctrine is limited in scope mainly because of the lack of clarity on the recognition of the duty to protect human rights. As noted in chapter 3, international law imposes the duty on the state to protect individuals or groups from violations of their rights in the private sphere. This duty entails the duty to exercise due diligence to prevent those violations, investigate them, control or regulate private actors or provide remedies when they occur.⁵¹ There are some commentators who maintain that the duty to protect does not exist in American constitutional law. For example, Henry Strickland:

The state generally has no constitutional obligation to intervene in private disputes either to protect individuals from harm inflicted by other private entities or to force the wrongful private entities to compensate the victims of their wrongdoing. Certainly most people expect the state to provide such protection from or to compensation for at least the more flagrant private wrongs, and voters quickly would elect officials that would pass statutes providing for such protection and judicially enforced compensation if the state did not already provide for it. But the Constitution does not require the state to provide such protections or compensation.⁵²

On the other hand, the case of *Shelley v Kraemer*, which held that judicial enforcement of private conduct abridging rights amounts to state action, sought to give effect to this duty.⁵³ However, as has been the case with other decisions having a wider reach on private conduct, opponents of the horizontal application of human

⁵¹ This duty is explained in *Velásquez Rodríguez v Honduras*[1988] Inter-Am Court HR (ser C) No 4.

⁵² Strickland, above n 19, 608 (footnotes omitted). See also *DeShaney v Winnebago County Department of Social Services*, above n 3.

⁵³ N 39 above.

rights have criticised it on the grounds that it has negative consequences on individual autonomy, state sovereignty and the separation of powers.⁵⁴ As a result, while the *Shelley v Kraemer* remains part of American Constitutional law as it has not been overruled and continues to be cited, it has rarely been applied in practice.

The reluctance to recognise the duty to protect in American constitutional law means that non-interference in private matters by the state may be constitutionally permissible even where the state's intervention through the court could have stopped a human rights violation. The recognition of this duty would have the effect of ensuring that many actions of private actors infringing rights are not upheld by courts thereby giving effect to the duty to protect human rights and rendering private actors accountable for human rights.⁵⁵

Erwin Chemerinsky has argued for the abolition of the state action doctrine because it permits deprivations of fundamental liberties by non-state actors.⁵⁶ He has submitted that the effect of abolishing this doctrine would be that 'the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification.'⁵⁷ Stephen Gardbaum has argued differently but to the same

⁵⁴ See generally Kevin L Cole 'Federal and state "state action": The undercritical embrace of a hypercriticized doctrine' (1990) 24 *Georgia Law Review* 327. For an incisive critique of these arguments see Erwin Chemerinsky 'Rethinking state action' (1985) 80 *Northwestern University Law Review* 503.

⁵⁵ The jurisprudence of the courts in Germany, Ireland and South Africa, discussed later, support this conclusion.

⁵⁶ Chemerinsky, above n 54, 550.

⁵⁷ *Ibid.*

effect that the state action doctrine gives only a partial answer to the foundational question of the reach of constitutional rights into the private sphere in the United States. He submits that the supremacy clause in the American Constitution should be interpreted to mean that '[a]ll law, including common law and the law at issue in litigation between private individuals is directly and fully subject to the Constitution'.⁵⁸

In short, this discussion demonstrates that the American Constitution is very conservative as regards the application of its rights to private actors. Nevertheless, the state action doctrine, though designed to give effect to this restricted view of human rights provisions under the American Constitution, impliedly gives recognition to the idea that human rights also bind private actors albeit in limited circumstances.

2.2 The Alien Tort Claims Act



There are a number of pieces of legislation in the US that apply to non-state actors including the Torture Victims Protection Act of 1991, the Foreign Sovereign Immunities Act of 1976, the Civil Rights Act of 1964, the Disabilities Act of 1990, and terrorism laws. However, the Alien Tort Claims Act (ATCA), enacted in 1789, has become the 'most utilized legislative device for reaching human rights abuses'.⁵⁹ This section demonstrates that even where the Constitution does not allow human rights to apply in the private sphere, these rights may still bind non-state actors through legislation. It also shows that arguments based on the separation of powers

⁵⁸ Stephen Gardbaum 'The "horizontal effect" of constitutional rights' (2003) 102 *Michigan Law Review* 387, 389 – 390.

⁵⁹ Elizabeth F Defeis 'Litigating human rights abuses in United States Courts: Recent developments' (2004) *ILSA Journal of International and Comparative Law* 319, 319.

doctrine that constitutional rights should not apply in the private sphere because the courts would have too much power are often overstated. This is so because legislation does not often provide detailed guidelines on how courts should determine human rights issues between non-state actors as the ATCA demonstrates.

None of the provisions of the ATCA explicitly mention human rights. However, this Act has generated a range of suits against non-state actors for violations of human rights committed outside the US. These suits are based on a provision of the ATCA which stipulates that: ‘The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’⁶⁰

This provision was applied for the first time in 1980 in the celebrated case of *Filartiga v Pena-Irala*.⁶¹ This case was instituted by citizens of the Republic of Paraguay, who had applied for permanent political asylum in the United States, against Pena-Irala, also a citizen of Paraguay, who was in United States on a visitor's visa, for wrongfully causing the death of their son allegedly by the use of torture.⁶² The US Court of Appeals held that deliberate torture perpetrated under the colour of official authority violates universally accepted norms of international law of human rights regardless of the nationality of the parties. It was therefore held that whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction.⁶³ This case

⁶⁰ Alien Tort Claims Act 28 U.S.C.A. § 1350 (2004).

⁶¹ 630 F 2d 876 (2nd Cir, 1980).

⁶² Ibid 878 – 879.

⁶³ Ibid 880.

opened up opportunities for holding private actors accountable for human rights violations committed abroad in the private realm.

Unlike under the state action doctrine, claims under the ATCA can only be brought by aliens not nationals of the US in respect of violations committed outside the US.⁶⁴ Furthermore, the plaintiff must prove that the defendant violated the ‘law of nations’ or international law.⁶⁵ American Courts have held that the content of the law of nations must be interpreted ‘not as it was in 1789, but as it has evolved and exists among the nations of the world today.’⁶⁶ They have also considered international human rights law as part of the law of nations whose violations could give rise to litigation under this Act. In *Filartiga*, for example, it was held that the Universal Declaration of Human Rights was part of customary international law.⁶⁷ These pronouncements mean that violations of economic social and cultural rights could also give rise to actions against non-state actors under this Act. Thus far, most of the cases brought under ATCA have alleged gross violations of civil and political rights or international humanitarian law. However, a few cases can be cited which included direct and indirect references to violations of economic, social and cultural rights.⁶⁸ In *Aguinda v Texaco*, plaintiffs, (citizens of Peru and Ecuador) alleged the defendant had

⁶⁴ See *Filartiga*, above n 61, 630; *Amerada Hess Shipping Corp. v Argentine Republic* 830 F.2d 421, 425 (2d Cir.1987); Michelle M Melon ‘The Alien Tort Claims Act: A mechanism for alien plaintiffs to hold their foreign nations liable for tortuous conduct’ (1996) 5 *Journal of International Law and Practice* 349, 349 – 350.

⁶⁵ *Ibid.*

⁶⁶ *Filartiga*, above n 61, 881.

⁶⁷ *Ibid* 883.

⁶⁸ 142 F Supp 2d 534 (SDNY, 2001).

violated the law of nations as a result of its oil exploration. It was argued that the defendant's activities led to the pollution of rain forests and rivers, and resulted in serious environmental damage and personal injuries. The US Court of Appeals for the Second Circuit⁶⁹ upheld, with some minor modifications, the decision of the District Court dismissing the case for *forum non conveniens*. In *Wiwa v Royal Dutch Petroleum Company*⁷⁰, the plaintiffs (three Nigerian emigrants) alleged a range of abuses of international human rights by the defendants, Royal Dutch Petroleum Company, and Shell Transport and Trading Company. The latter were incorporated in the Netherlands and the United Kingdom respectively, but they jointly controlled and operated the Royal Dutch/Shell Group. The latter was affiliated with Shell Petroleum Development Company of Nigeria (Shell Nigeria), which was engaged in oil exploration in Nigeria. The plaintiffs alleged that they had been subjected to many abuses including torture by the Nigerian government following their opposition to the defendants' oil exploration activities. It was alleged that Shell Nigeria forcibly appropriated land for oil development without offering adequate compensation. The oil activities themselves resulted in the pollution of air and water. Shell Nigeria, it was alleged, recruited and funded the Nigerian police and military to attack local villages and suppress the opposition to its activities. On 14 September 2000, the US Court of Appeals for the Second Circuit reversed the District Court's decision dismissing the case on grounds of *forum non conveniens*. The facts of these cases demonstrate that violations of socio-economic rights may also be the subject of litigation under the ATCA.

⁶⁹ 303 F 3d 470 (2nd Cir, 2002).

⁷⁰ 226 F 3d 88 (2nd Cir, 2000).

When deciding cases alleging violations of international human rights, American Courts act as enforcers of both their domestic law as embodied in the ATCA and international law.⁷¹ As argued in chapter 3, the jurisprudence under the ATCA suggests that nationality is not always the basis on which a rights holder can enforce their international rights or a duty bearer can have his/her international obligations enforced.

Of particular importance to note is that while under the state action doctrine, private conduct may not be subject to human rights unless it amounts to state action, private actors are directly bound by international human rights standards under the ATCA under two circumstances. The first relates to liability for acts for which state action or state involvement is a prerequisite because these acts are such that they may allegedly not be committed without the involvement of the state.⁷² They include the destruction of property, arbitrary detention and torture.⁷³ The test for state complicity is not as high as the control test that obtains with regard to state responsibility in international law as discussed in chapter four. It may be enough for a plaintiff to show that the defendant provided assistance with the knowledge that it will be used for

⁷¹ In *Filartiga*, above n 61, 890, the US Court of Appeals stated:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture ... In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest ... Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

⁷² *Kadic v Kuradzic* 70 F3.d 232. Meloni, above n 54, 357 – 358.

⁷³ *Kadic* *ibid*.

violating human rights. This test was articulated recently in *Doe v Unocal*.⁷⁴ The plaintiff alleged that Unocal, a private corporation, hired the military to provide security for its project on gas exploitation, which was undertaken jointly with the government. The military forced villagers to work and entire villages to relocate for the benefit of the project. While forcing villagers to work and relocate, the military also committed acts of violence. It was argued that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortuous acts. On 18 September 2002, the US Court of Appeals for the Ninth Circuit reversed the District Court's decision, which dismissed the lawsuit against Unocal.⁷⁵ The Court of Appeals held that the District Court was wrong in determining that the plaintiffs had to show that Unocal *controlled* the Burmese military's actions in order to establish Unocal's liability. Rather, the plaintiffs needed only to demonstrate that Unocal gave *practical assistance or encouragement knowing that it was or would be used for in perpetrating the abuses*.⁷⁶

The other category of acts does not require state connivance because these acts are such that they may be committed without the involvement of the state. In *Kadic v Kuradzic*, the United States Court of Appeals Second Circuit expressly rejected the argument that 'the law of nations, as understood in the modern era, confines its reach to state action.'⁷⁷ 'Instead,' it held that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as

⁷⁴ 963 F Supp 880 (CD Cal, 1997).

⁷⁵ *Doe v Unocal* 2002 WL 31063976 (9th Cir, 2002).

⁷⁶ *Ibid* 13 & 15.

⁷⁷ *Above n 72*, 239.

private individuals.⁷⁸ These include genocide, crimes against humanity, murder, rape, war crimes, economic plunder and mistreatment of civilians and prisoners of war.⁷⁹

The foregoing discussion demonstrates that the reach of the ATCA is very wide in theory. Unlike the state action doctrine, the jurisprudence under ATCA expressly recognises that private actors have direct human rights obligations emanating from international law.

The state action doctrine applies to conduct within the US while the ATCA applies to actions committed outside the US and in respect of foreign victims. In addition, the ATCA is an Act while the state action doctrine is a constitutional law doctrine. Interestingly, the interpretation that the ATCA has been given by US Courts with regard to its application to corporations and other private actors has attracted some opposition from the Bush administration.⁸⁰ This opposition has been directed at the fact that the courts have interpreted the Act in a manner that enables courts to encroach upon the executive branch of government as regards control over foreign affairs and that the ATCA cases constitute a threat to US foreign policy.⁸¹ This means

⁷⁸ Ibid. See also *Doe v Unocal*, above n 74, 15.

⁷⁹ Ibid.

⁸⁰ See Beth Stephens 'Upsetting checks and balances: The Bush Administration's efforts to limit human rights litigation' (2004) 17 *Harvard Human Rights Journal* 169. For a discussion of other concerns around the ATCA, see Ralph G Steinhardt 'Fulfilling the promise of Filartiga: Litigating human rights claims against the estate of Ferdinand Marcos' (1995) *Yale Journal of International Law* 65.

⁸¹ Ibid 205. In dismissing these arguments, Stephens (at 205) argues:

... ill-founded arguments about judicial misinterpretation of the ACTA and the need to defer to executive branch foreign policy decisions have been asserted as pretexts to oppose judicial review of human rights abuses of corporations and foreign governments.

that the horizontal application of human rights whether sanctioned by the constitution or legislation will sometimes raise policy issues that touch upon the principle of separation of powers. This fact must not be treated as a barrier to the recognition of the obligations of non-state actors in relation to constitutional rights. It must instead be viewed as a point in favour of this recognition because human rights will sometimes raise policy issues whether the duty bearer is the state only or not and whether these rights are recognised in legislation or the constitution.

It can therefore be concluded that while constitutional position in the US regarding the application of constitutional rights is traditional, non-state actors can still be held accountable for violations of human rights in limited circumstances where their conduct qualifies as 'state action'. It has also been argued that the state action jurisprudence could result in a wider range of private conduct being subject to constitutional rights if the duty to protect human rights was fully recognised. Significantly, this section demonstrates that even where a constitution does not allow human rights to bind non-state actors, the latter could still be held responsible for these rights through legislation. The ATCA represents a unique legislative measure through which non-state actors who violate human rights abroad can be held to account for those violations in the US.

Although the Constitution clearly assigns the executive branch the leading role in foreign affairs, it also requires that judicial branch review and decide questions properly brought before it. Where the Administration offers strained readings of federal statutes and implausible predictions about foreign relations, its views are not entitled to deference.

3 CANADA

The Canadian Charter of Rights and Freedoms (the Charter),⁸² adopted in 1982, is similar to the American Constitution in that it does not have economic, social and cultural rights.⁸³ Furthermore, the rights entrenched in the Charter were generally regarded as creating negative obligations only until recently.⁸⁴

Like the American Constitution, the Charter does not contain an express provision regarding its application in the private sphere. However, section 32(1) of the Charter provides:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *Dolphin*,⁸⁵ the Supreme Court took a restrictive interpretation of this section to hold that Charter rights do not bind private persons. The respondent in this case (Dolphin Delivery Company) was a private company engaged in courier business. The appellants (a Union and some of its members) advised the respondent that its

⁸² The Constitution Act 1982.

⁸³ However, the Charter recognises language rights (section 16) and affirmative action to ameliorate the conditions of disadvantaged groups (section 15(2)).

⁸⁴ See Timothy Macklem 'Vriend v. Alberta: Making the private public' (1999) 44 *McGill Law Journal* 197, 209.

⁸⁵ Above n 2.

place of business would be picketed unless it agreed to stop doing business with Supercourier with whom the appellants were involved in an unresolved labour dispute.⁸⁶ Thereupon, the respondent made an application for an injunction to restrain the threatened picketing, which was granted.⁸⁷ The basis of granting the injunction was that the threatened secondary picketing amounted to the common law tort of inducing a breach of contract.⁸⁸ The appellants' appeal to the Court of Appeal was dismissed.

In the appeal to the Supreme Court, the issue for consideration was whether secondary picketing by members of a trade union in a labour dispute is a protected activity under section 2(b) of the Canadian Charter, which guarantees freedom of expression, and therefore not the proper subject of an injunction to restrain it.⁸⁹ The Court assumed, among other things, that the respondent was a third party to the labour dispute in issue.⁹⁰

The Supreme Court found it easy to hold that the picketing sought to be restrained involved freedom of expression.⁹¹ However, since the parties to this matter were private, the question arose as to whether Charter rights had application to private litigation and common law.⁹² With regard to the first question, the Supreme Court

⁸⁶ Ibid para 6.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid para 4.

⁹⁰ Ibid para 13.

⁹¹ Ibid para 27.

⁹² Ibid paras 16-17.

held in the negative. According to McIntyre J, who wrote the opinion of the court, section 32(1) of the Charter was conclusive as regards the actors to whom the Charter is applicable.⁹³ It was held that the actors bound by the Charter are ‘the legislature, executive and administrative branches of government’.⁹⁴ With respect to these, the Charter will apply ‘whether or not their action is invoked in public or private litigation.’⁹⁵ Thus, as the respondent was a private company, the appellants could not plead freedom of expression as a defence to the injunction.

Having denied the possibility of direct horizontal application of the Charter, the Supreme Court considered the question whether the Charter applied indirectly to private litigation through the Charter’s direct application to the judiciary and to common law. The Court rejected the contention, on grounds departing from the approach of the US courts in *Shelley v Kraemer* (discussed above), that judicial orders constitute governmental action. In an attempt to justify this holding, the Court stated:



... I cannot equate for purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The Courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard the court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. ... A more direct and a more precisely defined connection between the element of government action and the claim advanced must be present before the Charter applies.⁹⁶

⁹³ Ibid para 40.

⁹⁴ Ibid para

⁹⁵ Ibid para 41.

⁹⁶ Ibid para 43.

This dictum means that as far as litigation involves private actors, the judiciary is not bound to apply or consider the human rights provisions in the Charter unless it can be shown that there is some governmental connection to the litigation at hand. The prime basis for this holding was that section 32(1) of the Charter did not mention the judiciary as an actor to whom it applied. However, the dictum cited above demonstrates that the Court found it difficult to deny that court orders constitute governmental action. Interestingly, in *R v Rahey*,⁹⁷ the Supreme Court held a year later, without referring to *Dolphin*, that court decisions amounted to governmental action and therefore subject to the Charter. This case concerned the question whether a criminal court had violated the right of a defendant to be tried within a reasonable time. The facts were that when the defence made an application for a directed verdict following the close of the prosecution's case, the trial judge initiated 19 adjournments spanning a period of 11 months.⁹⁸ Although the defendant did not object to any of those adjournments, he did so to further adjournments that occurred and demanded that the charges be withdrawn.⁹⁹ It was held that the eleven-month delay constituted, in the circumstances of this case, an infringement of the accused's right to be tried within a reasonable time.¹⁰⁰ Lamer J stated that it was obvious that 'the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties.'¹⁰¹ While this case did not

⁹⁷ [1987] 1 S.C.R. 588. This case was confirmed in *British Columbia Government Employees' Union v British Columbia* [1988] 2 S.C.R. 214.

⁹⁸ Ibid 626-7.

⁹⁹ Ibid.

¹⁰⁰ Ibid 649.

¹⁰¹ Ibid 633.

concern private parties, it seems untenable to argue that the same judge behaving in a similar manner in a case involving private litigants would not be bound to decide the case within a reasonable time having regard to the right to an effective remedy for example.

McIntyre J suggests in the dictum cited above that the prime reason for saying that Courts are not bound by the Charter is to preserve their neutrality in private litigation. This contention is flawed as it suggests that courts become biased arbiters when they consider Charter rights in litigation involving the state or governmental action, which is not true. If courts can consider human rights in common law disputes where a party is the state why should the question of neutrality arise when similar issues arise in litigation between private parties? This judgment highlights the shaky theoretical foundations on which the public/private distinction regarding the application of human rights rests. It also demonstrates that the Canadian conception of duties inherent in human rights is limited. If the duty to protect Charter rights was recognised, as has been argued in relation to the American state action doctrine, the Court would definitely have the obligation to prevent violations in the private sphere by considering human rights provisions when deciding private disputes.

Regarding the question whether the Charter applies to common law, the Supreme Court in *Dolphin* also held that this was possible ‘only insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom’.¹⁰² Accordingly, ‘where private party “A” sues private party “B” relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.’¹⁰³ The rationale for restricting the application

¹⁰² Ibid para 41.

¹⁰³ Ibid para 46.

of the Charter to common law in this manner defies logic. The Court held in this case that the Charter applies to all legislation,¹⁰⁴ meaning that the Charter will apply to private relations when legislation is involved. It is difficult to understand why legislation should be subject to the Charter in private litigation but not common law. The implication of the Courts decision, which we submit is absurd, is that it is governmental action when the legislature enacts law or a minister promulgates by-laws but it is not state action when the judiciary ‘makes’ or develops or interprets common law. What is more, this supposed distinction between legislation and common law as regards the application of the Charter to private litigation raises many questions which undermine the validity of the Courts rationale. For example, as Brian Slattery has asked:

Where a statute partially *modifies* the common law governing a particular subject, silently leaving other parts intact, is it sensible to hold that statutory portions of the resulting legal regime are governed by the *Charter* while the common law portions are exempt? By the same token, where a statute merely *replicates* a portion of the common law rules governing a subject, making no mention of the remaining portion, should we hold that the replicated rules are subject to *Charter* scrutiny while the others are not?¹⁰⁵

¹⁰⁴ Ibid para 41. McIntyre J stated:

It would also seem that the Charter would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal laws, and by-laws and regulations of other creatures of Parliament and the legislatures ... where such exercise of, or reliance upon, governmental action is present and where one party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable.

¹⁰⁵ Brian Slattery ‘The *Charter*’s relevance to private litigation: Does *Dolphin* deliver?’ (1987) 32 *McGill Law Journal* 905, 919 (emphasis original).

In short, the Supreme Court of Canada held that Charter rights do not have application to private actors. It has also held that court orders do not constitute governmental action and that the Charter does not apply to common law in a general sense. As shown above, the Court was at pains to provide a coherent basis for these opinions.

That said, it must be pointed out that the Court conceded that the Charter was relevant to private litigation concerning the application of common law to a limited extent.¹⁰⁶ It held that the judiciary, while not bound by the Charter in private litigation, ‘ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.’¹⁰⁷ The Court did not provide any constitutional basis for holding so given that it had rejected the argument that the Charter applied to private common law disputes.¹⁰⁸ What is



¹⁰⁶ *Dolphin*, above n 2, para 46.

¹⁰⁷ *Ibid.*

¹⁰⁸ Thus, Amnon Reichman has even suggested that

The duty to develop the common law in light of constitutional values, therefore, is *not* derived from the supremacy of the *Charter*, but from the common law itself. Nor does the duty demand that the common law mimic *Charter* values that are not reason-based, such as the compromise reached regarding the status of the French and English languages. Rather, the duty demands that courts, in deciding the scope and application of common law principles in concrete cases, must grapple with the reason-based principles embedded in the Charter.

See Amnon Reichman ‘A Charter-free domain: In defence of *Dolphin Delivery*’ (2002) 35 *The University of British Columbia Law Review* 329, 343. Apart from the fact that the decision in *Dolphin* does not support this construction, the view that common law inherently requires Courts to develop this

important for now is to note that this decision, despite its clear rejection of the horizontal application of the rights and freedoms in the Charter, found that the Charter values were relevant to private relations. While the importance of Charter values to private law remains to be elaborated by Canadian courts,¹⁰⁹ it appears that there is no significant difference in effect between the Charter rights applying directly to common law or indirectly as Charter values. According Peter Hogg, an eminent authority on Canadian constitutional law:

The rule that the common law should be developed into conformity with “Charter values” means that, although the Charter does not apply directly to the common law, it does apply indirectly. Despite some differences in the way s. 1 justification is assessed, the indirect application is much the same in effect as the direct application.¹¹⁰

It must also be noted that recent decisions of the Supreme Court Appeal of Canada point towards a recognition of the positive duty of the state to protect individuals or groups. Thus far, these decisions demonstrate that a state can be held liable for infringements of human rights occurring in the private sphere. For example in *Vriend v Alberta*,¹¹¹ the appellant was dismissed from his employment based on his sexual orientation.¹¹² He then made an application for a declaration that the exclusion of

law in line with reason-based principles is not only novel but also an invitation to water down the supremacy of constitutional values and rights.

¹⁰⁹ Lorraine E Weinrib & Ernest J Weinrib ‘Constitutional values and private law in Canada’ in Daniel Friedmann & Daphne Barak-Erez (eds), above n 6, 43, 46.

¹¹⁰ Peter W Hogg *Constitutional law of Canada* (Vol 2) (Thomson & Caswell, 2001) 34 – 24 (footnotes omitted).

¹¹¹ 156 D.L.R. (4th) 385, [1998] 1 S.C.R. 493.

¹¹² *Ibid* para 7.

sexual orientation as a prohibited ground of discrimination from the Individual's Rights Protection Act¹¹³ amounted to a violation of the Charter, which recognises in section 15 the right to equality before and under the law and the right to equal protection and benefit of the law. The Supreme Court of Appeal held that this omission constituted government action to which the Charter was applicable. The Court stated that where the challenge concerns an Act of the legislature that is 'underinclusive' (or fails to protect Charter rights) as a result of an omission, section 32 should not be interpreted as precluding the application of the Charter.¹¹⁴ The fact that the effect of applying the Charter to the impugned Act was to regulate private activity did not persuade the Court to hold otherwise. The Court reasoned as follows:

The application of the *Charter* to the IRPA [Individual's Rights Protection Act] does not amount to applying it to private activity. It is true that the IRPA itself targets private activity and as a result will have an "effect" upon that activity. Yet it does not follow that this indirect effect should remove the IRPA from the purview of the *Charter*. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from *Charter* scrutiny.¹¹⁵

Another case of *Dunmore v Ontario (Attorney General)*¹¹⁶ concerned the exclusion of agricultural workers from Ontario's statutory labour relations regime. The appellants, who were individual farm workers and union organisers, argued that this exclusion amounted to an infringement of their freedom of association and equality

¹¹³ 1972 (Alta.)

¹¹⁴ *Vriend v Alberta*, above n 111, para 61.

¹¹⁵ *Ibid* para 65.

¹¹⁶ [2001] 3 S.C.R. 1016.

rights under the Charter as they were prevented from establishing, joining and participating in the lawful activities of a trade union.¹¹⁷ They also claimed that the labour legislation violated their equality rights under section 15(1) of the Charter by denying them a statutory protection enjoyed by most occupational groups in Ontario.¹¹⁸ In finding that these rights were violated, the Supreme Court of Canada stated, while reiterating that Charter rights do not generally create positive obligations on the state, that ‘the *Charter* may oblige the state to extend underinclusive statutes to the extent underinclusion licenses private actors to violate basic rights and freedoms’.¹¹⁹ According to the Court, this may be so to the extent underinclusive state action ‘substantially orchestrates, encourages or sustains the violation of fundamental freedoms’.¹²⁰ Thus, the impugned legislation was found to be unconstitutional.

These cases establish that failure by the state to take legislative measures to prevent certain kinds of human rights violations committed by private actors will lead to state responsibility. The precise scope of the duty to protect is yet to be developed by Canadian Courts but it can be envisaged that a more expansive definition of this duty as developed in international human rights law will be adopted incrementally. If that happens, then Canadian courts will have to reconsider that their position regarding the question whether they too have a duty to prevent violations of human rights by refusing to enforce remedies in private litigation that aid the perpetration of human rights infringements by private actors or provide remedies that can discontinue or prevent those infringements. As mentioned above, the Supreme Court did not

¹¹⁷ Ibid para 1.

¹¹⁸ Ibid.

¹¹⁹ Ibid para 26.

¹²⁰ Ibid.

provide a convincing explanation as to why Charter rights should not be considered in private litigation where no state connection was in issue. Furthermore, having denied the relevance of Charter rights to private litigation, the Court went, rather inconsistently, on to hold that Charter values were relevant to common law. The Canadian position as elaborated in *Dolphin* highlights the conceptual difficulties in justifying the non-recognition of the horizontal application of human rights.

4 GERMANY

Like the American Constitution and the Canadian Charter, the German Constitution¹²¹ does not contain an explicit provision concerning the direct application of ‘basic rights’ to non-state actors.¹²² However, article 1(3) of the German Constitution provides expressly that ‘basic rights *shall bind* the legislature, the executive, and the *judiciary* as directly applicable law.’¹²³ The absence of an express provision led to the emergence of two main camps, one led by Hans Nipperdey and Walter Leisner arguing that basic rights had direct horizontal application but no indirect application, and the other led by Günter Dürig taking the opposite view.¹²⁴

¹²¹ Basic Law for the Republic of Germany (Grundgesetz, GG) promulgated on 23 May 1949.

¹²² Basil Markesinis ‘Privacy, freedom of expression, and the horizontal effect of the Human Rights Bill: Lessons from Germany’ (1999) 115 *Law Quarterly Review* 47, 49.

¹²³ Emphasis added.

¹²⁴ See generally Kenneth M Lewan ‘The significance of constitutional rights for private law: Theory and practice in West Germany’ (1968) 17 *International and Comparative Law Quarterly* 571.

Early decisions, rendered by the Federal Labour Court, in which Hans Nipperdey presided, took the view that basic rights bind private actors directly.¹²⁵ This meant that basic rights could be invoked as a basis of an action or defence to an action in litigation involving non-state actors. However, the Federal Constitutional Court appears not to have endorsed these decisions. Its jurisprudence establishes that basic rights apply to all law including private law. Thus, while a private person may not bring a direct constitutional tort against another, parties to private litigation may raise basic rights in support of their respective positions through the general clauses and concepts of private law. This means that basic rights have a ‘strong’ indirect effect on private actors and their reach to the private sphere far exceeds those under the Canadian Charter and the American Constitution where one has to prove state connectedness for a private action to be subject to human rights. Under the German Constitution, basic rights may be considered in private law whether or not one of the parties is relying on governmental action.¹²⁶

The *Lüth Case* (1958)¹²⁷ is regarded as a ‘linchpin of German constitutional law’¹²⁸ especially on the issue of the horizontal effect of basic rights. Erich Lüth was the

¹²⁵ See Stefan Oeter ‘Fundamental rights and their impact on private law – Doctrine and practice under the German Constitution’ (1994) 12 *Tel Aviv University Studies in Law* 7, 11.

¹²⁶ In comparison to the position in Canada, it may be argued that German Civil Law is codified meaning that Charter rights would apply to private litigation if one is relying on this legislation. But the German cases have not determined the application of human rights based on the distinction between codified or unmodified law or showing state connectedness. Rather, their rationale is that basic rights are superior values which affect all spheres of law and serve as a benchmark for measuring all actions in the areas of legislation, public administration and adjudication. See *Luth Case* 7 BVerfGE 198.

¹²⁷ Ibid. The facts and holding as discussed herein are based on the English translation of the case in Kommers, above n 4, 361 – 368. All page references of the judgement are cited to this book.

Director of Information and an active member of a group whose objective was to contribute to achieving reconciliation between Jews and Christians in the aftermath of the Nazi regime.¹²⁹ When a film director, Veit Harlan, well-known for producing anti-Semitic films during the Nazi regime, produced a new movie in 1950 after his acquittal of Nazi crimes, Lüth called for a public boycott of the film arguing that the re-emergence of this film director could jeopardise reconciliation efforts.¹³⁰ Consequently, the film's producer and distributor applied for an injunction to restrain Lüth from urging the German public not to see the movie and asking theatre owners and distributors not to show or distribute the film.¹³¹ The injunction was granted on the ground that the actions of Lüth amounted to actionable incitement under article 826 of the German Civil Code.¹³² An appeal by Lüth to the Court of Appeals was rejected. As a result, he filed a constitutional complaint in the Federal Constitutional Court alleging that the superior court had violated his right to free speech enshrined under article 5(1) of the Constitution.



The Federal Constitutional Court, while endorsing the idea that 'the primary purpose of basic rights is to safeguard the liberties of the individual against interferences by public authority',¹³³ highlighted that:

¹²⁸ Kommers, *ibid*, 361.

¹²⁹ *Ibid* 361 – 2.

¹³⁰ *Ibid* 362.

¹³¹ *Ibid*.

¹³² This article provides: 'Whoever causes damage to another person intentionally and in a manner offensive to good morals is obligated to compensate the other person for the damage.' Based on the Translation by Kommers, above n 4, 362.

¹³³ *Ibid* 363.

It is equally true, however, that the Basic Law is not a value-neutral document ... *Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights.* This value system, which centers upon the dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. *Thus it is clear that basic rights also influence [the development of] private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.*¹³⁴

Thus, basic rights serve the function of ‘influencing’ the development of private law in Germany and, as such, bind private actors indirectly. This influence, the Court suggested, would be through those provisions of private law that contain mandatory rules of law forming part of the *ordre public*.¹³⁵ These are rules which ‘for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent.’¹³⁶ The Court also suggested that this influence could occur through the interpretation of such general clauses in private law as ‘good morals’.¹³⁷

According to the Court, the Constitution imposes a duty on judges to ‘determine whether the basic rights have influenced the substantive rules of private law’, and, if so, to ‘heed the resulting modification of private law’ in interpreting and applying

¹³⁴ Ibid (emphasis added, citations omitted).

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

these provisions.¹³⁸ This duty, it was held, emanates from article 1(3) of the Constitution cited above which states that basic rights shall bind, among other actors, ‘the judiciary’. Thus, if a judge fails to apply these standards and ignores the influence of constitutional law on the rules of private law, he violates ‘objective constitutional law’.¹³⁹ However, a finding that a court has violated a right, it was suggested, can be made ‘only if the court was required to take the right in question into consideration when deciding the case’.¹⁴⁰

In applying these principles to the main issue in the present case - whether the superior court had violated the applicants’ freedom of speech - the Court stated that private law must be interpreted so as to preserve the significance of basic rights.¹⁴¹ It was further stated that article 5(1) guaranteeing freedom of expression protects both the expression itself and its effects. However, if one’s rights are violated as a result of freedom of opinion then the court must weigh the protected values against each



¹³⁸ Ibid 364.

¹³⁹ Ibid.

¹⁴⁰ Ibid. A plaintiff has two options regarding the remedial action against such violation. He can seek private law remedies or bring a constitutional complaint before the Federal Constitutional Court. Ibid 364. As regards the relationship between the Federal Constitutional Court and other courts, it was held that:

It is not up to the Constitutional Court to examine the decisions of the private-law judge for any legal error that he might have committed. Rather, the Constitutional Court must confine its inquiry to the “radiating effect” of the basic rights on private law and make sure that the [judge below] has correctly understood the constitutional principle [involved] in the area of law under review ...

Ibid 364.

¹⁴¹ Ibid 365.

other.¹⁴² Accordingly, the courts ‘must deny the right to express an opinion if the exercise of this right would violate a more important interest protected [by private law]’.¹⁴³ This balancing act has to be on a case-to-case basis.¹⁴⁴

It was therefore held that Lüth was acting within his rights to state his views about the film in public given his especially close relation to all that concerned the German-Jewish relationship.¹⁴⁵ The Court regarded as unjustified the contention that under these circumstances, Lüth should nevertheless have refrained from expressing his opinion out of regard for the director’s professional interest and the economic interests of the film companies employing him.¹⁴⁶ It was held that ‘where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual interests must, in principle, yield.’¹⁴⁷ Thus, it was concluded that the superior court violated the complainant’s right enshrined in article 5(1) by misjudging the special significance of the basic right to freedom of opinion in assessing the behaviour of the complainant.¹⁴⁸ The decision of the superior court upholding the injunction was thus quashed. This case demonstrates that German courts will consider human rights when determining private disputes based on private law.

¹⁴² Ibid 366.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 367.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid 367 – 8.

While the *Lüth Case* engaged in a balancing exercise of a constitutional basic right and a right protected by private law, the *Mephisto Case* (1971)¹⁴⁹ considered two conflicting constitutional rights. In the 1930s Klaus Man published a novel based on the character of his brother-in-law Gustaf Gründgens, an actor who had gained prominence by subscribing to and supporting the Nazi ideology and regime.¹⁵⁰ An adopted son of Gründgens applied for an injunction, which was granted banning the distribution of the novel on the ground that it ‘dishonoured the good name and memory of the now-deceased actor’.¹⁵¹ This decision was confirmed by the High Court. Consequently, the publisher of the novel filed a constitutional complaint in the Federal Constitutional Court arguing that the lower courts violated the right to freedom of art and science guaranteed in article 5(3) of the Constitution.

The Court held that article 5 of the Constitution guarantees autonomy of the arts without reservation.¹⁵² However, it went on to hold that the lower courts properly considered the right to human dignity of the late actor as a limitation on freedom of the arts. It reasoned thus:

It would be inconsistent with the constitutionally guaranteed right of the inviolability of human dignity, which forms the basis for all basic rights, if a person ... could be degraded or debased even after his death. Accordingly the obligation which article 1(1)

¹⁴⁹ 30 BVerfGE 173. The discussion of this case is based on the English translation of the case in Kommers, above n 4, 301 – 304 & 427 – 430. Page references below are made to this book.

¹⁵⁰ Kommers, above n 4, 301.

¹⁵¹ Ibid.

¹⁵² Ibid 428.

imposes on all state authority to protect the individual against attacks on his dignity does not end with death.¹⁵³

After weighing the two rights and considering the circumstances of the case, the decision was made in favour of Gründgens to protect the dignity of the now deceased actor. In other words, the decisions of the lower courts restraining the distribution of the novel were affirmed. This case also demonstrates how human rights affect private law disputes.

The *Lüth Case* remains as a landmark in German constitutional law. This case and the jurisprudence it has generated were given a renewed impetus by two recent decisions of the Federal Constitutional Court in 2001.¹⁵⁴ The first handed down in February concerned the validity of a marital agreement whereby a mother waived claims relating to the maintenance of her son and herself in the event of a divorce. It was held that the agreement constituted a violation of the right to family protection and the rights of the child. The Court ‘upheld the law that prohibits a parent from disavowing claims to the support allocation for a dependant child’ and further held that ‘by having been led to a marital agreement including the surrender of claims to financial support of such drastic degrees, the contracting woman suffered nothing less than a violation of her constitutional rights.’¹⁵⁵

¹⁵³ Ibid.

¹⁵⁴ These cases are discussed in ‘Constitutional control of marital agreements II: The FCC affirms its path-breaking decision’ (2001) 2(15) *German Law Journal*. The present author read an electronic version of this article which does not indicate the name of the author and page numbers. Available at <http://www.grmanlawjournal.com/print.php?id=86> (accessed 12 December 2004).

¹⁵⁵ Ibid para 1.

The other decision handed down in March in the same year also concerned the validity of a marital agreement.¹⁵⁶ The Court reiterated that it has an obligation to ‘exercise control of the agreement’s content and, where necessary, correct the contractual terms in order to render the agreement compatible with the Constitution’.¹⁵⁷ It stated that it has power ‘to intervene in a private contract when one party is severely and disproportionately burdened by the duties created by and the effects of the agreement.’¹⁵⁸ It considered the fact that the woman’s inferior bargaining position and quashed the decision of the lower court and ordered the former husband to pay a stipulated monthly sum as maintenance for the ex-wife.¹⁵⁹

The above discussion demonstrates that basic rights have ‘strong’ indirect horizontal application. It is indirect simply because a private person may not commence a constitutional tort against another private person. One has to rely on private law to redress violations of human rights. In addition, the cases brought before the Federal Constitutional Court are argued as if it is a lower court that violated the right in issue rather than the private action involved in the litigation. What is interesting, however, is that, despite these technical points, the Federal Constitutional Court has held quite clearly that private law courts have the duty to consider human rights if called upon by the parties to the case at hand. If they fail to do so, the aggrieved party may commence a constitutional complaint before the Federal Constitutional Court. Furthermore, although the role of basic rights is said to be that of ‘influencing the development of private law’, these cases suggest a more direct role

¹⁵⁶ Ibid para 3.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

of these rights. Influencing the development of private law suggests that the latter will be expanded or altered or amended to accommodate basic rights. However, the cases discussed above show that the Federal Constitutional Court does not always develop private law when resolving private disputes involving conflicting basic rights. As the *Lüth Case* and *Mephisto Case* discussed above demonstrates, the Court sometimes merely engages in a balancing of conflicting rights and determines whether the conduct of a private person should be condoned or censured. In such instances, the distinctions between direct application (basing a claim or defence on a right in private litigation) and indirect application (raising human rights issues through general clauses of private law) of human rights appear to be academic because the result is ultimately the same, that a non-state actor who violates a human right can be held accountable for it in a court of law. In other instances, the Court has found itself finding expressly that a private person violated a right.¹⁶⁰

¹⁶⁰ In the *Blinkfuer Case* (1969) 25 BVerfGE 256, the Federal Constitutional Court stated:

In order to protect the institution of a free press, the independence of organs of the press must be assured against incursions of powerful economic groups using inappropriate means ... the goal of freedom of the press – to encourage and protect the formation of free public opinion – thus requires protection of the press against attempts to suppress the competition of ideas by means of economic pressure. The boycott of the weekly paper “Blinkfuer” contravenes this constitutionally protected freedom ... the action of the defendant (Springer) is directed toward the suppression of news through primarily economic means, in violation of the freedom of reporting.

This passage is quoted in Oeter, above n 125, 17. The facts were that the powerful Axel Springer newspaper company urged kiosk operators not to sell a procommunist weekly newspaper, Blinkfuer, threatening that the former would withdraw its own newspaper from the dealers who did not comply with this command. Blinkfuer commenced a case alleging unfair competition in the lower court, which was decided in its favour but reversed by the High Court on the ground that the boycott was protected

Compared to the position under the American Constitution and Canada, basic rights have a wider reach in Germany. There is no need to prove state action before invoking basic rights. All laws (private or public) are subject to basic rights. All laws have to be construed and interpreted against the backdrop of basic rights. Furthermore, German courts, unlike those in the US and Canada, are bound to consider basic rights when resolving purely private disputes. While it could be said that section 1(3) of the German Constitution, which expressly provides that the judiciary is bound by basic rights, is responsible for the manner in which courts have understood the influence of basic rights on private law, it must also be noted that the decisions discussed above essentially also recognise that German Courts are bound to protect peoples' rights. The recognition of this duty alone is enough to achieve the result that German Courts have produced regarding the impact of human rights in the private sphere.



5 IRELAND

Like the Constitutions of the United States, Canada and Germany, the Irish Constitution¹⁶¹ does not have an express provision recognising the application of constitutional rights to non-state actors. Article 40(3) of this Constitution provides:

- 1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

by free speech. The Federal Constitutional Court held that Springer's means of achieving the boycott conflicted with the right to free speech. See Kommers, above n 4, 372 – 374.

¹⁶¹ Adopted on 1st July 1937, entered into force on December 1937, as amended up to 7 November 2002.

2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

This article clearly imposes on the state the duty to respect and protect the rights of citizens. The duty to protect is defined in a manner that suggests that the state would discharge its duty by simply enacting legislation aimed at defending and vindicating the personal rights of the citizen.

However, the Supreme Court of Ireland has construed these provisions quite broadly. The case of *Meskeil v C.I.É.*,¹⁶² is often accredited as the authority for the position that human rights under the Irish Constitution bind non-state actors such that an action against a private person alleging an infringement of a right could be based on the Constitution. In that case, Walsh J stated that:

A right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it.¹⁶³

In fact the view that that non-state actors have duties in relation to human rights was recognised far earlier than this case. In *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)*,¹⁶⁴ Budd J held that

If an established right in law exists a citizen has the right to assert it and it is the duty of the Courts to aid and assist him in the assertion of his right. The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of

¹⁶² [1973] 1 I.R. 121. It was held in this case that to try to alter the constitutional rights of an employee retrospectively by enforcing a closed shop agreement on current employees was unconstitutional.

¹⁶³ Ibid 134.

¹⁶⁴ [1961] I.R. 345.

every citizen, and it follows that *if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it*. To say otherwise would be tantamount to saying that a citizen can set the Constitution at naught and that a right solemnly given by our fundamental law is valueless.¹⁶⁵

This dictum clearly demonstrates that Irish courts regard rights as entitlements requiring protection from both the state and other actors. In *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v Open-Door Counselling Ltd*,¹⁶⁶ Hamilton J, of the Irish High Court, also stated poignantly that ‘the judicial organ of government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right and, if there is a threat to that right *from whatever source*, to protect that right from such threat, if its support is sought.’¹⁶⁷ In this case, the defendant, both private companies, provided such services to pregnant women as counselling those who had an unwanted pregnancy and sought assistance on the options open to them.¹⁶⁸ Termination of pregnancy was one of the options which were being put to the clients and if those clients decided to take that option, the defendants could refer them abroad to carry out the abortion or to obtain further advice.¹⁶⁹ The proceedings were first commenced by the Society but later converted in the name of the Attorney General upon the request of the Society.¹⁷⁰ The

¹⁶⁵ Ibid 368 (emphasis added).

¹⁶⁶ [1988] I.R. 593.

¹⁶⁷ Ibid 599 (emphasis added).

¹⁶⁸ Ibid 600-1.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid 619.

action sought a declaration that the activities of the defendants infringed the right of the unborn to life and an injunction to stop those activities.¹⁷¹ Both the High Court and the Supreme Court found that the activities of the defendants in counselling or assisting pregnant women to obtain further advice on abortion or obtain an abortion abroad amounted to a violation of the right of the unborn to life guaranteed under article 40(3)(3) of the Constitution. Finlay CJ, who wrote the opinion of the Supreme Court, while stating that both the legislature and the judiciary had a duty to defend and vindicate the right to life of the unborn approved the following dictum of Ó Dálaigh CJ¹⁷² in *The State (Quin) v Ryan*¹⁷³:

It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set those rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires.

It must be noted, however, that this case can be criticised on the ground that it did not consider the question of abortion against the backdrop of women's reproductive rights and right to security of the person. It is therefore cited here as an authority for the position that Irish courts consider constitutional rights as binding on non-state actors in addition to states not on the constitutionality of abortion.

Another case in which a violation of a constitutional right by non-state actors was found concerned a socio-economic right. In *Crowley v Irish National Teachers*

¹⁷¹ Ibid 603.

¹⁷² Ibid 622.

¹⁷³ [1965] IR 70, 122.

Organisation,¹⁷⁴ the defendants were a teachers' organisation, its members and a number of national teachers. The plaintiffs alleged that the defendants had violated their right to education by reason of the defendants' circular written in August 1976, as part of a strike, to neighbouring schools urging the latter not to accept pupils from Drimoleague national school. As a result, the pupils of that school were deprived of schooling until February 1977. It was held that the actions of the teachers were both unjustified and illegal, and constituted an unlawful interference with the constitutional rights of the infant plaintiffs to education.

As is clear from these cases, Irish courts consider themselves bound to allow constitutional claims alleging violations of human rights as part of fulfilment of the duty to protect entrenched in article 40(3) of the Constitution. This construction of the duty to protect comports with international human rights law as discussed in chapter 4 in this study. As has been argued earlier, where the Constitution does not expressly state that the judiciary is bound by rights, the recognition of this duty alone would support the interpretation given by Irish Courts of the role of human rights in the private sphere.

A fear was expressed from some quarters that the express recognition of the horizontal application of human rights would see common law actions being replaced by 'innominate claims for infringements of personal rights'.¹⁷⁵ Contrary to this expectation, Gerard Hogan and Gerry White observe that nothing of this sort has happened.¹⁷⁶ They write that, rather, courts have 'taken the view that it is only in

¹⁷⁴ [1980] I.R. 102.

¹⁷⁵ Gerald Hogan & Gerry White *The Irish Constitution (JM Kerry)* (Butterworths, 1994) 707 (citing Heuston 'Personal rights under the Irish Constitution' (1976) 11 *Irish Jurist* 205).

¹⁷⁶ *Ibid.*

those cases where common law remedies are inadequate or non-existent that an action based directly on the Constitution would arise'.¹⁷⁷ This view is borne out by the case of *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*¹⁷⁸ in which Henchy J stated:

So far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts – for example, negligence, defamation, trespass to a person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course, in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v C.I.E. IR 121*); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional rights.¹⁷⁹

It was held in this case that the right to bodily integrity and the right to property did not have the effect of shifting the onus of proof from the plaintiff to the defendant in an action for nuisance. The plaintiffs had the burden to show that their person or property had suffered injury or damage but also that the emissions from the defendant's factory was the cause of the injury or damage.¹⁸⁰

¹⁷⁷ Ibid.

¹⁷⁸ [1988] I.L.R.M. 629. The present author read the internet version of this decision available at <<http://www.bailii.org/ie/cases/IESC/1988/1.html>> (accessed: 30 April 2005).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

As is clear from this dictum, where common law or statutory law is inadequate to redress a human rights infringement, the victim may bring a direct constitutional tort. In some cases, the courts may develop the common law in line with the Constitution. In *McKinley v The Minister of Defence*,¹⁸¹ for example, the majority of the Supreme Court held that the right to bring an action for loss of consortium and servitium was inconsistent with the right to equality as it was available to the husband only not the wife. In order to cure the inconsistency, the majority of Supreme Court held that this action would continue to exist but that wives would also have the right to sue for loss of consortium.

The foregoing discussion demonstrates that the Irish Constitution admits of full horizontal effect of the constitutional rights. This position has not resulted from an express provision of the Constitution recognising the full application of the Bill of Rights to private actors. Rather, Irish courts have interpreted article 40(3), which essentially embodies the duty to protect, as the basis of this position. Thus, claims alleging violations of human rights based directly on the Constitution can be permitted. Significantly, Irish courts have also recognised that private law contains causes of action which give effect to human rights. However, they have not required that all human rights violations should be addressed through private law actions. Where private law (statutory or common law) is inadequate or ineffective or not available to redress a human rights infringement in the private sphere, the victim has the option of commencing a direct constitutional claim.¹⁸² Where reliance is placed on

¹⁸¹ [1992] I.R. 333.

¹⁸² *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*, above n 171.

a common law action, the court may develop that law in line with the right in question.¹⁸³

6 SOUTH AFRICA

Section 7(1) of the Interim Constitution of South Africa (1993) provided that '[the Bill of Rights] shall bind all legislative and executive organs of state at all levels of government'. Furthermore, section 35(1) stated that 'In the interpretation of any law and the application and development of the common law and customary law, a court shall have regard to the spirit, purport and objects of [the Bill of Rights].' The question whether these provisions permitted the horizontal application of the Bill of Rights was addressed comprehensively in *Du Plessis and Others v De Klerk and Another*.¹⁸⁴ The South African Constitutional Court basically adopted the Canadian position as elaborated in *Dolphin* discussed earlier. In short, the Court held that constitutional rights under the Interim Constitutional rights could be invoked against an organ of government but not by one private litigant against another.¹⁸⁵ But constitutional rights, it was held, were relevant to private litigation where a party alleges that a statute or executive act relied on by the other party was invalid for being inconsistent with any or the rights.¹⁸⁶ Furthermore, the Court held that since constitutional rights had application to common law, governmental acts or omissions committed in reliance on the common law could be attacked by a private litigant as

¹⁸³ *McKinley v The Minister of Defence*, above n 173.

¹⁸⁴ 1996 (5) BCLR 658 (CC), 1996 3 SA 850 (CC).

¹⁸⁵ *Ibid* para 49.

¹⁸⁶ *Ibid*.

being inconsistent with those rights.¹⁸⁷ The thrust of this decision was that the Bill of Rights was irrelevant to private litigation where no governmental conduct or legislation was relied upon by either party to the litigation.

The Final Constitution adopted in 1996 has effectively superseded *Du Plessis*. Section 8 provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Firstly and as is clear from section 8(1), the Bill of Rights now applies to ‘all law’ including common law. That the Bill of Rights applies to common law was confirmed in *In Pharmaceutical Manufacturers of SA; in re ex parte application of the President of the RSA*¹⁸⁸ where the Constitutional Court (per Chaskalson P) rejected a contention which treated the common law as a body of law separate and distinct from the Constitution. The Court states that ‘all law, including the common law, derives its

¹⁸⁷ Ibid.

¹⁸⁸ 2000 (3) BCLR 241 (CC), 2000 1 SA 674 (CC).

force from the Constitution and is subject to constitutional control.’¹⁸⁹ In addition to section 8(1), section 8(3) of the Constitution expressly states that when applying a provision of the Bill of Rights to a natural or juristic person, a court must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right in order to give effect to a right in the Bill and may develop rules of the common law to limit the right. Then, too, section 39(2) of the Constitution states that ‘[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

Regarding the effect of these provisions, Ackermann and Goldstone JJ in *Carmichele v Minister of Safety and Security and Another*,¹⁹⁰ observed that the Constitution embodies an objective, normative value system similar to the German Constitution.¹⁹¹ Accordingly, ‘[i]t is within this matrix of this objective value system that the common law must be developed’.¹⁹² The Court may consider constitutional values and rights either at the instance of the parties or on its own motion.¹⁹³

Secondly, unlike under the Interim Constitution, section 8(1) of the Final Constitution expressly provides that the Bill of Rights also binds ‘the judiciary’. As Stuart Woolman has rightly pointed out, this provision means that ‘[i]f any dispute is left uncovered by subjecting all law – thus the entire body of common law – to direct

¹⁸⁹ Ibid para 44.

¹⁹⁰ 2001 (10) BCLR 995 (CC).

¹⁹¹ Ibid para 54.

¹⁹² Ibid.

¹⁹³ Ibid paras 39 & 41.

application, then subjecting all judicial actions to constitutional review should fill that space.¹⁹⁴

These provisions constitute a radical departure from the decision in *Du Plessis* in that now common law is subject to the Bill of Rights whether the parties before it include the state or not and whether legislation or governmental action is in issue or not. Thus, private actors are bound by human rights through the application and development of common law without the need to prove some governmental connection. As an illustration, the case of *Protea Technology Ltd and Another v Wainer and Others*,¹⁹⁵ concerned a common law rule stating that all relevant evidence is admissible irrespective of the manner in which it was obtained subject to the court's discretion. The constitutionality of this rule was raised in a case concerning private parties. The facts were that the applicant sought an injunction to restrain the respondents from competing unlawfully with the former. The first respondent was a former employee of the applicants (private companies) and was at the time of the application associated with the other respondents (also private companies). In support of their application the applicants relied on transcripts of tape recordings of telephone calls made and received by the first respondent during his employment with the applicants. A question therefore arose as to whether this evidence recorded clandestinely was a breach of the right to privacy and whether it would be admissible

¹⁹⁴ Stuart Woolman 'Application' Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional law of South Africa* (Cape Town: Juta & Co Ltd, 1999) 10 – 1, 10 – 57.

¹⁹⁵ 1997 (9) BCLR 1225 (W) (hereafter *Protea*). See also *Bannatyne v Bannatyne* 2003 2 BCLR 111 (CC) para 31; *Heystek v Heystek* 2002 2 SA 757 (T).

in court.¹⁹⁶ The Constitutional Court observed that the new Constitution ‘admits of both horizontal and vertical application for the Bill of Rights’.¹⁹⁷ On the first question the Court held that the right to privacy was not violated as the employers in this case had not recorded private conversations of the employee.¹⁹⁸ However, the Court observed that the common law rule on the admissibility of illegally obtained evidence was inconsistent with the Constitution to the extent that it started with the assumption that all evidence however obtained is admissible subject to the court’s discretion to exclude it.¹⁹⁹ It therefore had to be developed to comport with the Constitution. The Court reformulated the rule so that evidence obtained in breach of a constitutional right can only be admitted if the admission of the evidence is justifiable by the standards laid down in the limitation clause in section 36(1) of the Constitution.²⁰⁰ This decision may be construed to mean that a private person who obtains evidence in breach of constitutional rights may not be allowed to rely on such evidence to support their case in court.



As noted above, section 8(2) provides that ‘[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ In terms of this section, therefore, the relevant considerations when determining the applicability of a human rights provision are the nature of the right and the duty imposed by it. These considerations are discussed in greater detail in chapter 7 in this

¹⁹⁶ Ibid 1238.

¹⁹⁷ Ibid 1237.

¹⁹⁸ Ibid 1241.

¹⁹⁹ Ibid 1241.

²⁰⁰ Ibid 1242 – 3.

study. The important issue to be address now relates to the argument advanced by Professors Halton Cheadle and Dennis Davis that this section, when read together with section 8(3) of the Constitution, does not mean that constitutional rights apply directly to private conduct.²⁰¹ As noted above, section 8(3) provides that when applying a provision of the Bill of Rights to a natural or juristic person a court ‘must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right’ in order to give effect to a right in the Bill and ‘may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)’. In view of these provisions, these authors contend that human rights under the South African Constitution apply to non-state actors only indirectly through their application to law. They argue that:

The conduct of a [private or natural] person is always tested against a statutory or common law rule. It is this rule that is subject to constitutional enquiry whether in respect of the rule’s validity, its development or its limitation. Conduct never gives rise to a constitutional question: only the rule that governs or ought to govern that behaviour gives rise to such a question. If a common-law rule permits conduct that infringes a constitutional right, it is the validity of the rule that that constitutes the constitutional question, not the conduct itself. ... It is difficult to conceive of a conduct that infringes a constitutional right that is not already regulated by statutory or common law rule.²⁰²

It is argued that the distinction drawn by Cheadle and Davis between the application of the Bill of Rights to law and conduct is misleading and cannot be easily maintained in all cases where the question of horizontality is raised. When applying

²⁰¹ Halton M Cheadle & Dennis M Davis ‘Structure of the Bill of Rights’ in Halton M Cheadle, Dennis M Davis & Nicholas RL Haysom *South African constitutional law: The Bill of Rights* (Durban: Butterworths, 2002) 1, 3.

²⁰² Ibid.

common law to give effect to human rights courts will sometimes be involved in balancing conflicting human rights such as the right to dignity and freedom of expression as German courts have been doing.²⁰³ In such cases, the issue is whether a given conduct amounts to a protected freedom or not. In resolving such disputes, common law just becomes the forum for addressing the human rights questions involved and human rights here apply directly to the conduct involved. If the common law on the issue is not adequate, human rights will apply both to the common law involved and the conduct in issue.

It is submitted that Rautenbach is correct when he interprets section 8(2) thus:

Private law rules that limit individual action are often (inevitably) formulated in general and vague terms. When these concepts are applied to particular, factual situations, it is often done by a process whereby rights and interests are weighed – the rights which is limited on the one hand, against the public interest or the rights of others on the other hand. Assuming that the private law rules which contain these general terms are valid, section 8(2) provides that the Bill of Rights must be applied in these instances “if and to the extent that it can be applied.”²⁰⁴

He further notes that in this case the application is not indirect in the sense that private law concepts are being given content. Rather, it is ‘direct application of the Bill of Rights to individual action to which legal consequences are attached in terms

²⁰³ The Court engaged in a balancing of the constitutional rights to dignity and free speech in *Khumalo & Others v Holomisa* 2002 (8) BCLR 771 (CC) when deciding the issue whether the common law of defamation was consistent with the right to free speech.

²⁰⁴ IM Rautenbach ‘Introduction to the Bill of Rights’ in *Bill of Rights Compendium* (Durban: Butterworths, 2001) 1A – 1, 1A – 56-7.

of valid private law rules – analogous to the application of the Bill of Rights to administrative action in terms of valid empowering law'.²⁰⁵

In *Khumalo & Others v Holomisa*, the Constitutional Court suggested that one has to determine whether a right has direct application before a common law rule may be considered for development or application.²⁰⁶ It is therefore difficult to separate the application of the Bill of Rights to private conduct and law. Thus, while it is conceded that section 8(3) suggests that a person may not be permitted to commence a direct constitutional action in order to remedy a human rights violation, the fact that such an issue can be addressed by bringing an action based on a statute or common law does not mean that constitutional rights have no application to the private conduct itself.

Apart from enforcing the human rights obligations against non-state actors through statutory or common-law based actions, these obligations may also be enforced indirectly by suing the state. Section 7(2) of the Constitution enjoins the state to protect the rights in the Bill of Rights. South African Courts have construed this

²⁰⁵ Ibid.

²⁰⁶ Above n 203. At para 33, the Court stated:

In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution.

consistently with international law as discussed in chapter 4 by holding that the state may be held responsible for violations committed by non-state actors.²⁰⁷ In *Carmichele*, referred to earlier, the Constitutional Court while noting that the state has the duty not to perform any act that infringes rights, it stated that '[i]n some circumstances, there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.'²⁰⁸ It was held in this case that South Africa has a duty in international law 'to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take *reasonable and appropriate measures* to prevent the violation of those rights'.²⁰⁹ Furthermore, it was held that the police are one of the primary state agencies responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.²¹⁰ As a result, it was held that a recommendation by the police to release a person accused of rape, who had a history of assaults, on bail could give rise to state responsibility for the assault committed by the accused person while on bail. The case was referred back to the High Court for trial. Similarly, in *Modder East Squatters v Modderklip Boerdery; President of the RSA v Modderklip Boerdery*,²¹¹ the

²⁰⁷ See eg *Carmichele*, above n 190.

²⁰⁸ *Ibid* para 44.

²⁰⁹ *Ibid* para 63 (emphasis added).

²¹⁰ *Ibid*.

²¹¹ 2004 (8) BCLR 821 (SCA). This decision was upheld by the Constitutional Court albeit on a different basis, namely the right to an effective remedy. The Constitutional Court held that by failing to carry out the evictions, the state had failed to ensure that the farm owner had an effective remedy. See

Supreme Court found that the state had breached the duty to protect the rights of a farm owner by failing to provide squatters, who had occupied a private farm, with land.

As was noted in chapter 4, international human rights law uses the standard of due diligence as a measure of state compliance with the duty to protect.²¹² ‘Due diligence’ relates to the question whether the state has taken measures that are ‘reasonable’ or ‘serious’ to prevent the violation.²¹³ The Constitutional Court in *Carmichele* has adopted a similar test by holding that the state will be liable for an infringement of a constitutional right by a non-state actor if it fails to take ‘reasonable and appropriate measures’ to prevent it.²¹⁴

In short, the South African Constitution expressly recognises that the state has a duty to protect human rights and that courts are bound by constitutional rights. As a result, courts are enjoined to apply human rights to common law and develop it in line with constitutional rights. Furthermore, courts are obliged to uphold human rights even in private litigation where no state action is in issue. While some human rights provisions also specifically apply to private action,²¹⁵ section 8(2) of the Constitution generally states expressly that both natural and legal persons are bound by human rights depending on the nature of the right and the duty imposed by it. Once the court finds that a right binds a private actor, common law or statutory law may be used to

President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd CCT 20/04 (unreported).

²¹² See chapter 4 section 3.2 in this study.

²¹³ Ibid.

²¹⁴ Above n 190 para 63.

²¹⁵ Eg section 9, reproduced and discussed in chapter 7 section 2.3 in this study.

give effect to that right. Where no common law action exists to address the human rights violation involved or where some action exists but it is ineffective or insufficient, the courts are bound to develop the common law to give effect to the right in question.

7 CONCLUSION

In conclusion, this chapter demonstrates that domestic constitutions increasingly recognise that private actors are bound by constitutional rights. The extent and bases for these practices differ. Some constitutions such as those of the US and Canada are conventional in the sense that they mainly give recognition to civil and political rights and do not generally recognise positive obligations engendered by constitutional rights. These Constitutions tend to deny the application of human rights to non-state actors. However, courts of these countries have found it difficult to justify this denial.

US courts can, through the doctrine of state action, find non-state actors liable for violating constitutional rights where it can be shown that there is some state connection to the private conduct. It can therefore be said that these courts, to this limited extent, acknowledge that non-state actors can also be bound by human rights. The fact that a constitution does not permit the application of constitutional rights to non-state actors does not mean that these rights may not be made applicable to non-state actors through other means such as legislation. Thus, this chapter has demonstrated that while courts in the US are disinclined to accept that non-state actors can be bound by constitutional rights without proof of any state connection, their jurisprudence developed under several Acts, especially the ATCA, establishes a wider reach of human rights to non-state actors. US courts have allowed cases brought by aliens alleging violations of international human rights law committed by non-state actors outside the US. Although the ATCA is an Act, the jurisprudence it has

generated challenges the traditional view that non-state actors cannot be bound by human rights generally. It also highlights the fact that the difference between constitutional rights and those recognised in legislation in terms of their impact on the doctrine of separation of powers are often overstated.

Canadian courts have experienced particular difficulty in maintaining the public/private distinction in the application of constitutional rights. On the one hand, the Canadian Supreme Court held in *Dolphin* that Charter rights have no application to common law in private litigation unless some governmental connection to the issues at hand can be established. On the other hand, the Supreme Court held in the same case that Charter values are relevant to private disputes. To complicate matters further, the Supreme Court held in *Dolphin* that court orders do not constitute governmental action but later in *Rahey* it decided otherwise. This jurisprudence lacks consistency because, as argued in this study, the public/private distinction in the application of human rights cannot be defended philosophically especially given the changing role of private actors in contemporary times. This chapter has also made the point that despite its inclination to the conventional position, Canadian courts have impliedly acknowledged that private actors can in certain circumstances be bound by human rights. This could be where conduct of a private actor can be attributed to the state or where private action is considered in the light of Charter values. There is also a move toward the recognition of the duty to protect human rights, which if fully embraced will lead to a reconsideration of *Dolphin*. As argued in this chapter, the recognition of this duty as defined in international law and other domestic jurisdiction such as Ireland and Germany might require courts to intervene to protect parties to private litigation from violations of their rights by other parties.

The jurisprudence arising from the Constitutions of Germany, Ireland and South Africa recognises that non-state actors are bound by constitutional rights. In Germany, this recognition has occurred through the doctrine of *drittwirkung*, which posits that basic rights influence the development of private law. The cases decided by the Federal Constitutional Court effectively establish that basic rights have a strong indirect effect on private actors. Private law operates as a forum for raising the constitutional issues involved in a case. But when the Federal Court decides these cases the balancing of rights of private parties is done in explicit human rights language and in some cases the Federal Court expressly finds that a private party violated a right. Failure by a court to consider a basic right in private litigation amounts to a dereliction of duty on the part of the court, which will entitle the aggrieved party to apply to the Federal Constitutional Court to set aside the decision of that court. As noted above, the doctrine of *drittwirkung* has been adopted by the European Court of Human Rights and many other countries including Italy, Spain, Switzerland, and Japan.²¹⁶

While the Irish Constitution does not contain an explicit provision allowing the application of constitutional rights to non-state actors, its article 40(3) provides that the state has a duty to ‘defend and vindicate personal rights of the citizen’. Irish courts have construed this provision to mean that non-state actors are bound by constitutional rights. They have thus allowed constitutional claims alleging violations by these actors of these rights. However, such constitutional claims have been accepted only in those cases where common law remedies are inadequate or non-existent. Where reliance is placed on a common law action to address a human rights

²¹⁶ See section 1 above.

violation, the courts may also develop that law to give full effect to the right complained of.

The South African Constitution bears a close resemblance to the German and Irish Constitutions but it is quite unique. Unlike the German and Irish Constitutions, the South African Constitution expressly states that non-state actors can be bound by constitutional rights depending on the nature of the right and the duty in question. In addition, it expressly recognised that the judiciary is bound by these rights. However, in order to enforce a constitutional right against a non-state actor, the claimant has to bring a common law or statutory action. Where common law or statutory law is non-existent, inadequate or ineffective to address that human right in issue, courts are enjoined to develop that law in order to give effect to that right. A person may also choose to enforce the human rights obligations of non-state actors under the South African Constitution indirectly by bringing proceedings against the state. As noted earlier, the Constitutions of Ghana,  Malawi, the Gambia and Cape Verde also expressly recognise that constitutional rights bind non-state actors.²¹⁷

It can therefore be concluded that the traditional position that human rights bind the state only is not only conceptually flawed as argued in chapter 2 but practical evidence suggesting that non-state actors have human rights obligations is also mounting both in international law as shown in chapters 3 and 5, and in comparative constitutional practice as shown in this chapter.

²¹⁷ Section 1 above.

Chapter 7

THE NATURE AND EXTENT OF THE SOCIO-ECONOMIC RIGHTS OBLIGATIONS OF NON-STATE ACTORS

1 INTRODUCTION

The previous chapters have shown that non-state actors have human rights obligations in international law and domestic constitutional law. These actors can be held directly responsible in international law through voluntary and soft law standards but it has been shown that a move towards the development of hard law mechanisms is underway. At the domestic level, non-state actors could discharge their human rights obligations through corporate codes of conduct. They can also be held accountable through the application and development of private law. In some countries, non-state actors can be held directly accountable for constitutional rights where private law remedies are ineffective or absent to address the violation at hand.

The question remains even after accepting that non-state actors are responsible for human rights whether such responsibility extends to economic, social and cultural rights as well. And if it does, which economic, social and cultural rights bind non-state actors? This chapter seeks to address these questions. It will also provide some insights into the nature of the obligations of non-state actors in this regard. Considering that non-state actors are diverse, this chapter also attempts to develop a framework for distinguishing the extent of the obligations of these actors. All these questions are relevant to all mechanisms of holding non-state actors responsible for human rights. For example, the clarification of the specific economic, social and

cultural rights that are capable of application in horizontal relations and the nature of the obligations of non-state actors arising from them would assist in determining the content of voluntary standards such as corporate codes of conduct, when a state could be said to be responsible for violations of non-state actors, and in developing both private law remedies and direct constitutional remedies against non-state actors.

2 DO ECONOMIC, SOCIAL AND CULTURAL RIGHTS BIND NON-STATE ACTORS?

2.1 Arguments against horizontal application of economic, social and cultural rights

As noted in chapter 1, the argument that non-state actors should be bound by economic, social and cultural rights has to surmount a conceptual difficulty relating to the nature of these rights. These rights, unlike civil and political rights, are generally perceived to engender positive obligations requiring the duty-holder to act. A fear is therefore expressed that such obligations would be too onerous for non-state actors to fulfil. Stuart Woolman, for example, while commenting on section 8 of the South African Constitution, which permits a degree of horizontal application of the South African Bill of Rights, has argued that economic, social and cultural rights such as ‘the right to property, housing, health care, food, water, security, education, just administrative action and the rights of children’ are incapable of applying to horizontal relationships.¹ Alfred Cockrell has argued similarly that:

¹ Stuart Woolman ‘Application’ in Matthew Chaskalson Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional law of South Africa* (Cape Town: Juta & Co. Ltd, 1999) 10—59.

As a matter of political morality, it is submitted that it would be wholly inappropriate for [the right to of access to sufficient food and water] to be interpreted as imposing positive burdens on private agencies. Whatever view we may adopt regarding the existence of moral duties which require the rich to assist the poor, it would be intolerably far-reaching to endorse the proposition that rich persons have a constitutional duty to provide food to the impoverished... On the basis of this reasoning, it might be concluded that social welfare rights will in general not impose positive duties on private agencies.²

This view is also shared by Judge Dennis Davis and Professor Halton Cheadle, who argue that socio-economic rights flow from a social democratic vision of the state of the role of the state.³ This vision views the state as the sole provider of the basic services necessary to facilitate basic equality of the citizenry, which in turn, is essential to achieving equal and fair participation in democratic processes.⁴ This duty is considered to be extremely onerous; it is the state alone that is suited to achieving these rights on a progressive basis.⁵



2.2 Counter arguments

The view that economic, social and cultural rights engender onerous obligations is conventional but it wrongly assumes that these rights do not generate negative obligations.⁶ This is one of the arguments that have for long been cited against

² Alfred Cockrell 'Private law and bill of rights: A threshold issue of "horizontality"' in *Bill of Rights compendium* (Durban: Butterworths, 2001) 3A—18.

³ Halton Cheadle & Dennis Davis, 'The application of the 1996 Constitution in the private sphere' (1997) 13 *South African Journal on Human Rights* 44, 59—60.

⁴ Ibid 60.

⁵ Ibid.

⁶ The arguments for and against economic, social and cultural rights, see David Beetham *Democracy and human rights* (Cambridge: Polity Press, 1999); Craig Scott & Patrick Macklem 'Constitutional

protecting economic, social and cultural rights on a par with civil and political rights. However and as Henry Shue has demonstrated quite persuasively, civil and political rights ‘are more “positive” than they are often said to be’ and economic, social and cultural rights are more “negative” than they are often said to be.’⁷ For example, the right to vote involves considerable positive action from the state to conduct voter education, register voters, establish and maintain an electoral commission, and finance the electoral process. The same can be said about the right to fair trial, which entails that the state must establish and maintain a court system, provide law training to law officers, establish and maintain a justice department, and provide and maintain correctional services. An example of a socio-economic right that protects the negative obligation is the right to housing. As will be shown below, this right protects individuals or groups from forced evictions, which essentially engenders a negative obligation. If the view that all rights generate negative and positive obligations is accepted, it cannot be maintained that economic, social and cultural rights cannot bind private actors simply on account of their nature.

ropes of sand or justiciable guarantees? Social rights in a new South African Constitution’ (1992) 141 *University of Pennsylvania Law Review* 1; Erika de Wet *The constitutional enforcement of economic and social rights: The meaning of the German constitutional model for South Africa* (Durban: Butterworths 1996); Dennis M Davis ‘The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles’ (1992) 8(4) *South African Journal on Human Rights* 475; Etienne Mureinik ‘Beyond a charter of luxuries: Economic rights in the Constitution’ (1992) 8(4) *South African Journal on Human Rights* 464; Pierre de Vos ‘Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa’s 1996 Constitution’ (1997) 13(1) *South African Journal on Human Rights* 67.

⁷ Henry Shue *Subsistence, affluence, and US foreign policy* (Princeton: Princeton University Press, 1980) 37.

The other argument advanced by Davis and Cheadle suggesting that economic, social and cultural rights flow from a social democratic vision of the state, which recognises the latter as the sole provider of basic services is no longer sacrosanct. Firstly, current human rights standards are silent on the mode of providing services and as to who should provide them. According to Professor Paul Hunt, the UN Special Rapporteur on the right to health, there is no single road to realising economic, social and cultural rights.⁸ Some judicial pronouncements suggest that it is actually permissible for private actors to play a role in the realisation of these rights.⁹ In the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*,¹⁰ the Constitutional Court conceded that '[i]t is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'¹¹ Similarly, in the Indian case of *Krishnan v State of Andhra Pradesh*,¹² Jeevan Reddy J commented on the position of private actors in relation to the directive principle in the Indian Constitution on free and

⁸ See Paul Hunt 'The international human rights treaty obligations of states parties in the context of service provision' Submission to the UN Committee on the Rights of the Child on the private sector as service provider and its role in implementing child rights, 20 September 2002, Office of the High Commissioner for Human Rights, Geneva.

⁹ Sandra Liebenberg has argued: 'The state should be entitled to rely on private mechanisms of delivery in appropriate circumstances.' She cites the provision of education by private institutions and adult education by NGOs as examples of private sector contribution to service delivery. See Sandra Liebenberg 'Socio-economic rights' in Chaskalson et al (eds), above n 1, 41-1, 41-35.

¹⁰ 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC).

¹¹ Ibid para 35.

¹² (1993) 4 LRC 231.

compulsory primary education for children until they reach the age of 14 years as follows:¹³

This does not, however, mean that this obligation can be performed only through state schools. It can also be done by permitting, recognising and aiding voluntary non-governmental organisations, who are prepared to impart free education to children. This does not also mean that unaided private schools cannot continue. They can, indeed, as they too have a role to play. They meet the demand of that segment of the population who may not wish to have their children educated in state-run schools.

These pronouncements suggest that non-state actors may be involved in the provision of basic services both as sole providers or in partnership with the state or other non-state actors. As will be shown below, non-state actors have actually increasingly been involved in the provision of such basic services as water, health, electricity and education. Secondly, the experience of the Cold War, where the West championed civil and political rights and the East favoured economic, social and cultural rights, has led to the development of the notion that human rights, including economic social and cultural rights, are not by-products of any political or economic system.¹⁴ Thus, while interpreting article 2(1) of the International Covenants on Economic, Social and Cultural Rights (ICESCR), the Committee on Economic, Social and Cultural Rights (CESCR) has stated that:

The undertaking 'to take steps ... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question,

¹³ Ibid 301. See also *Jain v State of Karnataka* (1992) 3 SCC 666 para 17.

¹⁴ In this sense human rights can be seen as but 'trumps' over collective goals as Ronald Dworkin would put it. See Ronald Dworkin 'Rights as trumps' in Jeremy Waldron (ed) *Theories of rights* (London: Oxford University Press, 1984) 153 – 167.

provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot be accurately described as being predicated exclusively upon the need for, or the desirability for a socialist or capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach.¹⁵

This position is also espoused in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) thus:

The achievement of economic, social and cultural rights may be realised in a variety of political settings. There is no single road to their full realisation. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures.¹⁶

This view dovetails with the principle that all human rights are interrelated, interdependent and mutually supporting as highlighted in chapter 1. It also represents a break with the ideological conceptions of human rights, which hampered a holistic development of human rights within the UN system especially during the adoption of the UDHR and, subsequently, the ICESCR and the ICCPR,¹⁷ by affirming that all political and economic systems are bound by human rights. This means that the so-called ‘social democratic’ perspective of human rights, which alleged limits the

¹⁵ See General Comment No 3 ‘The nature of state parties’ obligations (art 2(1) of the Covenant)’ adopted by the CESCR at its 5th session, 14 December 1990, para 8.

¹⁶ UN doc E/CN.4/1987/17, Annex, reprinted in (1987) 9 *Human Rights Quarterly* 122 para 6. The Limburg Principles were adopted by a group of distinguished experts in international law on 2-6 June 1986 in Maastricht, The Netherlands. Although not binding, they have been very influential to the understanding of the content and nature of obligations generated by socio-economic rights.

¹⁷ See Kitty Arambulo *Strengthening the supervision of the ICESCR: Theoretical and procedural aspects* (Antwerpen: Intersentia, 1999) 15 – 18.

imposition of positive duties on non-state actors, cannot be regarded as the true version of rights. As was shown in chapter 2, many theories of human rights support the horizontal application of these rights including economic, social and cultural rights.

Finally, international and regional human rights instruments and domestic constitutions, as was shown in chapters 3 and 6, at times expressly recognise that non-state actors are bound by economic, social and cultural rights.

It is therefore conceptually problematic to generalise that economic, social and cultural rights cannot apply to non-state actors because of their positive nature. The next section defines the criteria for determining whether a given economic, social and cultural right is capable of application in the private sphere.

2.3 Criteria for determining whether a given socio-economic right can bind a non-state actor



As pointed out above, the category to which a right is traditionally associated is irrelevant to a determination of whether the right is applicable to non-state actors. One must consider each right independently and the nature of the duty imposed by the right. In determining whether a given socio-economic right or any right for that matter has application to private relations, the formulation of the right is a relevant factor. Some rights may be defined in a manner that clearly eliminates the possibility that they can bind non-state actors while others may expressly target non-state actors as duty holders in addition to from states. For example, section 9 of the South African Constitution provides:

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social

origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

Section 9(3) clearly envisages a situation whereby the state is a duty holder while section 9(4) clearly binds non-state actors including legal persons.¹⁸ Many other constitutions and international and regional human rights instruments use supposedly neutral language in defining human rights. For example, the Malawian Constitution provides that '[a]ll persons are entitled to education',¹⁹ '[a]ll persons and peoples have a right to development',²⁰ and that '[e]very person shall have the right to freely to engage in economic activity to work and to pursue a livelihood anywhere in Malawi'.²¹ The African Charter on Human and People's Rights (African Charter) provides, among other things, that '[e]very individual shall have the right to enjoy the



¹⁸ As was noted in chapter 3, the European Court has construed 'everyone' in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) broadly, in the context of rights holders, to include legal persons. In *Autronic AG v Switzerland*, ECHR, Series A 178 (1990); 12 (1990) EHRR 485, para 47, it was held in the context of freedom of expression thus: 'Neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (freedom of expression). The Article applies to 'everyone', whether natural or legal persons.' 'No person' could be construed similarly in the context of individual duties in relation to human rights.

¹⁹ Section 25(1).

²⁰ Section 30(1).

²¹ Section 29.

best attainable state of physical and mental health’,²² ‘[e]very individual shall have the right to education’,²³ and that ‘[a]ll peoples shall have the right to their economic, social and cultural development’.²⁴ This formulation is open to the interpretation that these rights can bind non-state actors.

However, the language used in defining the right may not be conclusive. Constitutions are living documents, which are often interpreted generously and purposively having regard to changing circumstances.²⁵ International human rights instruments are also supposed to be interpreted similarly.²⁶ Nicola Jägers has argued that the provisions of the UDHR, the ICCPR and the ICESCR must be construed purposively in light of their preambles and other provisions.²⁷ This submission is consistent with the Vienna Convention on the Law of Treaties,²⁸ which requires treaties to be interpreted in good faith in accordance with the ordinary meaning given



²² Article 16(1).

²³ Article 17(1).

²⁴ Article 22(1).

²⁵ Gerard Hogan & Gerry White *The Irish Constitution (JM Kerry)* (Dublin: Butterworths, 1994) xcix-cix-cxiii; Johan de Waal, Iain Currie, & Gerhard Erasmus *The Bill of Rights handbook* (4th ed) (Landsdowne: Juta and Co Ltd, 2001) 130 – 140; Morris Manning *Rights, freedoms, and the courts: A practical analysis of the Constitution Act, 1982* (Toronto: Edmond Montgomery Ltd, 1983) 90.

²⁶ See article 31 of the Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the *United Nations Conference on the Law of Treaties* (entry into force: 27 January 1980).

²⁷ Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002) 50.

²⁸ See above n 26.

to the terms of the treaty in their context and in the light of its object and purpose, and subsequent treaties between the parties.²⁹

Such an approach is significant considering the fact that economic, social and cultural rights as defined in the ICESCR were defined in a different manner from civil and political rights to highlight that they were not designed to be implemented in the same way.³⁰ Thus, the ICESCR uses the language that imposes obligations on states to recognise these rights and realise them progressively within available resources. For example, it uses such phrases as ‘[s]tates parties to the present Covenant undertake to ensure’, ‘[t]he States Parties to the present Covenant recognize the right ...’ and ‘[e]ach States Party to the present Covenant undertakes to take steps’.³¹ If construed in isolation, such provisions might easily be interpreted to impose obligations on states only.

However, a general and contextual approach may not lead to this conclusion. As was observed in chapter 3, the Preamble to the UDHR proclaims that every ‘*every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms’. The preambles to both the ICCPR and the ICESCR also state that ‘the individual, having duties to other individuals and to the community to which he belongs’, is ‘under a responsibility to strive for the promotion and observance of the rights’ recognised under these instruments. In addition, they both contain a common provision similar to the UDHR’s article 30 stating that:

²⁹ See article 31.

³⁰ See Arambulo, above n 17, 18 – 20.

³¹ See eg articles 2 – 3 of the ICESCR.

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.³²

Such provisions should be borne in mind when construing specific provisions protecting economic, social and cultural rights and determining the possibility of their application to non-state actors because they clearly suggest that non-state actors have human rights obligations.

Another important consideration is the content of the right itself. What does the right the right seek to protect? Can the right be violated by non-state actors? A right could apply to non-state actors if what the right aims to protect can be infringed by non-state actors. To take the right to a fair trial as an illustration, the right seeks to protect the liberty of persons accused of crimes by guaranteeing that their liberty will not be removed without observing fairness in the conduct of their criminal trial.³³ According to Johann de Waal and others, fairness of a criminal trial may be jeopardised by conduct before and/or during the trial.³⁴ Thus, while the right itself may be drafted in a neutral fashion as regards its duty holders, one may easily conclude that this right cannot bind non-state actors since criminal trials are conducted by state actors.³⁵ However, one can envisage circumstances where non-state actors can violate this right. For example, where a corporation is entrusted with

³² See article 5(1) common to both the ICCPR and the ICESCR.

³³ De Waal et al, above n 25, 586.

³⁴ Ibid.

³⁵ See Halton Cheadle 'Application' in Halton M Cheadle, Dennis Davis & Nicholas RL Haysom (eds) *South African Constitutional law: The Bill of Rights* (Durban: Butterworths, 2002) 19, 38.

the duty of running, or providing security services to, a detention centre or prison and its employees collude with the state to obtain confessions from accused persons by using illegal means, the corporation could be said to have interfered with the right of the accused to fair trial.³⁶ The circumstances of each case must therefore be considered as well before a final decision can be made whether a right has application to private relations or not.

The determination of the question whether a given socio-economic right binds non-state actors must therefore depend on an examination of the right itself, its formulation and content, whether it can be violated by non-state actors, and the circumstances of each case. The following section demonstrates that almost every economic, social and cultural right can apply to private relations.

2.4 A consideration of selected economic, social and cultural rights

2.4.1 Non-discrimination



As noted above, article 3 of the ICESCR provides that ‘States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights’. This formulation would suggest that it is only states that are the subject of the duty to ensure equality. But when construed in the light of the Preamble to and article 5(1) of the Covenant in section 2.3 above, and other international instruments, one may have cause to conclude that the right to

³⁶ The policy of privatising services has become common in many countries including in the United States, Britain and Australia. See Lenny Roth ‘Privatisation of prisons’ Background Paper No 3/04, available at <<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/ED4BA0B9D18C2546CA256EF9001B3ADA>> (accessed: 30 April 2005).

ensure equality of treatment of everyone in the enjoyment of their economic, social and cultural rights can reach private conduct.

Article 1 of the African Charter on Human and Peoples' Rights (African Charter) provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind'. Likewise, the UDHR provides that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'.³⁷ Both these instruments enshrine both civil and political rights and economic, social and cultural rights and do not limit the range of duty-holders to states.

Even in 1976, Michael Horan argued that anti-discrimination provisions are on their face 'clearly intended to reach private conduct'.³⁸ He cited the Constitution of India, which provides still that:

- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
- (a) access to shops, public restaurants, hotels and places of public entertainment;
- or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.³⁹

³⁷ See article 2.

³⁸ Michael J Horan 'Contemporary constitutionalism and legal relationships' (1976) 25 *International and Comparative Law Quarterly* 848, 853 – 854.

³⁹ Article 15(2).

A wide range of constitutions including those of Kenya,⁴⁰ Lesotho,⁴¹ Pakistan,⁴² the Bahamas⁴³ and Bangladesh⁴⁴ contain similar provisions.⁴⁵ What is interesting about these Constitutions is that they prohibit non-discrimination in relation to access to certain services and places whether owned or operated privately or publicly as long

⁴⁰ Section 82(7) of the Kenyan Constitution adopted in 1963 as amended up to 1999 provides:

Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

⁴¹ Section 18(7) of the Constitution adopted in 1993 as amended up to 2001 is the same as the Kenyan provision cited above.

⁴² Section 26 (1) of the Constitution of Pakistan adopted in 1999 still contains the provision that ‘In respect of access to places of public entertainment or resort not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, residence or place of birth.’

⁴³ Section 26(7) of the Constitution of Bahamas provides that:

Subject to the provisions of subparagraph (4)(e) and of paragraph (9) of this Article no person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

⁴⁴ Article 28(3) of the Constitution of Bangladesh as amended up to 1996 provides that ‘No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.’

⁴⁵ Although Horan (above n 38 at 855) made reference to these constitutions in 1976 their provisions on non-discrimination have remained unchanged. See above notes 40 – 44.

as those services or premises are intended for the use of the general public. The South African Constitution has also been referred to, which also expressly states that ‘No person may unfairly discriminate directly or indirectly against anyone’.⁴⁶

The Human Rights Committee (HRC) has defined ‘discrimination as used in the ICCPR to mean ‘any distinction, exclusion, restriction or preference’ which is based on the prohibited grounds and ‘which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all right and freedoms’.⁴⁷ Non-discrimination provisions are therefore intended to protect the dignity of the individual by ensuring that persons who are in a similar position are not treated differently on any of the prohibited grounds without any justifiable reason.⁴⁸

That this right can be violated by non-state actors is confirmed both implicitly and sometimes expressly by a range of human rights instruments and their monitoring bodies, which require states to take measures to eliminate discrimination by both private and public actors. Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States Parties ‘to take all appropriate measures to eliminate discrimination against women *by any person*,

⁴⁶ Section 9(4).

⁴⁷ General Comment 18/37 [Non-discrimination] adopted by the Human Rights Committee (HRC) on 9 November 1989, para 7; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

⁴⁸ De Waal et al, above n 25, 198. It must be observed though that the enjoyment of rights and freedoms on an equal footing does not require identical treatment in each and every case. See General Comment 18/13, above n 47, paras 8 & 13.

*organisation or enterprise.*⁴⁹ Likewise, article 2(d) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) requires each State Party to ‘prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination *by any persons, group or organization.*’⁵⁰ In the context of labour relations, ILO Convention 100 enjoins states

⁴⁹ Emphasis added. The Committee on the Elimination of Discrimination Against Women (Committee on CEDAW) has emphasised that -

the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

See General Comment No 19 ‘Violence against women’ adopted by the Committee on CEDAW on 30 January 1992, UN Doc No A/47/38.

⁵⁰ Emphasis added. The Committee on the Elimination of Racial Discrimination (Committee on CERD) has stated that:

The rights and freedoms referred to in article 5 of the Convention and any similar rights shall be protected by a State Party. Such protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions ... To the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.

See General Comment No 20 ‘Non-discriminatory implementation of rights and freedoms (Art 5)’ adopted by the Committee on CERD on 15 March 1996, para 5. The HRC has also asked states to

to ensure the application to all workers the principle of equal remuneration for men and women workers for work of equal value.⁵¹

In view of this jurisprudence, it can be concluded that anti-discrimination provisions can apply to private relations.

2.4.2 *Labour rights*

The ICESCR requires States Parties to recognise the right to work.⁵² Furthermore, it provides that States Parties must recognise the right of everyone to the enjoyment of just and favourable conditions of work⁵³ and ensure everyone a range of trade union rights.⁵⁴ While many other instruments protect these rights, the ILO has adopted a range of specialist instruments to reinforce the protection of these rights. According to the International Council on Human Rights Policy, the following could be described as core labour rights protected in the ILO system: Freedom of association and the rights to organise and bargain collectively; non-discrimination in the work place; prohibition of bonded and forced labour; prohibition of child labour; safe and healthy

report 'any problems of discrimination in fact, which may be practised either by public authorities, by the community, or private persons or bodies.' General Comment 18/37, above n 47, para 9.

⁵¹ Article 2(1), ILO Convention (No 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted by the General Conference of the ILO on 29 June 1951 (entry into force: 23 May 1953).

⁵² Article 6(1).

⁵³ Article 7.

⁵⁴ Article 8.

work environment; payment of a living wage; and reasonable and working hours and overtime.⁵⁵

As is the case with all other rights in the ICESCR, these rights are couched as though states alone that are burdened by them. However, labour rights are probably the most relevant rights to private relations as they are most at risk of violation by non-state actors. According to Nicola Jägers, ‘corporations are violators *par excellence*’ of these rights and the rights to just conditions of work and rest and leisure are ‘clearly relevant’ to horizontal relations.⁵⁶ In support of this argument she cites Matthew Craven who has argued that ‘if State obligations were limited to ensuring that public employees enjoyed fair conditions of work, this right would largely be deprived of effect.’⁵⁷ Michael Horan has also argued that slavery and its variants such as serfdom and forced labour has incurred universal world condemnation and observes that almost every modern constitution prohibits these infractions.⁵⁸ Such prohibition, he argues, apply to ‘all persons who contravene them, whether governmental officers, corporations or private individuals.’⁵⁹

The ICESCR can, on close examination, also be interpreted to support the contention that labour rights bind non-state actors. Article 6 of the ICESCR, for

⁵⁵ International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (Versoix, International Human Rights Policy 2002) 28 – 29.

⁵⁶ Jägers, above n 27, 2002, 65.

⁵⁷ Ibid. see also Matthew Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford: Clarendon Press, 1995) 112.

⁵⁸ Horan, above n 38, 853 – 4.

⁵⁹ Ibid.

example, requires States Parties to 'take appropriate steps to safeguard' the right to work, while article 8 obligates State Parties to 'ensure' trade union rights. As was shown in chapter 4, these phrases mean that non-state actors are indirectly responsible in international law for these rights and must therefore ensure that these actors abide by them.

The ILO Tripartite Declaration discussed in greater detail in chapter 5 expressly affirms that labour rights are intended to bind non-state actors as well. Paragraph 2 states that the primary purpose of the Declaration is to encourage the positive contribution which multinational enterprises can make to economic and social progress. Adopted in consultation with employers, employees and governments, the Declaration speaks directly to non-state actors. For example, it provides that 'The principles set out in this Declaration are commended to the governments, the employers' and workers' organizations of home and host countries and to the multinational enterprises themselves.'⁶⁰ The rights recognised in the Declaration relate to employment promotion; equality of opportunity and treatment; security of employment; training; wages, benefits and conditions of work; minimum age of employment, safety and health and industrial relations. While adherence to the Declaration, as was noted in chapter five is voluntary, the Declaration provides evidence of the acceptance by employers including those in the private sphere that they have duties in relation to these rights.

Both the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights⁶¹ and the UN Global

⁶⁰ See para 4.

⁶¹ See paras 5-9.

Compact⁶² also expressly state that business enterprises have obligations in relation to labour rights.

4.4.3 *The right to social security*

Article 9 of the ICESCR requires States Parties to recognise the right of everyone to social security, including social insurance. Like this article, the definition of this right in article 22 of the UDHR is closely linked to the state. It provides:

Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

By contrast article 25(1) of the UDHR does not make any reference to the state. It provides that ‘Everyone has ... the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’



It has been suggested that the right to social security cannot apply in horizontal relations.⁶³ However, this view ignores the close link between social security, employment rights and the right to family protection. If this link is appreciated, it can easily be accepted that this right is also capable of binding non-state actors.

Article 10 of the ICESCR guarantees family protection. One of the elements of this right obligates States Parties to accord special protection to mothers during a reasonable period before and after childbirth.⁶⁴ According to the ICESCR, mothers should be accorded paid leave or leave with adequate social security benefits during

⁶² Principles 3 – 6.

⁶³ Jägers, above n 27, 64.

⁶⁴ Article 10(2).

this period.⁶⁵ These benefits can be protected in the employment relations involving non-state entities.

Besides the ICESCR, the ILO Social Security (Minimum Standards) Convention,⁶⁶ adopted in consultation with employers, employees and governments, lists as core social security benefits the following: medical care benefits, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, and survivors' benefits.⁶⁷ These benefits are elaborated in a range of other more specific ILO Conventions.⁶⁸ While some of the benefits listed in this Convention are clearly inapplicable to non-state actors (with regard to the duty to provide these benefits), others such as employment injury benefits and maternity benefits are clearly applicable to them.

The African Charter reinforces the argument that the right to social security can in certain circumstances bind non-state actors. It provides that every individual shall have the duty 'to respect his parents at all times and to maintain them in case of need'.⁶⁹ This duty is reiterated in the African Charter on the Rights and Welfare of the

⁶⁵ Ibid.

⁶⁶ Adopted by the General Conference of the ILO on 26 June 1952 (entry into force 27 April 1955).

⁶⁷ It must be noted that the Convention requires States to implement at least three of these benefits, one of which must be an unemployment benefit, old-age benefit, employment injury benefit, invalidity benefit or survivors benefit. See article 2.

⁶⁸ Eg the Invalidity, Old-Age and Survivors' Benefits Convention, adopted by the General Conference of the ILO on 29 June 1967 (entry into force: 01 November 1969); The Medical Care and Sickness Benefits Convention, adopted by the General Conference of the ILO on 25 June 1969 (entry into force: 27 May 1972); the Employment of Injury Benefits Convention, adopted by the General Conference of the ILO on 28 July 1964 (entry into force: 28 July 1967).

⁶⁹ Article 29(1).

Child.⁷⁰ Lawrence Mashava has argued that this duty ‘revives a form of social security which has been in existence for a long time as a tradition in African communities.’⁷¹

Quite apart from the employment and family environment, non-state actors could be bound by the right to social security in the context of privatisation. For example this right would be relevant where the administration of social grants is outsourced to private entities or where financial institutions are involved in the investment of social security schemes such as retirement funds.⁷² It would also be relevant where pension schemes are administered by non-state actors.⁷³

The upshot of this discussion is that the right to social security is applicable to private relations.



⁷⁰ Article 30.

⁷¹ Lawrence Mashava ‘Introduction to the right to social security in the South African Constitution’ in Lawrence Mashava (ed) *A compilation of essential documents on the right to social security* (Vol 6) (Pretoria: Centre for Human Rights, 2000) 1, 13.

⁷² On the implications of the privatisation of social security, see Kathryn L Moore ‘Partial privatisation of social security: Assessing its effect on women, minorities, and lower-income workers’ (2000) 65 *Missouri Law Review* 341 (arguing that partial privatisation would likely have an adverse effect on the benefits of women, minorities, and lower-income workers).

⁷³ See generally Christian Courtis ‘Social rights and privatisation: Lessons from the Argentine experience’ in Koen de Feyter & Felipe G Isa (eds) *Privatisation and human rights in the age of globalisation* (Antwerp: Intersentia, 2005) 175; Lucie Lamarche ‘Social protection is a matter of human rights: Exploring the ICESCR right to social security in the context of globalisation’ in de Feyter & Isa (eds), above in this note, 129.

4.4.4 *Adequate standard of living*

Article 11(1) of the ICESCR obligates States Parties to ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. As is clear from this article, the right to an adequate standard of living encompasses the rights to adequate food, clothing and housing, and continuous improvement of living conditions. The UDHR contains a similarly broad definition of this right.⁷⁴ One notable difference between the two is that the ICESCR recognises the right to health in a separate article as will be seen below.

The content of the right to an adequate standard of living has been developed through its derivative rights. The following sections discuss the applicability of each of these rights in the private sphere.

4.4.4.1 *The right to food*



The CESCR has stated that the right to food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights.⁷⁵ This right is realised ‘when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.’⁷⁶

⁷⁴ Article 25(1).

⁷⁵ General Comment No 12 (1999) ‘The right to adequate food (art 11 of the Covenant)’ adopted by CESCR at its 20th session, 12 May 1999, para 4.

⁷⁶ *Ibid* para 6.

According to Anthony Paul Kearns, the right to food is violated by non-state actors frequently.⁷⁷ The CESCR has stated that '[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.'⁷⁸ Examples of such violations can occur when non-state actors influence arbitrary price increases of food (eg by promoting food scarcity), pollute the soil and water, unreasonably raise the prices of farm inputs and equipment, and acquire patents to traditional knowledge or life forms that provides food without the knowledge of local communities and compensating them.⁷⁹

The CESCR has therefore required State Parties to 'take measures to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.'⁸⁰ It has also expressly stated that 'While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities in the realisation of the right to adequate food.'⁸¹

The above jurisprudence of the CESCR and the fact that that the right to food can be violated by non-state actors as well underscore the point that this right is relevant to horizontal relations as much as it is to vertical relations.

⁷⁷ Anthony Paul Kearns 'The right to food exists via customary international law' (1998) 22 *Suffolk Transnational Law Review* 223, 224.

⁷⁸ See General Comment No 12, above n 75, para 19.

⁷⁹ See also International Council on Human Rights Policy, above n 55, 35.

⁸⁰ General Comment No 12, above n 75, para 15.

⁸¹ *Ibid* para 20.

4.4.4.2 *The right to adequate housing*

The right to adequate housing is also capable of application in the private sphere. The CESCR has stated that this right guarantees something more than having a roof over one's head or shelter viewed exclusively as a commodity.⁸² It protects 'the right to live somewhere in security, peace and dignity.'⁸³ It entails that the shelter must contain facilities essential for health, security, comfort and nutrition including natural and common resources; safe drinking water; energy for cooking; heating and lighting; sanitation and washing facilities; means of food storage; and refuse disposal, site drainage and emergency services.⁸⁴ Most of these services are now being provided by non-state actors either severally or in partnership with state actors.⁸⁵ This right can therefore be violated in many ways by non-state actors; for example, through lack of building maintenance, unreasonable rent increases by landlords, arbitrary tariff increases for the services by private service providers, forced evictions, and contamination of food and water sources.

⁸² General Comment No 4 (1991) 'The right to adequate housing 9art 11(1) of the Covenant' adopted by CESCR at its 6th session, 13 December 1991, para 7.

⁸³ Ibid.

⁸⁴ Ibid, para 8(b). See also *Grootboom*, above n 10, para 35.

⁸⁵ See generally Danwood M Chirwa 'Privatisation of water in southern Africa: A human rights perspective' (2004) 4(2) *African Human Rights Law Journal* 218; Danwood M Chirwa 'Water privatisation is South Africa and socio-economic rights' (2004) 8(2) *Law, Democracy and Development* (Forthcoming); Adam McBeth 'Privatising human rights: What happens to the state's human rights duties when services are privatised' (2004) 5(1) *Melbourne Journal of International Law* 133; Anton Kok 'privatisation and the right to access to water' in de Feyter & Isa (eds), above n 75, 259.

With regard to forced evictions, the CESCR has acknowledged that many instances of violent forced evictions arise in the context of international armed conflicts, internal strife and communal or ethnic violence while others occur in the name of development such as dam construction projects, development and infrastructure projects, and large scale energy projects.⁸⁶ In all these instances, non-state actors could be involved as perpetrators, instigators or beneficiaries of forced relocations, destruction of homes, food, pillage and other human rights abuses.⁸⁷

Thus, the CESCR has stated that States Parties ‘must ensure that the law is enforced against its agents or third parties who carry out forced evictions.’⁸⁸ In particular, while noting that development projects financed by international agencies have resulted in forced evictions, it has stated that ‘international agencies should scrupulously avoid involvement in projects which, for example ... involve large scale

⁸⁶ General Comment No 7 (1997) ‘The right to adequate housing (art 11(1) of the Covenant): Forced evictions’ adopted by CESCR at its 16th session, 20 May 1997, paras 7 & 8.

⁸⁷ For example, the claim in *Doe v Unocol* WL 359787 (9th Cir, 2003), alleges that Unocol was complicit or aided and abetted the commission of rape, murder and forced labour during the construction of a pipeline in Burma. See chapter 6. The facts in the *SERAC Case* discussed in chapter 4 in this study and *Wiwa v Royal Dutch Petroleum Company* 226 F 3d 88 (2nd Cir, 2000), also show how Shell was complicit in the various human rights violations committed by the military forces, including destruction of homes, crops, livestock and other abuses. David Copie and Pablo Policzer observe that ‘Today these rebel groups, militias, warlords, and insurgents seriously threaten not just the security of states, but the most basic human rights of millions of people.’ They therefore contend that these actors must also be bound by human rights standards. See David Copie and Pablo Policzer ‘Keeping the promise of protection: Holding armed groups to the same standards as states’ available at <http://www.un-globalsecurity.org/pdf/Policzer_Capie_paper_non-state_actors.pdf> (accessed: 30 April 2005).

⁸⁸ *Ibid* para 9.

evictions or displacement of persons without the provision of appropriate protection and compensation.⁸⁹ Furthermore, it has recommended that States Parties must provide domestic remedies protecting the right to housing including:

- (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
- (b) legal procedures seeking compensation following an illegal eviction;
- (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination;
- (d) allegations of any form of discrimination in the allocation and availability of access to housing; and
- (e) complaints against landlords concerning unhealthy or inadequate housing conditions.⁹⁰

According to the CESCR, '[i]nternational financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing.'⁹¹

It can therefore be said that the right to adequate housing is normatively also capable of applying in private relations

4.4.4.3 *The right to water*

The right to water is recognised in a range of international instruments⁹² but not in the ICESCR or the UDHR.⁹³ However, the CESCR has considered it as a derivative right flowing from the right to an adequate standard of living and the right to housing.⁹⁴

⁸⁹ See General Comment No 7, above n 86, para 18.

⁹⁰ General Comment No 4, above n 82, para 17.

⁹¹ Ibid para 19.

⁹² Eg article 14(2)(h) of the CEDAW; article 24 (2)(c) of the Convention on the Rights of the Child.

⁹³ The right of access to sufficient water is recognised expressly in the South African Constitution. See section 27(1).

The right to water ‘entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.’⁹⁵ It seeks to protect the right to maintain access to existing water supplies, the right to be free from interference such as the right to be free from arbitrary disconnections or contamination of water supplies.⁹⁶ Furthermore, this right entitles everyone to a system of water supply and management that provides equality of opportunity for people to enjoy the right.⁹⁷

Water is increasingly being provided by both state and non-state actors. Almost all countries in southern Africa, for example, have embarked on the privatisation of water services.⁹⁸ The most common form of privatisation has been what has come to be called public/private partnerships, whereby the state does not sell the assets for providing a service but allows a private actor to operate and manage the provision of the service.⁹⁹ Another form of privatisation affecting water services has been the outsourcing of such services as water treatment, meter readings, and infrastructure

⁹⁴ See above n 84 and the accompanying text.

⁹⁵ General Comment No 15 ‘The right to water (arts 11 and 12 of the Covenant)’ adopted by the CECSR at its 29th session, 11-29 November 2002, para 2.

⁹⁶ Ibid para 10.

⁹⁷ Ibid.

⁹⁸ See generally Chirwa ‘Privatisation of water in southern Africa’, above n 85.

⁹⁹ David A McDonald & Greg Ruiters ‘Introduction: From public to private (to public again)’ in David A McDonald & Greg Ruiters (eds) *The Age of Commodity: Water Privatisation in Southern Africa* (London: Earthscan 2005) 1, 2.

development or repair.¹⁰⁰ Through their involvement in the provision of these services, non-state actors can violate the right to water, for example, by contaminating water,¹⁰¹ arbitrary disconnections, and unreasonable water prices.¹⁰²

The CESCR, recognising that this right is relevant in private relations, has stated that States Parties must ‘prevent third parties’ including ‘individuals, corporations and other entities and agents acting under their authority from interfering in any way with the enjoyment of the right to water.’¹⁰³ Not only are State Parties enjoined to take legislative and other measures to restrain third parties from committing such acts as denying equal access to adequate water and polluting and inequitably extracting from water resources, they are also required to establish an effective regulatory system, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.¹⁰⁴



¹⁰⁰ David A McDonald & Greg Ruiters ‘Theorizing water privatisation in southern Africa’ in McDonald & Ruiters (eds), above n 99, *ibid*, 28.

¹⁰¹ For example, when water testing was contracted out to a private actor in Canada, an outbreak of E. coli infection occurred resulting in seven deaths and 2 300 people falling ill. See Elizabeth Drent, ‘Privatisation of basic services in Canada: Some recent experiences’ (2003) 4(4) *ESR Review* 16.

¹⁰² Many commentators attribute the increase in disconnections and water tariffs that have taken place in South Africa since the inception of democracy to privatisation and other commercialisation policies affecting water. See Laila Smith ‘The murky waters of second wave Neoliberalism: Corporatisation as a service delivery model in Cape Town’ in McDonald & Ruiters (eds), above n 99, 168; Alex Loftus ‘“Free water” as commodity: The paradoxes of Durban water service transformations’ in McDonald & Ruiters (eds), above n 99, 189.

¹⁰³ General Comment No 15, above n 95, para 23.

¹⁰⁴ *Ibid* para 24.

It can therefore be concluded that the right to water is normatively capable of application in the private sphere.

4.4.5 *The right to health*

As noted above, the ICESCR protects this right as a separate right from the right to an adequate standard of living.¹⁰⁵ While this Covenant and many other international instruments identify this right closely with the state,¹⁰⁶ the UDHR,¹⁰⁷ the African Charter,¹⁰⁸ and the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights¹⁰⁹ do not.

The right to health guarantees both freedom to control one's health and body and freedom from interference such as torture, non-consensual medical treatment and experimentation, and entitlements to a system of health protection.¹¹⁰ Not only does it protect the right to timely and appropriate health care, it also protects the right to 'the underlying determinants of health, such as access to safe and potable water and

¹⁰⁵ Article 12(1) provides that States Parties must 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

¹⁰⁶ Eg, article 5(e)(iv) of CERD; articles 11(1) & 12 of CEDAW; & article 24 of the Convention on the Rights of the Child.

¹⁰⁷ Article 25 of the UDHR provides that 'Everyone has the right to standard of living adequate for the health and wellbeing of himself and his family'.

¹⁰⁸ Article 16 of the African Charter provides that 'Every individual shall have the right to enjoy the best attainable state of physical and mental health.'

¹⁰⁹ Article 10 provides that 'Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.'

¹¹⁰ General Comment No 14 'The right to the highest attainable standard of health (art 12 of the ICESCR)' adopted by CESCR at its 22nd session, 25 April – 12 May 2000, para 8.

adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information'.¹¹¹

As is the case with many other services, health care services and those related to the underlying determinants of health are increasingly being provided with the involvement of non-state actors.¹¹² Significantly, pharmaceutical corporations and scientific research institutions hold influential positions regarding the availability and accessibility of drugs and other medical products.¹¹³ Non-state actors can therefore violate the right to health in many ways including producing or marketing or advertising unsafe or harmful medication and treatment, arbitrary price increases for drugs, polluting water and food sources, and unethical medical experimentation.

The CESCR has acknowledged that non-state actors have both direct and indirect obligations in relation to the right to health. It has stated quite clearly that while States are ultimately accountable for compliance with the ICESCR, 'individuals including health professionals, families, local communities, intergovernmental and non-governmental organisations, civil society organisations, as well as the private business

¹¹¹ Ibid para 11.

¹¹² See generally MacBeth, above n 85; Gregg M Bloche 'Is privatisation of health care a human rights problem?' in de Feyter & Isa (eds), above n 73, 207.

¹¹³ Sarah Joseph 'Pharmaceutical corporations and access to drugs: The "fourth wave" of corporate human rights scrutiny' (2003) 25(2) *Human Rights Quarterly* 425; Danwood M Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19(4) *South African Journal on Human Rights* 541-554; WHO 'Evolving public-private roles in the pharmaceutical sector' A report of an Information Consultation, Geneva, Switzerland, 15-18 April 1996, available at <http://whqlibdoc.who.int/hq/1997/WHO_DAP_97.10.pdf> (accessed: 30 April 2005).

sector – have responsibilities regarding the realisation of the right to health.¹¹⁴ It has also stated that State parties must take legislative and other measures to:

- ensure equal access to health care and health-related services provided by third parties;
- ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services;
- control the marketing of medical equipment and medicines by third parties;
- ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct;
- ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning;
- prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation;
- protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence; and
- ensure that third parties do not limit people's access to health-related information and services.¹¹⁵

Clearly, therefore, the right to health is capable of reaching private conduct.

¹¹⁴ General Comment No 14, above n 110, para 42.

¹¹⁵ Ibid para 35.

4.4.6 *The right to education*

The right to education is recognised in a wide range of international and regional instruments. Some of these, including the ICESCR,¹¹⁶ define this right as if it is states only that have obligations in relation to it.¹¹⁷ Other instruments, however, use open-ended language.¹¹⁸

Education is usually classified as a public service but it is a service that has for long been also provided by non-state actors. Many religious schools are run by non-state actors while private schools generally are also not uncommon. Employers can infringe this right by engaging in child labour or employing children in exploitative work.¹¹⁹ Parents can also limit this right by preventing children (especially the girl child) from going to school.¹²⁰ Other non-state actors could interfere with this right through practices such as child trafficking and prostitution.¹²¹



¹¹⁶ See articles 13 & 14.

¹¹⁷ Eg article 10 of CEDAW; article 5(e)(v) of CERD; articles 23, 28 & 29 of the CRC; the Convention against Discrimination in Education.

¹¹⁸ Eg, article 14 of the African Charter; article 26 of the UDHR; article 13 of the Additional Protocol to the American Convention.

¹¹⁹ Timothy A Glut 'Changing the approach to ending child labor: An international solution to an international problem' (1993) 28 *Vanderbilt Journal of Transnational Law* 1203; Matthew Bazzano 'Child labor: What the United States and its corporations can do to eliminate its use' (1996) 18 *Hamline Journal of Public Law and Policy* 200; Jennifer Bol 'Using international law to fight child labor: A case study of Guatemala and the inter-American system (1998) 13 *American University International Law Review* 1135.

¹²⁰ See generally Amy R Ritualo, Charita L Castro & Sarah Gormly 'Measuring child labor: Implications for policy and program design' (2003) 24 *Comparative Labor Law and Policy Journal*

International instruments suggest that aspects of this right bind non-state actors directly and indirectly. For example, article 13(1) of the ICESCR, article 26(2) of the UDHR, and articles 1 and 2 of the Charter of the United Nations set out the aims and objectives of education.¹²² The CESCR has stated that, while individuals and other entities have the liberty to establish and direct educational institutions, all education, whether public or private, formal or non-formal, should be directed towards these aims and objectives and must conform to certain minimum standards.¹²³ It has also stated that States Parties must take measures to prevent third parties from interfering with the enjoyment of this right; for example by ensuring that third parties such as parents and employers do not stop girls from going to school.¹²⁴

Furthermore, the CESCR has recommended that '[c]oordinated efforts for the realisation of the right to education should be maintained to improve coherence and interaction among all actors concerned, including the various components of civil



401; Thomas S Weisner 'The crisis for families and children in Africa: Change in shared social support for children' (1994) 4 *Health Matrix: Journal of Law-Medicine* 1.

¹²¹ See generally Susan O Von Struensee 'Violence, exploitation and children: Highlights of the United Nations Children's Convention and international response to children's human rights' (1995) 18 *Suffolk Transnational Law Review* 589; Elizabeth M Bruch 'Models wanted: The search for an effective response to human trafficking' (2004) 40 *Stanford Journal of International Law* 1.

¹²² Eg that education should be directed to the human personality's sense of dignity; that it should enable all persons to participate effectively in a free society; that it should promote understanding among all ethnic groups as well as nations, racial and religious groups; that it should be directed to the full development of the human personality.

¹²³ General Comment No 13 'The right to education (art 13 of the ICESCR)' adopted by CESCR at its 21st session, 15 November – 3 December 1999, paras 4, 29 & 59.

¹²⁴ *Ibid* paras 47 & 50.

society.’¹²⁵ It has also urged international financial institutions, especially the World Bank and IMF, to ‘pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.’¹²⁶

It can therefore be stated that this right is also applicable in the private sphere.

4.4.7 *Cultural rights*

Article 15 of the ICESCR guarantees cultural rights. These rights entail three elements: Firstly, the right of everyone to take part in cultural life; secondly, the right of everyone to enjoy the benefits of scientific progress and its applications; and thirdly, the right of everyone to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.¹²⁷ The UDHR contains a similar definition of cultural rights except that it uses neutral language regarding the duty-holders.¹²⁸

Examples of violations of these rights by non-state actors may occur when the latter produce goods and services which are culturally inappropriate,¹²⁹ or patent or obtain copyrights or trademarks in respect of traditional knowledge relating to songs, music, dances, literature, artworks, treatment methods or take and place traditional

¹²⁵ Ibid, para 60.

¹²⁶ Ibid.

¹²⁷ Article 15(1) of the ICESCR.

¹²⁸ See article 27.

¹²⁹ The CESCR has stated that water, health, food and other basic services must respect the culture of individuals, minorities, and indigenous groups. See eg General Comment No 14, above n 110, para 12(c); General Comment No 12, above n 75, paras 11 & 39.

paintings and crafts in museums without the knowledge of the local communities or giving the latter compensation.¹³⁰

The rights to culture are often also aimed at protecting minorities and indigenous person. For example, the ICCPR provides:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹³¹

The cultural rights of minorities and indigenous peoples are also protected in the ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries,¹³² the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious,¹³³ and the European Charter for Regional or Minority Languages.¹³⁴ These rights have been subjected to wide ranging violations by non-state actors. As the cases discussed in chapter 4 demonstrate, examples of such violations include deprivation



¹³⁰ See eg Audrey R Chapman 'The human rights implications of intellectual property protection', (2002) 5 *Journal of International Economic Law* 861; Daniel J Gervais 'Spiritual but not intellectual? The protection of sacred intangible traditional knowledge' (2003) 11 *Cardozo Journal of International and Comparative Law* 467; Susan Scafidi 'Intellectual property and cultural rights' (2001) 81 *Boston University Law Review* 793.

¹³¹ Article 27.

¹³² Adopted by the General Conference of the International Labour Organisation at its seventy-sixth session on 27 June 1989 (entry into force: 5 September 1991).

¹³³ GA Res 47/135, Annex, 47 UN GAOR Supp (No 49) at 210, UN Doc A/47/49 (1993).

¹³⁴ Adopted by the Committee of Ministers of the Council of Europe on 2 October 1992 and opened for signature on 5 November 1992 (entry into force: 1 March 1998).

of land, forced relocation, pollution of the air and water, deforestation, and forest logging, which affect their way of life.¹³⁵

Given the vulnerability of these rights to infringements by non-state entities, it is important that these rights must also apply in private relations.

2.5 Conclusion

The foregoing section has shown that the general perception denying the application of economic, social and cultural rights to non-state actors is misconceived. On the contrary, almost every economic, social and cultural right is capable of applying to horizontal relations. While the formulation of a right can shed light on its potential to apply to non-state actors, one should also bear in mind the fact that human rights instruments are living documents that must be construed progressively in the light of changing circumstances. Not only do circumstances now require that non-state actors should be bound by human rights, as argued throughout this study, existing international and domestic norms and jurisprudence increasingly point to the recognition of the relevance of human rights including economic, social and cultural rights in the private sphere. The next section considers the nature of the obligations of non-state actors in relation to economic, social and cultural rights, and their applicability to non-state actors.

¹³⁵ See *Ilmari Länsman v Finland* Communication No 511/1992 UN Doc CCPR/C/52/D/511/1992 (26 October 1994) (*Länsman No 1*); *Jouni Länsman v Finland* Communication No 671/1995 UN Doc CCPR/C/58/D/671/1995 (30 October 1996) (*Länsman No 2*).

3 THE NATURE OF DUTIES

3.1 The trinity of human rights duties

As related earlier, all rights generate positive and negative obligations: the former oblige the state to take positive action to fulfil the rights while the latter require the state to refrain from acting. However, the recognition of precise categories of human rights obligations is a relatively recent development. It has been suggested that Henry Shue may have been the first scholar to identify clearer categories of duties in relation to human rights.¹³⁶ In his seminal work on ‘subsistence rights’ published in 1980, he argued that every basic right entails three duties: ‘to avoid depriving’, ‘to protect from deprivation’, and ‘to aid the deprived’.¹³⁷ This classification of duties was adopted and refined by Asbjørn Eide in 1987, who termed these duties, the duty ‘to respect’, ‘to protect’ and ‘to fulfil’ respectively.¹³⁸ International and regional human rights

¹³⁶ See Sigrun Skogly ‘Extra-national obligations towards economic and social rights’ (International Council on Human Rights Policy, 2002) available at <<http://www.ichrp.org/index.html?project=108>> (accessed: 30 April 2005); Fons Coomans ‘The Ogoni case before the African Commission on Human and Peoples Rights’ (2003) 52 *International and Comparative Law Quarterly* 749, 752.

¹³⁷ Shue, above n 7, 52.

¹³⁸ See Asbjørn Eide *Final report on the right to adequate food as a human right* UN Doc E/CN.4/Sub.2/1987/23; Asbjørn Eide ‘Economic, social and cultural rights as legal rights’ in Asbjørn Eide, Catarina Krause & Allan Rosas (eds) *Economic, social cultural rights: A textbook* (Dordrecht: Martinus Nijhoff Publishers, 1995) 21, 35 – 40.

monitoring bodies and domestic constitutions and courts have increasingly adopted Eide's typology.¹³⁹

The duties to respect, protect and fulfil have for the most part been defined in relation to the state. This section defines these duties as developed in relation to the state. We then discuss their applicability to non-state actors in the next section.

The duty to respect is 'the most nearly negative or passive kind of duty that is possible'.¹⁴⁰ It can also be regarded as the most basic duty. According to Asbjørn Eide, the duty to respect requires 'the state to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including freedom to use the material resources available to that individual in the way she or he finds best to satisfy basic needs.'¹⁴¹ In the context of economic, social and cultural rights, Eide argues that this duty enjoins the state to 'respect the resources owned by the individual, her or his freedom to find a job of his preference and the freedom to take the necessary actions and use the necessary resources – alone or in association with others – to satisfy his or her own needs'.¹⁴² Henry Shue defines this duty (which he calls the duty 'to avoid') similarly as imposing an obligation not to eliminate a

¹³⁹ Eg see the African Commission's decision in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No 155/96 (2001) (*SERAC Case*); General Comment No 13, above n 123, para 46 ; General Comment No 14, above n 110, para 33; General Comment No 12, above n 75, para 15; and section 7 of the South African Constitution, which provides that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁴⁰ Shue, above n 7, 55.

¹⁴¹ Asbjørn Eide 'Realisation of social and economic rights: A minimum threshold approach' (1989) 10(1-2) *Human Rights Law Journal* 35, 37.

¹⁴² Eide 'Economic, social and cultural rights as legal rights', above n 138, 37.

person's security or a person's available means of subsistence.¹⁴³ According to Shue, the duty to avoid is 'a duty simply not to take actions that deprive others of a means that, but for one's own harmful actions, would have satisfied their subsistence rights, where the actions are not necessary to the satisfaction of one's own basic rights and where the threatened means is the only realistic one.'¹⁴⁴ The South African Constitutional Court has adopted a similar definition. It has stated that the duty to respect requires the state to 'desist from preventing and impairing' access to socio-economic rights.¹⁴⁵

While the duty to respect is often interpreted as requiring negative action, it must be pointed out that it also entails positive elements. Sandra Liebenberg has argued in relation to the South African Constitutional Court's jurisprudence that the duty to desist from 'preventing and impairing' access to rights is broad enough to include policies that result in denial of access to poor communities of the right, rather than simply an interference with the existing access to the right.¹⁴⁶ Moreover, breach of the duty to respect may require the duty-holder to take positive action to remedy the breach. For example, the South African Constitutional Court's decision in *Minister of Health v Treatment Action Campaign No 2*¹⁴⁷, holding that the policy of the South African government which limited the availability of Nevirapine to research and

¹⁴³ Shue, above n 7, 54-55.

¹⁴⁴ Ibid 55.

¹⁴⁵ *Grootboom*, above n 10, para 34.

¹⁴⁶ Sandra Liebenberg 'Socio-economic rights' in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, & Stuart Woolman (eds) *Constitutional Law of South Africa* (Cape Town: Juta & Co Ltd, 2004) 33 – 18.

¹⁴⁷ 2002 (5) SA 721 (CC)

training sites was unconstitutional, could be construed to be an instance of a finding of a violation of the duty to respect.¹⁴⁸ But the order made by the Court to rectify the violation required the government to take positive action as well. Among other things, it required the government to '[p]ermit and facilitate' the use of Nevirapine and 'to make it available' where medically indicated.¹⁴⁹

The duty to protect is a secondary obligation. As Henry Shue has argued, this duty is critical to ensuring that the duty to 'avoid' is observed.¹⁵⁰ If everyone were to fulfil their duty to avoid deprivation, the duty to protect would be unnecessary.¹⁵¹ According to Eide, the duty to protect obligates the state to protect 'the freedom of action and the use of resources against other, more assertive or aggressive subjects – more powerful economic interests'.¹⁵² As was noted in chapter 4, the elements of the duty to protect are threefold and closely interrelated: firstly, the duty to prevent violations of human rights by third parties from occurring; secondly; the duty to regulate and control third parties; and thirdly; the duty to react to human rights violations committed by third parties by investigating and punishing them and/or providing remedies.¹⁵³

¹⁴⁸ In fact, Liebenberg (above n 146 33 – 19) has submitted that this case is an example of a situation where it is difficult to say that the Court found a breach of negative obligation or positive obligations.

¹⁴⁹ Ibid orders 3(a) & (b) para 135. On this link, see also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

¹⁵⁰ Shue, above n 7, 55.

¹⁵¹ Ibid.

¹⁵² Eide, 'Economic, social and cultural rights as legal rights', above n 138, 37.

¹⁵³ See section 3.1 of chapter 4.

The state discharges the duty to protect through ‘the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations’ to enable individuals to freely realise their rights and freedoms.¹⁵⁴ It has to establish ‘an effective regulatory system’ providing for ‘independent monitoring, genuine public participation and imposition of penalties for non-compliance’.¹⁵⁵ Adoption of legislation is not exhaustive of the state’s duty to protect citizens from violations by third parties. Administrative, economic, social, political and other measures must complement legislation.¹⁵⁶

As mentioned in chapter 4, the duty to protect is enforceable against the state. Not every violation of a human right in the private sphere will give rise to state responsibility. In order to succeed in a claim that the state has violated the duty to protect a right, the claimant must prove that the state failed to exercise due diligence to protect the rights in question. This test was first developed in the case of *Velásquez Rodríguez v Honduras*¹⁵⁷ decided in 1988 and has since been adopted by a range of international human rights instruments and monitoring bodies.¹⁵⁸

The duty to fulfil is a tertiary obligation. This obligation may sometimes overlap with what may be commonly called ethical obligations in relation to non-state actors.¹⁵⁹ According to Henry Shue, the duty to ‘aid’ requires that resources be

¹⁵⁴ *SERAC Case*, above n 139, para 46.

¹⁵⁵ General Comment No 15, above n 95, para 24.

¹⁵⁶ General Comment No 3, above n 15, paras 5 – 7.

¹⁵⁷ [1988] Inter-Am Court HR (ser C) No 4.

¹⁵⁸ See chapter 4.

¹⁵⁹ Ethical duties are those that may be morally correct but not legally required. On the link between ethical and legal obligations see, International Council on Human Rights Policy *Taking duties*

transferred to those who cannot provide for themselves.¹⁶⁰ He distinguishes three circumstances in which this duty may arise. The first is where persons are in a relationship of dependence on each other such as the parent/child relationship.¹⁶¹ In this situation, parents have the duties to children such as the duty to provide food to them.¹⁶² The second scenario is where there is a failure to fulfil the duties to avoid depriving and duties to protect from deprivation.¹⁶³ Here, the duty to assist the victims arises because the victims are harmed by actions and omissions of other duty-holders.¹⁶⁴ The last situation is where deprivation results from natural causes not amounting to a dereliction of duty by other people.¹⁶⁵ The duty to aid or assist arising from the last two scenarios would seem to be ethical requiring voluntary conduct from duty-holders and, therefore, not enforceable unless it can be shown that the defendant contributed to the denial of the right. However, this is not the case with the state. The CESCR has stated that the state has an obligation to provide the right when groups or individuals are unable to realise the right by their own means or with state assistance.¹⁶⁶

seriously: Individual duties in international human rights law; A commentary (Versoix: International Council on Human Rights Policy, 1999), 13 – 18.

¹⁶⁰ Shue, above n 7, 56.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid 57.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Eg see General Comment No 12, above n 75, para 15; General Comment No 15, above n 95, para 25.

The duty to fulfil has two further limbs. It entails the obligation to promote. The state is enjoined to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance and raising awareness.¹⁶⁷ As I have argued elsewhere, this duty is essential to ensuring effective public participation and access by the public to information.¹⁶⁸ The other limb is the duty to facilitate the realisation of a right.¹⁶⁹ This duty requires the state to take positive measures that enable and assist individuals or groups to realise the right by their own means.¹⁷⁰

The duty to fulfil may sometimes requiring substantial resources. However, benchmarks for determining when the state will be in violation of this duty have begun to emerge. For example, the South African Constitutional Court has developed the reasonableness test¹⁷¹ while the CESCR has adopted the minimum core

¹⁶⁷ Egg see General Comment No 12, above n 75, para 15; General Comment No 15, above n 95, para 25.



¹⁶⁸ Chirwa, 'Privatisation in southern Africa', above n 83, 239.

¹⁶⁹ General Comment 14, above n 110, para 37; General Comment No 12, above n 75, para 15; General Comment No 15, above n 95, para 25.

¹⁷⁰ Ibid.

¹⁷¹ In *Grootboom*, above n 10, the Court rejected the notion of minimum core obligations. It held that in every case concerning an allegation that the state has violated positive obligations in relation to a socio-economic right 'the real question will be whether the legislative and other measures taken by the state are reasonable' (para 41). It was emphasized that the Court would not enquire into whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent.

A reasonable programme is one that 'clearly allocates responsibilities and tasks to the different spheres of government and ensures that appropriate financial and human resources are available'. It must be coordinated, comprehensive and coherent (paras 39 - 41). Additionally, it must be 'balanced

obligations, and the progressive realisation standards.¹⁷² These benchmarks are very recent, novel and not perfect¹⁷³ but they underscore the fact that the duty to fulfil/provide economic, social and cultural rights may also be enforceable in courts of law.

and flexible and make appropriate provision for attention to housing crises and to short-term, medium and long-term needs' (para 43). Thus, a programme that 'excludes a significant segment of society cannot be said to be reasonable' and those 'whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril' must not be ignored (paras 43 - 44).

¹⁷² The CESCR has stated that that 'progressive realisation' means that the state has the obligation to move as expeditiously and effectively as possible towards the realisation of socio-economic rights. It also means that 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.' Furthermore states bear 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels' of socio-economic rights. A state is in violation of the ICESCR if, for example, a significant number of its people are deprived of 'essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education'. A state that pleads insufficiency of resources as a defence to a failure by it to discharge its minimum core obligations shoulders the burden of showing that *it made efforts to use all resources at its disposal to satisfy, as a matter of priority, the minimum core obligations*. General Comment No 3, above n 15, paras 9-11.

¹⁷³ For scholarship analysing these standards see Sandra Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights' (2002) 6(2) *Law, Democracy and Development* 159; David Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119(3) *South African Law Journal* 484; Theunis Roux 'Understanding *Grootboom* – A response to Cass R Sustein' (2002) 12 *Constitutional Forum* 112; Murray Wesson '*Grootboom* and beyond: Reassessing the Socio-economic rights jurisprudence of the South African Constitutional Court' (2004) 20(2) *South African Journal on Human Rights* 284.

It is clear therefore that human rights generate three levels of duty on the state, namely, to respect, protect and fulfil. The duty to respect has been the most litigated duty. The enforceability of the duty to protect became possible only towards the end of the last century but, as was noted in Chapter Four, little litigation has taken place to enforce this duty. The existence and enforceability of the duty to fulfil has been recognised very recently. Unlike the duty to protect, benchmarks for the enforceability of this duty are at a very formative stage.

3.2 The applicability of the trinity of duties to non-state actors

3.2.1 Preliminary comments

As Nicola Jägers has argued, while the duties to respect, protect and fulfil have thus far been developed in relation to states, these duties can, with some modifications, also bind non-state actors.¹⁷⁴ At the same time, it must also be observed that more specific duties of non-state actors can also be identified.

In order to determine whether a duty is capable of binding a non-state actor, one has to consider the nature of the right to which the duty correlates. The factors to be considered when deciding whether a right is capable of applying in the private sphere are relevant here. For example, a right may be defined in a way that specifies the duties of non-state actors. For example, the provision that '[n]o-one may discriminate another person on any prohibited ground' expressly imposes an obligation on everyone including non-state actors not to discriminate.

However, very few provisions in international instruments or domestic constitutions expressly spell out the specific obligations of non-state actors.¹⁷⁵ As was

¹⁷⁴ Jägers, above n 27, 78.

¹⁷⁵ The same can also be said of states.

noted in relation to the criteria for determining the applicability of a given right to non-state actors, context is also a very critical factor. Thus, a right that may first appear to be directed at the state alone may also bind non-state actors depending on the circumstances of a given case. To revert to the example cited earlier, fair trial rights, which on face value may appear to bind the state alone, could generate duties on non-state actors who operate prisons in the context of privatisation.

The second consideration is the nature of the duty. Is it feasible that a given actor can bear the duty?¹⁷⁶ The issue of feasibility raises many theoretical, practical and political difficulties relating to the estimation of the capacities of the various actors to bear the duties, questions of priority between a range of responsibilities and the costs involved in discharging the duty.¹⁷⁷ However, it is not necessary to calculate the feasibility of a given duty mathematically in order for one to decide whether a given duty can feasibly be borne by a non-state actor. Some assumptions can be made about the level of resources that a duty could entail for its fulfilment. One has to look at the content of the duty and what it demands on the duty-bearer in order to decide whether it is feasible for it to be discharged by a non-state actor. For example, the duty to protect, as defined above, requires that legislation be enacted and implemented to fulfil this duty. This duty would require that there be parliament, a ministry of justice, and relevant officials to oversee the implementation of the legislation. Clearly, this duty involves both significant financial, human and administrative resources. The same can be said about the duty to fulfil and, to a limited extent, the duty to respect. It must be underlined, however, that not all positive duties would require huge financial

¹⁷⁶ See James W Nickel 'How human rights generate duties to protect and provide' (1993) 15 *Human Rights Quarterly* 77, 80.

¹⁷⁷ *Ibid* 81 – 82.

and human resources or infrastructure. Examples of such obligations are identified in the next sections. An important question should therefore be whether it is reasonable, having regard to the nature and content of the duty at hand, to impose the duty on a given non-state actor.

The question of feasibility is related to the third factor, namely – the nature and activities of the non-state actors. Much debate on the responsibility of non-state actors for human rights has centred on multinational enterprises, and to a lesser extent, international organisations, non-governmental organisations and other non-state actors.¹⁷⁸ The underlying assumption is of course that multinational enterprises have the financial and, at times, political power that puts them in a position to abuse human rights and escape responsibility for them.¹⁷⁹ However, the thrust of this dissertation is that there is a need for a coherent and holistic theoretical framework for the accountability of all non-state actors for human rights. Thus, while size of a non-state actor or the level of economic, social or political influence it enjoys may be relevant to the issue of feasibility, these considerations may not be conclusive on whether the actor should bear a given obligation.¹⁸⁰ For a non-state actor small in size but

¹⁷⁸ As is clear from chapters 3 and 5, efforts aimed at regulating non-state actors have focussed more on multinational enterprises than other non-state actors.

¹⁷⁹ See chapter 4.

¹⁸⁰ In the *Blinkfuer Case* 25 BVerfGE 250, for example, the Federal Constitutional Court of Germany considered whether the circular issued by Axel Springer, a powerful newspaper company, instructing kiosk operators not to sell a certain newspaper and threatening to withdraw its own newspaper from the dealers who refused to comply with the order constituted unfair competition. The Court stated that:

The call for a boycott may still enjoy protection from the Constitution even where the caller [of the boycott] competes professionally, economically, or in some form of business relationship... if the advocate of a boycott possesses a certain amount of

involved in activities that present a very high risk to the rights of individuals or groups could have more human rights obligations than a non-state actor involved in activities that do not present any meaningful risks to peoples' human rights. For example, a small company in charge of water treatment would have to exercise greater care and diligence to avoid contaminating water or ensure that other non-state actors do not contaminate water, which may lead to serious health complications and hazards. It is therefore important to consider the nature of the activities of the non-state actor as well as the size of the non-state actor. If the duty sought to be imposed on the non-state actor is closely related to the core activities of the non-state actor, then the actor must be bound to perform it: the closer the duty is related those core activities the greater the obligation on the duty-bearer. Furthermore, one must



economic power, his or her influence is likely to be substantial. But this fact in and of itself will not render the call for a boycott inadmissible; the Constitution does not bar the economically more powerful from engaging in the intellectual struggle of opinion.

However, it was held in this case the circular issued by the company infringed upon the right to freedom of the press as it amounted to an abuse of economic powers. The Court stated that

Exercise of economic pressure that leads to severe drawbacks for those concerned and pursues the objective of preventing the constitutionally guaranteed free dissemination of opinions and information infringes the equality of opportunities in the process of opinion-formation. It further contradicts the meaning and essence of the fundamental right to free expression of opinion, which is intended to guarantee the intellectual clash of opinion.

Part of this judgment is reproduced in Donald P Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2ed) (Durham & London: Duke University Press, 1997) 372 – 4.

consider the potential threat that the activities of the non-state actor poses to human rights: the greater the threat, the greater the obligations.¹⁸¹

The fourth consideration relates to the question of the entity to which the duty is owed. States owe human rights obligations to everyone. This is not the case with non-state actors, which may not owe everyone positive obligations in relation to human rights. Steven Ratner has submitted that there must be a nexus between the non-state actor and the claimant possessing human rights for the former to be bound by a given human right duty.¹⁸² This test has been endorsed by David Kinley and Junko Tadaki,¹⁸³ and the International Council on Human Rights Policy.¹⁸⁴ It can also be regarded as having been endorsed by the UN Global Compact¹⁸⁵ and the UN Norms.¹⁸⁶

¹⁸¹ *Rail Commuters Action Group and Others v Transnet Ltd and Others* 2005 (4) BCLR 301 (CC) para 88, discussed in chapter 6.

¹⁸² Steven R Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 443, 506 – 511.

¹⁸³ David Kinley & Junko Tadaki 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' (2004) 44 *Virginia Journal of International Law* 931, 963 – 4.

¹⁸⁴ International Council on Human Rights Policy, above n 55, 136.

¹⁸⁵ Principle 1 requires companies to 'Support and respect the protection of international human rights within their sphere of influence.'

¹⁸⁶ Para A.1 of the UN Norms provides that:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.'

The proximity test posits that individuals and institutions owe greater duties to those with whom they have special associative ties than to others beyond that sphere.¹⁸⁷ Thus, as the association between an enterprise and the claimant lessens, the duties of the enterprise lessen as well.¹⁸⁸ An industrial plant owes more duties in relation to the right to health (in connection with environmental damage for example) to those living in the neighbourhood than those living far away. A corporation may have the duty to provide security benefits to its employees but not anybody else. The proximity could be physical or not. As the International Council on Human Rights Policy has stated, a non-state actor's sphere of influence 'may encompass those to whom it has a certain political, contractual, economic or geographical proximity.'¹⁸⁹ A consumer of medical products may be living far away from a pharmaceutical company that produced them but the latter may still be bound by the duty to ensure that the medical products are safe and of appropriate quality. Proximity could also be direct or indirect. Direct proximity will exist where the actor has direct close relations with rights-holders such as employees, consumers or the local neighbourhood. Indirect proximity will arise where a non-state actor has no direct connections with rights-holders but has close connection with other actors whose activities infringe the rights of individuals.¹⁹⁰ For example, a company involved in a joint venture with a state to build a gas pipeline could be indirectly proximate to victims of forced labour, where the forced labour benefits the joint venture and is employed by the state with actual or constructive knowledge of the non-state actor.

¹⁸⁷ Ratner, above n 182, 507 – 508.

¹⁸⁸ Ibid 508.

¹⁸⁹ International Council on Human Rights Policy, above n 55, 136.

¹⁹⁰ Ibid 136 – 141.

To conclude, the applicability of human rights obligations to corporations will depend on a range of factors. Although not exhaustive, the preceding section has identified four key factors in this regard, namely – the nature of the right, the nature of the obligation, the nature of the non-state actor and its activities, and how proximate the non-state actor is to rights-holders.

The following section attempts to identify some general socio-economic rights obligations of non-state actors. These obligations could be relevant to all rights but the examples given relate largely to economic, social and cultural rights, which forms the focus of this study.

3.2.2 *The duty to respect*

As noted above, the duty to respect is the most basic duty and the one that has been subject to judicial enforcement more than any other duty. It lies central to the liberal conception of rights as injunctions requiring duty-holders to refrain from acting. To the extent that this duty requires negative action, it is feasible that this duty should be borne by non-state actors. To the extent that this duty entails positive elements, such as where a policy adopted by a company discriminates against women, there might be need to show that the victim is proximate to the company as argued above.

In defining the duty to ‘avoid’, Henry Shue suggests that this duty could also bind non-state actors. He submits that the fulfilment of a basic right requires ‘the performance by some individuals or institutions of each of the three general kinds of correlative duties’.¹⁹¹ In illustrating the interdependence between the duty to avoid and the duty to protect, he notes that ‘if everyone who ought to fulfil duties to avoid

¹⁹¹ Shue, above n 7, 60.

did so, performance of duties to protect might not be necessary.’¹⁹² Nicola Jägers has argued that the duty to respect ‘can be considered the least controversial in the light of its applicability to corporations.’¹⁹³ David Kinley and Junko Tadaki have presented their argument for the recognition of human rights duties of corporations by distinguishing between self reflexive duties (which apply to the duty-bearers own conduct) and third-party duties (which apply to conduct of others with whom the duty bearer has dealings or has some control or influence). They contend that the proposition that corporations are bound by self-reflexive duties is ‘relatively unproblematic’.¹⁹⁴ A reflexive duty, they posit, is a ‘minimum duty “to do no harm” to all those with whom the TNCs have contact.’¹⁹⁵ James Nickel has also contended that individuals and institutions everywhere have the primary duty to refrain from violating rights.¹⁹⁶ He argues that this duty is ‘universal in the sense of being against everyone’ as it ‘can feasibly be borne and fulfilled by all’.¹⁹⁷

The view that non-state actors are bound by the duty to respect human rights including economic, social and cultural rights was recently upheld (*obiter*) by the South African Constitutional Court in *Grootboom*.¹⁹⁸ In this case, the Court held in the context of the right of access to adequate housing that there exists ‘at the very

¹⁹² Shue, above n 7, 60-61.

¹⁹³ Jägers, above n 27, 79.

¹⁹⁴ Kinley & Tadaki, above n 183, 963.

¹⁹⁵ *Ibid.*

¹⁹⁶ James W Nickel ‘How human rights generate duties to protect and provide’ (1993) *Human Rights Quarterly* 77.

¹⁹⁷ *Ibid* 80 – 81.

¹⁹⁸ *Grootboom*, above n 10.

least, a negative obligation upon the state and *all other entities and persons* to desist from preventing or impairing the right of access to adequate housing.¹⁹⁹

While the various international and regional instruments discussed earlier in this chapter suggesting that economic, social and cultural rights are capable of applying in the private sphere can be interpreted to generate a duty on non-state actors to respect these rights, a wide range of other soft-law norms, some of which have been accepted by non-state actors themselves, expressly recognise this duty of non-state actors. To begin with, article 1 of the UN Norms provides that transnational corporations and other business enterprises have the obligation, among other things to ‘respect’ and ‘ensure respect of’ human rights recognised in international and national law. Secondly, the OECD Guidelines as revised in 2000 expressly require enterprises to ‘[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.’²⁰⁰ Thirdly, the ILO Tripartite Declaration obligates all parties concerned including employers (both public and private) to ‘[r]espect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation’.²⁰¹ Fourthly, the UN Global Compact also provides that ‘[b]usinesses should support and *respect* the protection of internationally proclaimed human rights.’²⁰² Nicola Jägers has observed that various corporate codes of conduct also recognise that corporations have the duty to respect human rights.

¹⁹⁹ Ibid para 34 (emphasis added).

²⁰⁰ Part II(2) of the OECD Guidelines: Revision 2000, discussed in chapter 5.

²⁰¹ Para 8. The Tripartite Declaration is discussed in chapter 5.

²⁰² Principle 1 (emphasis added). The Global Compact is discussed in chapter 5.

Many examples can be cited of instances of violations of the duty to respect economic, social and cultural rights by non-state actors. Forcibly displacing people from their land in order to carry out a development project could amount to a violation of the duty to respect the rights to housing, food, culture and family protection. Contamination of soil and water resulting from wastes from an oil plant can amount to violations of the duty to respect the right to food, the right to water, and the right to health.²⁰³ A pharmaceutical corporation manufacturing or advertising an unsafe drug which gives rise to health hazards could be guilty of violating the duty to respect the right to health.

It must be emphasised, as noted above, that the duty to respect does not simply entail negative action. It also has positive dimension in that failure to take certain steps to prevent violations might give rise to a non-state actor's breach of the duty to respect. For example, in *Port Elizabeth Municipality v Various Occupiers*, the South African Constitutional Court held that courts should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative accommodation or land is available.²⁰⁴ Similarly, failure by an oil company to put in place measures to control oil wastes from spilling into neighbouring land can result in a violation of the duty to respect the right to health, food and water. A pharmaceutical corporation may also not be able to fulfil the obligation to respect the right to health if it fails to take steps to ensure that the drugs it manufactures are safe for human use. To do this, it might have to take a wide range of measures including a protracted testing process of the drugs.

²⁰³ Eg see the *SERAC Case*, above n 139.

²⁰⁴ 2005 (1) SA 217 (CC).

It can be concluded therefore that the duty to respect is a fundamental one. As it requires duty-holders to refrain from acting, this duty raises not feasibility concerns and should therefore bind everyone. A claimant would have to establish a nexus with the actor where an alleged violation of this duty relates to positive measures to be taken by the actor because such claims may only be made against persons with whom the right-holder stands in some relationship. Academic opinion, some domestic courts and a range of international hard law and soft law norms including corporate codes of conduct already acknowledge that this duty is applicable against everyone.

3.2.3 *The duty not to be complicit in violations*

A key duty of non-state actors is the duty not to be complicit in human rights violations. This duty does not fit neatly in the trilogy of human rights duties discussed above. It sits uneasily between the duty to respect and the duty to protect. While the duty not to be complicit can be regarded as a species of the duty to respect, the former is distinguishable in the sense that it deals with a situation where a violation is committed by a third party. But the duty bearer will not be held responsible for failing to take steps to prevent or regulate the perpetrator of a human rights violation but because of the duty bearer's acts which can be construed to have contributed to the occurrence of the violation. For this reason, the duty not to be complicit does not really qualify as a duty to protect.

Both the UN Global Compact and the UN Norms recognise this duty expressly as a separate obligation. Principle 2 of the UN Global Compact states that companies must '[m]ake sure their own corporations are not complicit in human rights abuses.' Paragraph C(3) of the UN Norms obligate transnational corporations and other business enterprises 'not to engage in or benefit' from violations of international law and humanitarian law as defined by international law (in particular human rights and

humanitarian law). Furthermore, the Norms require these entities to ‘refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights’.²⁰⁵ They also obligate these entities to ‘seek to ensure that the goods and services they provide ill not be used to abuse human rights.’²⁰⁶

The nature of the duty not to be complicit is such that it can be borne by non-state actors. This duty actually arises in instances where the alleged duty bear may not be directly proximate to the rights holders. The first is where non-state actors solicit, encourage, or support other actors (state or non-state) either directly or indirectly in the commission of human rights violations.²⁰⁷ As an illustration, the case of *Doe v Unocal*²⁰⁸ dealt with allegations of several human rights violations including forced labour, rape, torture and murder committed directly or indirectly by Unocal, a corporation, during the implementation of a joint project between the Myanmar government and Unocal relating to the construction of a pipeline to carry gas. In an appeal to the United States Court of Appeal of the Ninth Circuit, the appellants (plaintiffs) argued for the reinstatement of their action on the ground that their case showed that Unocal aided and abetted the Myanmar Military to commit the human rights violations complained of.

The Court agreed with the appellants. It held that an actor does not have to engage in ‘active participation, in the commission of a violation for him/her to be held liable

²⁰⁵ See para E(11).

²⁰⁶ Ibid.

²⁰⁷ International Council on Human Rights Policy, above n 55, 126.

²⁰⁸ 2002 WL 31063976 (9th Cir.(Cal.)), RICO Bus Disp Guide 10 336 2 Cal Daily Op Serv 9585, 2002 Daily Journal DAR 10 794.

for the violation.²⁰⁹ The Court stated that the principles of aiding and abetting developed by the *ad hoc* international criminal tribunals for Yugoslavia and Rwanda are also relevant and useful to civil cases dealing with violations of human rights.²¹⁰ Some of the principles adopted state that a person giving ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime will give rise to his/her responsibility for the crime.’²¹¹ The act of assistance need not have caused the act of the principal but must make a significant difference to the commission of the criminal act by the principal.²¹² Furthermore, the act of assistance could be physical or moral.²¹³ The knowledge of the commission of violations could either be actual or constructive, but the accomplice need not share the criminal intention of the principal.²¹⁴

Applying these principles, the Court found that the appellants’ case raised triable issues. It found that there was evidence in support of the finding that Unocal gave practical assistance to the Myanmar military in subjecting the plaintiffs to forced labour, rape and murder. Among other things, the practical assistance was given in the form of hiring the military to provide security and build infrastructure along the

²⁰⁹ Ibid para 11.

²¹⁰ Ibid 12. See also *Cabello Barrueto v Fernandez Larios* 205 F.Supp.2d 1325, 1333 (S.D.Fla.2002); *Mehinovic v Vuckovic* 198 F.Supp.2d 1322 (N.D.Ga.2002)

²¹¹ *Doe v Unocal*, above n 207, 12. See also *Prosecutor v Furundzija* IT-95-17/1 T (10 December 1998) reprinted in 38 *ILM* 317 (1999).

²¹² *Doe v Unocal*, *ibid*, para 12; *Prosecutor v Tadic* ICTY-94-1 para 688 (May 7, 1997).

²¹³ *Doe v Unocal*, *ibid*, para 13; See also *Prosecutor v Musema* ICTR-96-13-T (Jan. 27, 2000).

²¹⁴ *Doe v Unocal*, *ibid*. See also *Musema*, *ibid*, 180.

pipeline route in exchange for food, and using photos, surveys, and maps in daily meetings to show the military where to provide security and build infrastructure.²¹⁵

Secondly, the duty not to be complicit would arise where a non-state entity is involved in a joint venture with a state or another non-state entity. The case of *Doe v Unocal* also dealt with a situation whereby the Myanmar government and Unocal were involved in a joint venture, but the Appeals Court did not deal with this element of complicity. However, in an earlier decision in the same case, a District Court suggested that Unocal could be liable if it knew that forced labour was being used and that the joint venture benefited from the practice.²¹⁶ The International Council on Human Rights Policy has submitted along similar lines that where a company willingly enters into a joint venture with a likely perpetrator of human rights violations, it should be held responsible for the violations committed by the perpetrator even though the company may not have done anything that actively assists the perpetrator other than fulfilling its side of the obligations.²¹⁷ This element of the duty not to be complicit can be seen as requiring an entity to take measures to make it clear to the other party that it will not allow the other party to fulfil their part of the obligations by committing human rights.

The duty not to be complicit could also arise where a non-state actor does not assist or procure the violations committed by the state but remains silent about them.²¹⁸

²¹⁵ *Doe v Unocal*, *ibid*, paras 14 – 17.

²¹⁶ *Doe v Roe II*, 110 F. Supp. 2d 1310. However, the Federal Court held further that active participation of Unocal in the violations was required, a decision reversed by the Appeal Court of the Ninth Circuit.

²¹⁷ International Council on Human Rights Policy, *above n 55*, 128.

²¹⁸ *Ibid* 133.

This situation is different from the one involved in a joint venture in that a non-state actor under in the first case, the non-state actor is not involved in a direct partnership with the state in terms of an agreement on a defined project whose implementation leads to the occurrence of the violations. It would be unrealistic to argue that non-state actors should be held to be complicit in violations committed by the state or another non-state actor simply because the former does not speak out against the violations or does not do anything about them. However, there is a strong case for the position that in certain limited circumstances, certain non-state actors should be held responsible for 'gross' human rights violation committed by other actors if the former do not do anything about them. One such instance would be where a non-state actor with actual or constructive knowledge of the occurrence of serious violations of human rights derives substantial benefits either directly or indirectly from those violations.²¹⁹ An example of such a case is where a government suppresses trade union activities and companies voluntarily provide details of their employees involved in trade union activities knowing that they would be subjected to other human rights violations.

Both the UN Global Compact Principles and the UN Norms require transnational corporations and other business enterprises not to benefit from violations committed by authorities.²²⁰

Another instance where silence or inaction could give rise to complicity is where the international community speaks out against a given regime regarding its human rights record e.g. by imposing sanctions. According to Nicola Jägers, companies must not cooperate with government that have been widely condemned for their

²¹⁹ Ibid 134.

²²⁰ See principle 2 of the UN Global Compact and para C(3) of the UN Norms.

widespread human rights violations.²²¹ Non-cooperation may entail that companies cease operations in the state concerned.²²² Where the business operations continue, the actors involved should take measures to ensure that it does not unintentionally participate in human rights violations.²²³ A classic example given by Jägers is the Sullivan Principles adopted by US corporations operating in South African during the apartheid era whereby US corporations committed themselves to implementing non-discriminatory working conditions for black South Africans.²²⁴

Given that many violations of human rights are committed indirectly by non-state actors, it is important to recognise a specific duty of these actors not to be complicit in violations of human rights. The nature of this duty would not overburden non-state actors as it largely enjoins them not to be involved in acts knowingly that these acts will provide opportunities for violating human rights and not to derive benefits from human rights violations.



3.2.4 *The duty to exercise rights responsibly*

Unlike states, some non-state actors have human rights. Thus, claims alleging violations of human rights by such actors will often meet the defence that the defendant was merely exercising their right. For example, where an epidemic erupts in a community, a pharmaceutical company which owns a patent to the essential drug that can cure the disease may raise the cost of the drug in order to maximise profits on their discovery. Such a decision may be defended on the basis of the right to property

²²¹ Jägers, above n 27, 92.

²²² Ibid 94.

²²³ Ibid 94 – 5.

²²⁴ Ibid 93. The Sullivan Principles are discussed in chapter 5.

and the right to enjoy the benefits of scientific progress and its applications. This is a situation in which the duty to enjoy rights responsibly arises.²²⁵ This duty is a species of the duty to respect in that it requires the duty bearer to refrain from violating other people's rights. However, as seen above, the former is unique in the sense that it deals with situations where the duty-bearer engages in positive action in pursuit of his/her rights.

The duty to enjoy rights responsibly acts as an internal limitation on the enjoyment of rights. It is implicit in both the liberal conception and cross-cultural perspectives of human rights. As noted in chapter 2, the social contract arose from the evils of absolute freedom. Likewise, chapter 2 established that many non-Western societies had notions of human rights which were conceived of as being inseparably linked to individual duties to others.

The existence of the duty to enjoy rights responsibly is often acknowledged implicitly by international instruments and domestic constitutions through limitation clauses. Civil and political rights, in particular, are often defined with internal limitations allowing the state to limit those rights to protect 'public health', 'public order', 'morals', 'national security', 'the reputation of others', or 'the rights and

²²⁵ According to Leon Trakman and Sean Gatién, the duty to enjoy rights responsibly arises 'when the exercise of a right adversely impacts upon the interests that are not protected by duties arising from the rights of others or state action.' Leon Trakman and Sean Gatién *Rights and responsibilities* (Toronto: University of Toronto Press, 1999) 63. The authors draw a distinction between a duty, which place external limitations on rights and responsibility, which places an internal limitation on rights that are not subject to external limits arising from the rights of others or from state action. However, the authors do not suggest that responsibilities are voluntary or not legal. For purposes of this study, this distinction is not endorsed.

freedoms of others.’²²⁶ As The International Council on Human Rights Policy has argued, these phrases impose restrictions on the enjoyment of rights.²²⁷

However, in some cases the recognition of this duty is express. For example, article 30 of the UDHR provides that ‘[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.’ A similar provision is contained in article 5 common to both the ICCPR and the ICESCR and article 17 of the European Convention. The American Declaration posits that ‘[r]ights and duties are interrelated’ and that ‘[w]hile rights exalt individual liberty, duties express the dignity of that liberty.’²²⁸ It also provides that ‘[i]t is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.’²²⁹ The American Convention endorses these principles by providing that ‘[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.’²³⁰

The African Charter echoes both the American Declaration and Convention by explicitly providing that ‘the enjoyment of rights and freedoms also implies the

²²⁶ Eg see articles 18 – 22 of the ICCPR.

²²⁷ International Council on Human Rights Policy *Taking duties seriously: Individual duties in international human rights law, a commentary* (Versoix: International Council on Human Rights Policy, 1999) 40 – 7.

²²⁸ See the preamble to the Declaration.

²²⁹ Article XXIX.

²³⁰ Article 32(2).

performance of duties on the part of everyone'.²³¹ Moreover, the Charter states that '[t]he right and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'²³²

These provisions support the conclusion that the duty to enjoy rights responsibly has already received some degree of acceptance at both international and domestic levels. As is clear from this discussion, this duty has application to everyone. Furthermore, it is feasible for this duty to be borne by non-state actors.

3.2.5 *The duty to protect*

As related earlier, the duty to protect may require a duty bearer to take measures to prevent violations of human rights by third parties, control or regulate third parties, and respond to those violations when they occur by investigating them, prosecuting perpetrators or providing reparations. This duty is obviously onerous and, as such, non-state actors may not be bound by some of its elements. For example, non-state actors cannot enact legislation or maintain courts to provide remedies to redress human rights violations.

However, certain non-state actors could in certain circumstances be bound by those aspects of the duty to protect which are not too onerous. Non-state actors could be responsible to take measures to prevent violations of human rights where the enjoyment of the services provided by those non-state actors presents risks of violations of the rights of consumers by third parties. This principle was recognised implicitly by the South Africa Constitutional Court in the *Rail Commuters Case*.²³³

²³¹ See the preamble to the Charter.

²³² Article 27(2).

²³³ Above n 181.

This case dealt with the issue whether the respondents had the duty to ensure the safety of passengers travelling on commuter trains. The first respondent, Transnet Ltd, was a public company registered with share capital owned by the state. The second respondent, South African Rail Commuter Corporation Ltd, was also a legal person registered under the Companies Act, 61 of 1973.²³⁴ Both these Corporations were public companies and were treated by the Court as organs of the state. The Court held that the respondents had both statutory and constitutional obligation to ensure that reasonable measures are put in place to provide for the security of rail commuters when they provide rail commuter services.²³⁵ The duty, it was held, was one of ensuring that the measures are in place regardless of who was implementing them.²³⁶ In reaching this decision, the Court not only considered the provisions of the Constitution and the Acts under which the Corporations were incorporated, but it also considered several factors including the fact that the two respondents enjoyed a monopoly over rail commuter services, the commuters were poor people who had little choice whether to use the rail services or not, and that once they were on the train they were unable to protect themselves against attacks by criminals.²³⁷ The Court stated that this duty would not impose undue burdens on the two respondents that would impair their ability to provide the service effectively or efficiently.²³⁸

Although this case dealt with a situation where both corporations were public companies, it demonstrates that it is possible for corporations generally to bear the

²³⁴ The other respondents were the Minister of Transport and the Minister of Safety and Security.

²³⁵ Above n 181, para 84.

²³⁶ Ibid.

²³⁷ Ibid para 82.

²³⁸ Ibid para 83.

duty to protect human rights. Assuming that shares in these corporations were owned by private persons or jointly by private persons and the state, it is not likely that the Court would have held differently to deny that the corporation had a duty to protect passengers on their trains. It can therefore be said that a private boarding school, for example, has the duty to take measures to ensure the safety of pupils on the school. The same can be said of a private hospital which provides boarding to its patients.

The UN Norms expressly recognise the duty of transnational corporations to protect human rights.²³⁹ Nicola Jagers has also shown that some corporations such as Levi Strauss, The Bodyshop, Reebok, and British Petroleum have accepted this duty through their codes of conduct.²⁴⁰

3.2.6 *The duty to fulfil*

As noted above, the duty to fulfil requires positive action on the part of the duty bearer not only to promote the right, but also to facilitate the realisation of the right and to provide the right if the right holder cannot realise it using their own means. These obligations may require greater resources that may not be within the reach of non-state actors. As a result, it may not be feasible for these actors to discharge this duty without jeopardising its own rights or other obligations. It must be recalled in this regard that even states are required to discharge this obligation progressively within available resources. Non-state actors may therefore not be expected to shoulder more burdens than states, which are considered to be the principal duty bearers in relation to human rights. The application of the duty to fulfil might also be limited the

²³⁹ Para A.1 provides that ‘Within their spheres of influence, transnational corporations shall have the obligation to ... secure the fulfilment of, ensure respect of and protect human rights’.

²⁴⁰ Jägers, above n 27, 83.

principle of proximity discussed earlier. Non-state actors, unlike states, do not owe everyone positive obligations implicit in human rights. One has to establish a nexus with the duty-bearer to require the latter to discharge a human rights obligation.

However, the duty to fulfil may not always require considerable resources and where a given instrument clearly imposes this duty on non-state actors, the latter must fulfil that obligation. For example, various ILO instruments impose certain obligations on employers with regard to conditions of employment.²⁴¹ Examples include provisions relating to fair labour practices, maternity leave and benefits, non-discrimination in the work place.²⁴² Employers are enjoined to fulfil these rights in relation to their employees. Also, both the African Children's Charter and the CRC impose obligations on parents regarding the upbringing of their children.²⁴³ The *Grootboom Case* affirmed that the primary obligation to provide for children's socio-economic rights rests with their parents.²⁴⁴ Parents are therefore expected to promote

²⁴¹ See section 2.4.2 above in this chapter.

²⁴² Ibid.

²⁴³ See chapter 3, section 5.4.

²⁴⁴ This case dealt with, among other things, the interpretation of section 28(1)(c) of the South African Constitution, which provides that 'Every child has the right to ... basic nutrition, shelter, basic health care services and social services'. An issue arose as to whether this section meant that children living in intolerable conditions had a right to be provided with shelter by the state. The Constitutional Court held that:

Through legislation and the common law, the obligation to provide shelter in subsection 1(c) is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families.

See *Grootboom*, above n 10, para 77.

the rights of children, facilitate the realisation of these rights and provide the rights to them.

The duty to fulfil is also relevant to non-state actors in the context of non-discrimination. For example, the South African Constitution, as noted earlier, provides that '[n]o person may unfairly discriminate directly or indirectly against anyone' on certain prohibited grounds.²⁴⁵ The Promotion of Equality and Prevention of Unfair Discrimination Act 2000, enacted to give effect to this right, provides that '[a]ll persons have a duty and responsibility to promote equality'.²⁴⁶ This Act has a schedule promulgated under section 29(1) that lists examples of prohibited unfair practices binding on the state and all persons. They include applying human resource utilisation, development promotion and retention practices which unfairly discriminate against persons; and refusing to provide reasonable health services to the elderly or failing to reasonably accommodate the needs of the elderly. These provisions clearly entail the obligation on non-state entities to fulfil this right.

The obligation to fulfil could also bind non-state actors where the non-state actor exercises governmental functions or public functions.²⁴⁷ For example, a non-state actor in charge of correctional services would be bound to fulfil rights of detainees including their rights to food, water, and health. A non-state actor running an educational institution would also be bound by aspects of the duty to fulfil the right to education, including promoting the values of education and facilitating the realisation of right by its students.

²⁴⁵ Section 9(4).

²⁴⁶ Section 24(2).

²⁴⁷ Jägers, above n 27, 84.

Lastly, non-state actors may also discharge their duty to fulfil voluntarily as ethical obligations. As noted in chapter 5, corporations in particular have increasingly adopted codes of conduct containing their commitments to certain standards of principles regarding their operations. One advantage of voluntary codes is that corporations may commit themselves to discharging those obligations which may not be legally required of them.

Thus, the application of the duty to fulfil economic, social and cultural rights to non-state actors is limited. However, this does not mean that non-state actors have no obligations at all in relation to these rights. As argued above, the duty to respect economic, social and cultural rights is universal binding everyone, states and non-state actors alike. Non-state actors can also be bound by the duty to protect these rights in certain limited circumstances.

4 BALANCING COMPETING RIGHTS



Such non-state actors as human beings and legal persons have certain human rights. Circumstances will therefore often arise where allegations of violations of economic, social and cultural rights will meet the argument that there was no violation as the defendant was merely exercising their right. For example, where a Muslim association establishes a school but limits admissions to the school to Muslims, a claim by a Christian applicant who has been rejected by the school on the ground of religion may meet the a response that the exclusion of the applicant is justified by the right to religion. In such cases, court will have to deal with the difficult task of weighing competing rights.

Andrew Clapham has proposed the twin principles of dignity and democracy as analytical tools for resolving this issue. He posits that

Where a right involved is justified by the goal of democracy there has to be a public element in order to justify [the] protection of the right. But where a right can be justified by an appeal to dignity, we do not need such public element and consequently the right must be protected. This could be formulated as a duty-based theory. Individuals or private bodies have a duty not to subject others to indignities, and have a further public duty not to thwart the collective good of democracy where this is threatened.²⁴⁸

In other words, where the exercise of a given right is consistent with democratic rights, individual rights could give way as long as the exercise of those rights does not undermine the human dignity of others. However, where the enjoyment of rights does not advance the goals of democracy, those rights must still be upheld where their denial will constitute a violation of human dignity. Clapham explains his theory by giving the example of witches who demand to speak at a Christian prayer meeting to promote their beliefs. In this instance, he argues that a refusal to let them speak at the meeting would neither undermine the goals of democracy nor impinge on their dignity since the witches would have other means of imparting their views.²⁴⁹ However, if the witches were to be denied to meet at all, their dignity would be threatened and democracy would be impoverished.²⁵⁰

Clapham's thesis provides a good starting point for determining when a non-state actor will be bound by human rights. However, one of its limitations is that the concepts democracy and dignity, central as they may have become to the understanding current human rights standards, remain vague and subject to broad and narrow interpretations. They can therefore lead to more problems than solutions to

²⁴⁸ Andrew Clapham *Human Rights in the private sphere* (Oxford: Clarendon Press, 1993) 146.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

resolving the issue at hand. Secondly, these tools do not provide adequate guidelines for resolving problems posed by conflicting rights.

It is obvious that there can be not hard and fast rules governing competing rights. Each case will have to be considered on its own merits. However, this section attempts to identify some of the principles will be relevant to those decisions.

The first principle that ought to be considered relates to the public element in the activities of the person relying on rights as a defence to an alleged violation of another person's right. Where the enjoyment of a right by a person is closely connected to the general public, that rights holder must enjoy his or her rights in a manner that does not unduly limit the rights of others. This principle is implicitly recognised by the non-discrimination clauses discussed earlier. It prohibits non-discrimination with regard to access to shops, restaurants, hotels and other places of public entertainment or dedicated to the use of the general public. Implicit in these provisions is the recognition that once a person decides to exercise the right to economic activity by subjecting his private property to the use of the general public or for public entertainment, that person must respect the rights of every member of the general public regarding access to that property.

The South African case of *Victoria & Alfred Waterfront Ltd v Police Commissioner, Western Cape and Others*²⁵¹ partly supports this conclusion and raises issues, which are relevant to the issue of balancing competing rights. The applicants in this case were managers and owners of the Victoria and Alfred Waterfront, a large shopping complex in Cape Town. They sought an interdict restraining the second and third respondents, homeless persons, from entering the premises of the complex and from engaging such conduct as harassing, assaulting or intimidating the employees of

²⁵¹ 2004 (4) SA 444 (C) (*Waterfront Case*)

the applicants or visitors of the complex. The question was therefore whether the owners (private) of the complex had the right to exclude the respondents from it.

The Cape High Court stated in passing that the issue of begging raises a direct tension between the right to property of the owners of the premises and the rights to life and dignity of the beggars.²⁵² The Court suggested that it will consider the value of the competing rights to decide which one should prevail. The Court stated that ‘The rights to life and dignity are the most important of all human rights.’²⁵³

However, the case turned on a balancing of the right to property and freedom of movement. The Court held that, the facts of the case raised a possible infringement of the right to freedom of movement of the respondents. Not only did the Court hold that this right can bind private persons in appropriate circumstances, it also stated that a property owner does not have an unqualified right to exclude anyone from the former’s property as this right is also limited by the rights of others such as freedom of movement.²⁵⁴ In order to resolve this conflict, the Court held, the nature of the property and the circumstances of a given case must be considered.

The Court stated that the fact that the complex was a property to which members of the general public are invited to visit whether they intend to conduct business there or not made this property unique.²⁵⁵ Thus, it was held that, to restrain the respondents from accessing the complex, would amount to an infringement of freedom of

²⁵² Ibid 448.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ The complex is 123 hectares in size and consists of a vast array of shops, restaurants, offices and places of public entertainment. It also includes public roads, hotels and access to the sea. There is also a post office and a police-charge office there. *Waterfront Case*, *ibid*, 448.

movement.²⁵⁶ A less restrictive means of vindicating the right to property in this case, it was held, was to make an order that restrained the respondents from committing the acts of violence or harassment against visitors and the employees of the applicants.²⁵⁷

This case highlights the fact that balancing competing rights will involve a consideration of the competing values protected by the rights in question. As shown in chapter 6, German courts also consider the interests protected by the rights in issue as a primary consideration when dealing with competing rights. In the *Lüth Case*, for example, the Federal Constitutional Court held that courts ‘must deny the right to express an opinion if the exercise of this right would violate a more important interest protected [by private law]’.²⁵⁸ It may be easy to decide which rights are more important than others in some cases but in most cases, this will not be as easy because there is currently no consensus on the priority of rights. It is therefore also important to consider the degree of intrusion the enjoyment of a given right makes into the rights of others. The greater the intrusion, the less likely will the intruder’s right be justified. The *Waterfront Case* suggests that where there are less restrictive means of vindicating a right, a right holder must take those restrictive means to avoid impinging on the rights of others. Significantly, this case also suggests that the closer the exercise of a right is connected to the general public, the more difficult it will be for the holder of that particular right to insist on it if its exercise has the effect of impinging upon other peoples’ rights.

²⁵⁶ Ibid para 449.

²⁵⁷ Ibid.

²⁵⁸ 7 BVerfGE 198 366. Discussed in chapter 6.

5 CONCLUSION

The view that all human rights are universal, interdependent and interrelated has received increasing acceptance.²⁵⁹ The issue of non-state actors' responsibility for human rights also calls into question not only the traditional divide between the public and the private but also that between civil and political rights, and economic, social and cultural rights. This study has shown that both these divides cannot be justified in the modern world. In particular, this chapter has demonstrated that almost all economic, social and cultural rights can bind non-state actors. It is important to look at, among other things, the circumstances of each case, the human rights provision at hand, the nature of the duty, and the nature of the non-state actor and its activities in order to determine whether a given right and duty can bind a given non-state actor. Preconceived ideas about some categories of rights do not provide justifiable answers regarding the responsibility of non-state actors for a given human right.

All human rights generate the duties to respect, protect and fulfil rights on states. Given the predominance of the public/private divide, duties of non-state actors remain underdeveloped. This chapter has argued that non-state actors are mainly bound by the duty to respect. As it requires negative action, this duty is binding on everyone. However, non-state actors, unlike the state, do not owe the duties to protect and fulfil rights to everyone. These duties can bind only those actors who are proximate to the relevant rights holders. In other cases, however, persons who are not physically

²⁵⁹ As noted in chapter 1, this principle has been affirmed and reaffirmed in a number of international human rights declarations and resolutions including the Proclamation of Tehran, 1968; the Final Act of the International Conference on Human Rights, Tehran, UN Doc A/Conf 32/41, article 13; The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, June 1993, UN Doc A/ Conf 157/23 part I para 5.

proximate to a given actor may still have human rights claims against that actor if the activities of the latter result in direct or indirect impairment of those persons rights. In general, the more the activities of a non-state actor present risks to rights holders, the more onerous must be their human rights obligations. This chapter has also identified two more duties of non-state actors, namely, the duty not to be complicit in human rights abuses and the duty to exercise rights responsibly. Both these duties, it has been argued, do not fit in easily in the current typology of human rights duties but it has been shown that they can stand as separate duties and have gained some acceptance already.

Unlike states, non-state actors have human rights. Thus, cases will arise where claims against them alleging violations of economic, social and cultural rights will be defended on the basis of some right they hold. Such cases will obviously present difficulties for judges. However, the issue of balancing competing rights is not alien to judicial functions. As was shown in chapter 6, domestic courts have been involved in resolving disputes of this nature. This chapter has argued that there can be no uniform formula for resolving such disputes. However, it will be of some use to look at the weight of values that the competing rights seek to protect, the extent of the human rights infringements, whether there are less restrictive means of enjoying a right, and whether the exercise of one's right is closely connected to the general public.

Chapter 8

CONCLUSION

1 THE ORIGIN OF THE STATE CENTRIC APPLICATION OF HUMAN RIGHTS

This study essentially constitutes a challenge to the conventional view that human rights bind the state only. As shown in chapter 2, this view was propounded by the natural rights theory at a time when the institution of the state was just rising as an organisational unit of society and in a context where liberalism and capitalism was also gaining ground. The legitimacy of state authority was erected on the idea that the state was a natural institution necessary to achieve peaceful co-existence in society. However, the fear of absolutism, prompted the natural rights theorists to advance the idea that the legitimacy of that state authority rested on assurance that the state would refrain from interfering into and protect individual freedom in the private sphere. The natural rights theory was therefore premised on the notion that state had the right to exercise authority in the public sphere on the one hand and the duty, on the other hand, to refrain from acting or interfering in the private sphere. This division of the public and private spheres meant that human rights would be conceptualised as injunctions against the state. In other words, they were conceived of as safeguards of the private sphere against the powers of the state. This state centric conception of human rights has subsisted to the modern era.

2 CONCEPTUAL JUSTIFICATION FOR THE RECOGNITION OF THE HORIZONTAL APPLICATION OF HUMAN RIGHTS

However, this study has argued that this traditional view is conceptually flawed and is increasingly not being strictly adhered to in international law and comparative constitutional law. It has been argued that the state-centric approach that the natural rights theory took was largely shaped by the context of the time. Individual/state relations have changed significantly over time. As shown in chapter 1, non-state actors such as MNCs and other business enterprises, NGOs, and international organisations have increasingly exercised functions that were previously classified state or public functions. These actors also exercise substantial influence on state policies both internationally and domestically. As a result, not only do these actors (have potential to) violate human rights, it has also become increasingly clear that state action alone cannot guarantee the full realisation of human rights without recognising the obligations of these actors.¹ In addition, the natural rights theory ignored the important fact that individuals have always

¹ See generally Steven R Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 443; Nicola Jägers *Corporate human rights obligations: In search of accountability* (Antwerpen: Intersentia, 2002); Danwood M Chirwa 'Obligations of non-state actors in relation to economic, social and cultural rights under the South African Constitution' (2003) 7 *Mediterranean Journal of Human Rights* 29; International Council on Human Rights Policy *Beyond voluntarism: Human rights and the developing international legal obligations of companies* (Versoix, International Human Rights Policy, 2002); Sigrun I Skogly 'Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria' (1997) 15(1) *Netherlands Quarterly of Human Rights* 47.

lived in a 'complex web of relations' and that the private sphere is not really composed free and equal individuals.²

A range of jurisprudential schools that lend support to the horizontal application of human rights either directly or indirectly were discussed in chapter 2. The Marxist school, it has been demonstrated, critiqued natural rights as a potential tool for powerful actors to oppress poor and often defenceless people. Marxists argue that economic inequalities in the private sphere have a huge impact on the ability of people to participate on an equal basis in the public sphere. Thus, Marxism advocated for a strong state that would be able to control private actors and distribute resources amongst everyone. It also advocated for the collapsing of the distinction between public and private law. The feminist critique, it has also been shown, advances a strong case for the elimination of the public/private divide in the application of law generally and human rights in particular. It posits that this distinction serves the interests of men and shields non-state actors from human rights responsibility for abuses committed against women and children in the private sphere. Activities, interests and institutions that are considered to fall in the public domain, feminists contend, are often relevant to advancing the interests of male members of society who dominate this sphere while those that are categorised as private are predominantly relevant to women.³ Feminists contend therefore

² See Adamantia Pollis 'Towards a new universalism: Reconstruction and dialogue' (1998) 16(1) *Netherlands Quarterly of Human Rights* 5, 10.

³ See eg Hilary Charlesworth 'Worlds apart: Public/Private distinctions in international law' in Margaret Thornton (ed) *Public and private: Feminist legal debates* (Oxford: Oxford University Press, 1995) 243, 245 – 6; Aaron X Fellmeth 'Feminism and international law: Theory, methodology, and substantive reform' (2000) 22 *Human Rights Quarterly* 658, 668.

that non-state actors must also be held accountable for human rights and that the law should regulate the private sphere more than it currently does in order to prevent and redress violations committed by these actors in this sphere.⁴ Another jurisprudential school that supports the view that non-state actors ought to be bound by human rights is the socio-historical school. It maintains that human rights do not pre-exist the state but they are norms that are shaped by changing socio-historical circumstances. These norms have developed historically to limit the powers of powerful entities society. By conceptualising human rights thus, adherents to this theory contend that these norms human rights should be applicable to protect people from possible abuse of all forms of power by both state and non-state actors.⁵ This study has also shown that some African societies and other non-Western cultures knew ideas similar to current human rights standards, which emphasised duties of individuals to the family, community and the society as a whole. These societies' perspectives lend support to the idea that non-state actors must be bound by human rights.

Cumulatively, these jurisprudential schools provide a strong conceptual basis for the recognition of the human rights obligations of non-state actors.

⁴ Ibid. See generally also Charlotte Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 486; Dorothy Q Thomas & Michelle E Beasley 'Domestic violence as a human rights issue' (1993) *Human Rights Quarterly* 36; Ursula A O'Hare 'Realizing human rights for women' (1999) 21 *Human Rights Quarterly* 364.

⁵ Eg Neil Stammers 'Social movements and the social construction of human rights' (1999) 21 *Human rights Quarterly* 980; Neil Stammers 'A critique of social approaches to human rights' (1995) 17 *Human Rights Quarterly* 488.

3 THE RECOGNITION OF HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS IN INTERNATIONAL LAW

This study has also demonstrated that international law is increasingly recognising the obligations of non-state actors in relation to human rights generally and economic, social and cultural rights particularly, thereby departing markedly from the traditional position that international human rights bind states only. Chapter 3 discussed a range of key international and regional treaties and other instruments including the UDHR, the ICCPR, the ICESCR, the CRC, CEDAW and CERD, and the jurisprudence of various human rights monitoring bodies, which recognise that human rights can also have application to non-state actors. The concept of 'subjects of international law' was analysed critically with a view to showing that it does not present insurmountable obstacles to the recognition of human rights obligations of non-state actors. This study has advanced the point that the most important element of subjectivity in international law is capacity to bear rights and duties arising from that law. Not all actors need to have the power to enter into treaties, the capacity to bring international claims or be sued before an international tribunal or be a sovereign for them to qualify as subjects of international law. While states will continue to act as the prime subjects of international law, other actors ought to be treated limited subjects of international law. This study has demonstrated that international organisations, insurgents and national liberation movements are widely considered as subjects of international law while the emerging trend points towards an acceptance of NGOs, individuals and MNCs as subjects of international law.

4 THE RECOGNITION OF HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS IN COMPARATIVE CONSTITUTIONAL LAW

Like international law, domestic constitutions have increasingly departed from the traditional position that constitutional rights bind the state only. The Constitutions of the United States, Canada, Germany, Ireland and South Africa were discussed in detail in chapter 6. This chapter set out to fulfill the dual purposes of showing firstly, that even those constitutions that may be regarded as conservative impliedly accept that non-state actors can bear human rights obligations in certain circumstances and/or that their jurisprudence fails to provide a coherent basis for denying the application of these rights to non-state actors, and, secondly, that more recent constitutions increasingly recognize the horizontal application of constitutional rights.

The Constitution of the US does not expressly recognize the application of constitutional rights to non-state actors and US courts have insisted that these rights do not apply to private conduct. However, these courts have held that non-state actors can, through the doctrine of state action, find non-state actors liable for violating constitutional rights where it can be shown that there is some state connection to the private conduct. Examples include where the act of the non-state actor was regulated directly by the state,⁶ committed with the participation or involvement of the state,⁷ or

⁶ See eg *Jackson v Metropolitan Edison Co* 415 U.S. 912, 94 S.Ct. 1407 U.S., 1974.

⁷ See eg *Burton v Wilmington Parking Authority* 365 U.S. 715.

related to functions and powers normally exercised by the state.⁸ The exact parameters of the state action doctrine are highly contested but it can be said that this doctrine constitutes an acknowledgement that non-state actors can have obligations in relation to constitutional rights in certain limited circumstances. Some prominent authors including Professors Erwin Chemerinsky and Stephen Gardbaum have actually criticized this doctrine on the ground that it partially responds to the fundamental question regarding the reach of constitutional rights to non-state actors.⁹

The fact that a constitution does not permit the application of constitutional rights to non-state actors does not mean that these rights may not be made applicable to non-state actors through other means such as legislation. The US has adopted a number of Acts that have application to non-state actors. Key among them is the Alien Tort Claims Act. Under this Act, it has been shown, cases may be brought by aliens alleging violations of international human rights law committed by non-state actors outside the US.¹⁰ The jurisprudence this Act has not only challenged the traditional view that non-state actors cannot be bound by human rights generally but also reinforced the fact that nationality is not the sole basis upon which international law rights can be enforced against non-state actors or be claimed by them. It has also reinforced the point that legislation constitutes

⁸ See eg *Marsh v Alabama* 326 U.S. 501.

⁹ Erwin Chemerinsky 'Rethinking state action' (1985) 80 *Northwestern University Law Review* 503, 550; Stephen Gardbaum 'The "horizontal effect" of constitutional rights' (2003) 102 *Michigan Law Review* 387, 389 – 390.

¹⁰ See chapter 6 section 2.2 of this study.

another important means of ensuring the accountability of non-state actors for human rights.

Unlike in US courts, the Canadian Supreme Court has adopted a more conservative position regarding the application of the Canadian Charter of Rights and Freedoms to non-state actors. It has held that Charter rights have no application to common law in private litigation unless some governmental connection to the issues at hand can be established and that court orders do not constitute governmental action. This jurisprudence lacks consistency. The Canadian Supreme Court has held that the Charter applies to all legislation,¹¹ meaning that the Charter will apply to private relations when legislation is involved, but not to common law. It is difficult to understand why legislation should be subject to the Charter in private litigation but not common law. The implication of this distinction is that it is governmental action when the legislature enacts law or a minister promulgates by-laws but it is not state action when the judiciary ‘makes’ or develops or interprets common law. This distinction is plainly absurd. For it is difficult to maintain the distinction between legislation and common law as regards the application of the Charter to private litigation where, for example, legislation modifies common law or the latter replicates legislation.¹² These inconsistencies demonstrate that it is difficult to maintain the public/private distinction in the application of human rights.

¹¹ *Wholesale and Department Store Union v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 595 (*Dolphin* cited to S.C.R.) para 41.

¹² Brian Slattery ‘The *Charter*’s relevance to private litigation: Does *Dolphin* deliver?’ (1987) 32 *McGill Law Journal* 905, 919

Despite holding that Charter rights have no application to non-state actors, it must be noted that the Canadian Supreme Court has acknowledged, rather inconsistently, that Charter values are relevant to private litigation.¹³ This holding means that Charter rights are indirectly relevant to non-state actors. Furthermore, recent decisions of Canadian Supreme Court point towards the recognition of the duty to protect human rights requiring parliament to enact legislative measures aimed at protecting individuals in the private sphere.¹⁴ The recognition of this duty might lead to a reconsideration of the conventional position taken by the Canadian Supreme Court in *Dolphin*.

The constitutional jurisprudence from Germany, Ireland and South Africa establishes that non-state actors can be bound by constitutional rights. German courts have construed article 1(2) of the German Constitution, which provides that the judiciary is bound by basic rights, to mean that judges have a constitutional duty to ‘determine whether the basic rights have influenced the substantive rules of private law’, and, if so, to ‘heed the resulting modification of private law’ in interpreting and applying these provisions.¹⁵ Popularly known as the doctrine of *drittwirkung* (third party effect of basic rights), this jurisprudence holds that basic rights can be brought to bear on the outcome of private litigation through those provisions of private law that contain mandatory rules of law forming part of the *ordre public*. Examples include such general clauses in private law as

¹³ Ibid para 46.

¹⁴ *Vriend v Alberta* 156 D.L.R. (4th) 385, [1998] 1 S.C.R. 493; *Dunmore v Ontario (Attorney General)* [2001] 3 S.C.R. 1016, discussed in chapter 6 section 3.

¹⁵ *Lüth Case* (1958), reproduced in part in Donald P Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2ed) (Durham & London: Duke University Press, 1997) 361 – 368, 364.

‘good morals’, ‘reasonableness’, and ‘public policy’. Failure by a court to consider a basic right in private litigation amounts to a dereliction of duty on the part of the court, which will entitle the aggrieved party to apply to the Federal Constitutional Court to set aside the decision of that court. This doctrine demonstrates that basic rights have ‘strong’ indirect horizontal application in Germany. It is indirect simply because a private person may not commence a constitutional claim against another private person. He/she must instead rely on private law to redress violations of human rights. Otherwise, in considering the third party effect of basic rights, German courts sometimes merely engage in a balancing of conflicting rights (not with the interpretation of the private law clauses in the light of constitutional rights) and determines whether the conduct of a private person should be condoned or censured.¹⁶ In such instances, it is argued, the distinctions between direct application (basing a claim or defence on a right in private litigation) and indirect application (raising human rights issues through general clauses of private law) of human rights appear to be academic because the result may ultimately be the same, that a non-state actor who violates a human right can be held accountable for it in a court of law. In other instances, the Court has found itself finding expressly that a private person violated a right.¹⁷ The doctrine of *drittwirkung* has been adopted by the

¹⁶ See eg *Lüth Case* *ibid*; *Mephisto Case* (1979) 30 BVerfGE 173. The discussion of the latter case is based on the English translation of the case in Kommers, *ibid*, 301 – 304 & 427 – 430.

¹⁷ Eg in the *Blinkfuer Case* (1969) 25 BVerfGE 256.

European Court of Human Rights¹⁸ and many other countries including Italy, Spain, Switzerland, and Japan.¹⁹

Article 40(3) of the Irish Constitution provides that the state has a duty to ‘defend and vindicate personal rights of the citizen’. Irish courts have interpreted this provision broadly to allow constitutional claims alleging violations by these actors of these rights.²⁰ The practice has been to allow direct constitutional claims where common law remedies are inadequate or non-existent.²¹ Otherwise, where reliance is placed on a common law action to address a human rights violation, the courts may also develop that law to give full effect to the right in question.²²

The South African Constitution expressly states that non-state actors can be bound by constitutional rights depending on the nature of the right and the duty in question.²³ Other

¹⁸ See Andrew Clapham ‘The “Drittwirkung” of the *Convention*’ in Franz Matscher, R St John Macdonald and Herbert Petzold (eds) *The European system for the protection of human rights* (Dordrecht: Martinus Nijhoff Publishers, 1993) 163.

¹⁹ Aharon Barak ‘Constitutional human rights and private law’ in Daniel Friedmann & Daphne Barak-Erez (eds) *Human rights in private law* (Oxford: Hart Publishing, 2001) 13, 22; Michael J Horan ‘Contemporary constitutionalism and legal relationships between individuals’ (1976) *International and Comparative Law Quarterly* 848, 864 – 866.

²⁰ See eg *Meskeel v C.I.É.* [1973] 1 I.R. 121; *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)*; *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v Open-Door Counselling Ltd* [1988] I.R. 593.

²¹ Gerard Hogan & Gerry White *The Irish Constitution (JM Kerry)* (Butterworths, 1994) 707.

²² See eg *McKinley v The Minister of Defence* [1992] I.R. 333.

²³ See section 8(2).

African Constitutions, which expressly recognize the horizontal application of constitutional rights to non-state actors include those of Ghana, Malawi, the Gambia and Cape Verde.²⁴ The South African Constitution also expressly states that the judiciary is bound by these rights.²⁵ Where a court finds that a right is capable for applying to a non-state actor, it is enjoined to apply common law and, if necessary, to develop that law to the extent that legislation does not give effect to that right.²⁶ Courts are also generally bound to promote the spirit, purport and objects of the constitutional rights when developing the common law or customary law.²⁷ A person may also choose to enforce the human rights obligations of non-state actors under the South African Constitution indirectly by bringing proceedings against the state where it can be shown that the state failed to take reasonable measures to prevent a violation of the right in question.

It can therefore be seen that comparative domestic constitutional law does not strictly follow the traditional position that constitutional rights have no application to non-state actors.

²⁴ See chapter 6 section 1 in this study.

²⁵ Section 8(1).

²⁶ See section 8(3) of the South African Constitution.

²⁷ Section 39(1) of the South African Constitution.

5 TOWARDS A COMPREHENSIVE REGIME FOR HOLDING NON-STATE ACTORS RESPONSIBLE AND ACCOUNTABLE FOR HUMAN RIGHTS

5.1 Preliminary conclusions

While noting that international law increasingly imposes human rights obligations on non-state actors, chapter 3 noted that there currently exists a gap in international law regarding the enforcement of these obligations against these actors. Apart from the limited opportunity available in international criminal law, where individuals may be prosecuted for committing international crimes (some of which relate to gross human rights violations), international law does not prescribe binding mechanisms for monitoring the implementation of the obligations of non-state actors. This is a gap that must be filled.



However, this study has demonstrated that the obligations of non-state actors could be enforced indirectly through the doctrine of international law and/or directly through voluntary codes of conduct and other voluntary soft-law mechanisms of international law.²⁸ While acknowledging the usefulness of these mechanisms, the argument advanced in this study is that these mechanisms cannot fully address the problems posed by non-state actors in relation to human rights generally and socio-economic rights in particular unless these mechanisms are backed up by binding and enforceable human rights norms for these actors.

²⁸ See chapters 4 and 5.

5.2 State responsibility

Chapter 4 demonstrated that the doctrine of state responsibility can play a considerable role in fostering compliance by private actors with human rights generally and economic, social and cultural rights in particular. A host state²⁹ has an obligation to exercise due diligence to prevent violations of human rights in the private sphere, and to control and regulate non-state actors. Where such violations occur, it is enjoined to respond to them by investigating them, punishing the culprits, or providing effective remedies to victims. A home state³⁰ also has the obligation to ensure that its nationals, and other actors over whom they have control, respect human rights abroad. While this doctrine can be regarded as an affirmation of the traditional position that states are the only bearers of international rights and duties, it also highlights the fact that non-state actors can be held indirectly accountable for violating international human rights. Construed broadly, this doctrine as encapsulated in the duty to protect human rights may mean that domestic courts have a duty to intervene in private litigation to prevent possible violations of human rights by non-state actors³¹ or to consider human rights when interpreting private and common

²⁹ This is a state where a non-state actor commits a human rights violation complained of.

³⁰ This is a state of origin or nationality or incorporation where the actor is linked to more than one state.

³¹ As noted in chapter 6, the US Federal Supreme Court held in *Shelley v Kraemer* 334 U.S. 1, the equal protection clause in the Fourteenth Amendment inhibited the judicial enforcement of a contract between non-state parties which was discriminatory. Irish courts have interpreted this duty to mean that non-state actors can raise constitutional rights issues in private litigation based on common law or directly on the Constitution. See section 5 of chapter 6 in this study.

law.³² It may also mean that states have a duty to adopt legislative measures such as the Alien Tort Claims Act³³ that would ensure that non-state actors are held accountable for human rights including economic, social and cultural rights.

However, the contribution of this doctrine to ensuring that non-state actors respect their obligations in relation to human rights is limited.³⁴ Not only do states lack capacity or political will to control corporations, the effectiveness of this doctrine is affected by the lack of uniform domestic frameworks for regulating and controlling non-state actors. As a result, states are reluctant to regulate their non-state actors in a manner that diminishes these actors' competitiveness in the global market. The doctrine of home state responsibility also raises the political issue of possible inference with a host state's sovereignty when the home state is regulating its non-state actors operating abroad. These limitations underscore the significance of other approaches aimed at enhancing direct private sector responsibility for human rights such as voluntary and binding norms.

That said, a number of recommendations can be made to enhance the efficacy of the doctrine of state responsibility. Firstly, the standard of control used for the purpose of finding a home state responsible for acts of third parties committed abroad is very high. As noted in chapter 4, a home state will be liable for the acts of a non-state actor if it exercised physical control over the actor concerned. This standard means that many acts of non-state actors cannot be attributed to the state. Examples would include acts committed to assist, aid and abet a human rights violation. The standard for holding a state

³² As is the case in Ireland, South Africa, and Germany, see chapter 6 of this study.

³³ Discussed in chapter 6 section 2.2 in this study.

³⁴ See chapter 4 sections 5.2 & 6.2 in this study.

responsible for acts of non-state actors committed abroad must therefore be broadened to recognize a state's liability where it assists third parties with the full knowledge that the assistance will be used for perpetrating violations can be held responsible. Secondly, it is important for international treaties and domestic constitutions to recognize the justiciability of economic, social and cultural rights. Without such recognition and judicial remedies, the obligations of non-state actors in relation to these rights will remain obscure and difficult to enforce in both domestically and internationally. Thirdly, it was shown in chapter 4 that very few cases have been brought against states alleging violations of economic, social and cultural rights by non-state actors before both international and regional human rights monitoring bodies. While one of the reasons for this paucity of such litigation may be the fact that these rights do not have a complaints procedure, it was shown that these rights may still be enforced through certain civil and political rights and that some treaties such as the African Charter make provision for the enforcement of economic, social and cultural rights. It has also been pointed out that human rights enforcement bodies have not used such monitoring mechanisms as state reporting to monitor the obligations of states in respect of the protective measures taken to prevent violations of human rights by non-state actors or control and regulate them. It is therefore submitted that this device needs to be utilized more by individuals or groups affected by the acts of non-state actors, civil society organizations and human rights monitoring bodies.

5.3 Voluntary mechanisms

Chapter 5 demonstrated that the international human rights obligations of non-state actors may also be enforced directly against these actors through a range of soft-law

mechanisms in international law or through voluntary procedures adopted by or for these actors. Voluntary codes of conduct essentially constitute an acknowledgment by non-state actors that they have human rights obligations. The key international voluntary standards for MNCs and other business enterprises - the OECD Guidelines, the ILO Tripartite Declaration, and the UN Global Compact, and the newly adopted UN Norms – were discussed. The significance of these documents lies in the fact that they were negotiated and adopted at an intergovernmental level. The ILO Tripartite Declaration, in particular, was adopted with the participation of non-state actors, meaning that the latter have at least accepted that they have human rights obligations. While these international standards were not adopted as binding norms, they can be classified as soft-law norms of international law because they were adopted either as declarations or by international bodies lacking in international lawmaking authority, and are directed at non-state actors whose practices cannot constitute customary international law.³⁵ These norms may not only guide the interpretation, development, or application of hard law they also constitute evidence of hard law discussed in chapter 3 that non-state actors have obligations in relation to human rights including economic, social and cultural rights.

Chapter 5 highlighted that both international standards and those adopted by non-state actors can serve a range of other important purposes. They may be used as a double-edged sword for critiquing the conduct of non-state actors. On the one hand, where a non-

³⁵ On the definition of soft-law norms see Christine Chinkin 'Normative development in the international legal system' in Dinah Shelton (ed) *Commitment and compliance: The role of non-binding norms in the international legal system* (Oxford: Oxford University Press, 2000) 21, 30; Richard L Williamson Jr 'Hard law, soft law, and non-law in multilateral arms control: Some compliance hypothesis' (2003) 4 *Chicago Journal of International Law* 59, 63.

state actor adopts a code that is limited in scope, it may be criticised by reference to model codes or international codes that are more expansive in scope. On the other hand, where a non-state actor adopts a code that incorporates a wide range of human rights, it may be used as a tool for criticising the non-state actor's conduct if it fails to live up to its commitments as expressed in the code. These standards may be of use both where the horizontal application of human rights is recognised and where it is not. Where it is recognised, codes of conduct may assist in developing the precise obligations of private actors. Since voluntary standards deal with many other issues that are not directly linked to human rights or economic, social and cultural rights, they may operate to fill the gaps left by binding regimes of regulation. Significantly, voluntary standards may be particularly useful where the domestic legal system is dysfunctional, ineffective or does not recognize economic, social and cultural rights or in a context where there is no rule of law. It was also pointed out in chapter 5 that there is also some practical evidence showing that these standards have generated positive benefits for stakeholders.

However, this chapter also demonstrated quite clearly that the fact that these standards are voluntary undermines their effectiveness quite significantly. For example, very few non-state actors have adopted voluntary codes of conduct. It is mainly MNCs, especially those dealing with trade, textile, extractive, chemical, and mechanical products, which have adopted codes of conduct mainly because of public pressure. Voluntary standards differ considerably in content and very few of them actually make reference to human rights especially economic, social and cultural rights. It was shown that the OECD Guidelines, the ILO Tripartite Declaration and the UN Global Compact have expanded the scope of their principles regarding human rights but they still fail to specify the

human rights and obligations which non-state actors must abide by. These standards often do not make provision for enforcing those obligations and where such provisions exist, the enforcement mechanisms are ineffective and weak. For example, the UN Global Compact does not have any enforcement mechanisms. Both the ILO Tripartite Declaration and the OECD Guidelines have some monitoring mechanisms but they do not provide for a complaints procedure and remedies for violations of these norms. These weaknesses flow logically from the fact that these standards are based on voluntarism, which essentially means that non-state actors have absolute freedom in making the decision as to whether to adopt these standards or not, and what principles and enforcement mechanism to be included in the code. They underline the significance of binding human rights norms for non-state actors.

At the same time, it is submitted that the effectiveness of both voluntary codes of conduct and international guidelines could be improved considerably if their adoption and implementation were to involve a wider range of stake holders. This would improve their legitimacy and signify the commitment by the adhering non-state actors to the standards recognised in the code or guidelines. Secondly, the content of the codes/guidelines ought to include all the rights as well as the economic, social and cultural rights implicated by the activities of the adhering or intended non-state actors. A selective approach undermines the seriousness of the initiative. Crucially, the code ought to make provision for a realistic mechanism of enforcement that combines both self monitoring and independent monitoring. The World Bank Inspection Panel discussed in chapter 5 illustrates that a non-state actor may create its own monitoring mechanism that is quite independent. However, in order to ensure independence it is important that

provision is made to include the participation of members external to the non-state actor. The monitoring mechanism ought also to make provision for hearing complaints alleging violations of the code and for remedies where the allegations are proved. Such provisions would go along way towards demonstrating the seriousness of the adhering non-state actors to the code and ultimately ensuring that their obligations as reflected in the code or guidelines are carried out.

5.4 Conclusion

The foregoing discussion demonstrates that challenges posed by non-state actors with regard to human rights generally and economic, social and cultural rights in particular may not be overcome simply by having recourse to the doctrine of state responsibility and promoting voluntary and non-binding standards. There can be no doubt that these mechanisms play an important role in ensuring that the international obligations of these actors are adhered to. However, binding and enforceable norms for these actors are indispensable both in international law and domestic law given the limitations of the other mechanisms. The fact that the norms are binding and enforceable would mean that these norms would be enforced against all relevant non-state actors whether they express their consent to the norms or not. The recognition of such norms has a sound theoretical basis and finds support from the emerging human rights standards in international law and comparative constitutional law.

It was noted in chapter 5 that the UN Sub-Commission on Human Rights adopted the UN Norms in August 2003. These Norms are still under discussion in the Human Rights Commission and the manner in which they will be adopted, if at all, remains unclear. However, in their current form, the Norms contain a wide range of human rights that non-

state actors are required to observe and specify in a clearer fashion than any other previous international initiative the obligations of these actors. It was also pointed out that, consistent with the primary objectives of the UN Sub-Commission in preparing them, the Norms in their current form make provision for their enforcement. TNCs and other business enterprises are required to adopt internal monitoring mechanism that make provision for prompt, effective and adequate reparation; undertake human rights impact assessments of their activities; and report periodically to the UN. The Norms also envisage a monitoring mechanism that will make provision for the naming and shaming of TNCs and other business enterprises, and reparations for violations of the Norms. These norms signal the trend towards the elaboration of binding and enforceable norms in international law for non-state actors. It must be noted, however, that the UN Norms are limited in their reach as they would apply to TNCs and other business enterprises only. Similar norms would need to be developed for other non-state actors such as international organisations, NGOs and individuals.

Binding and enforceable obligations for non-state actors in relation to human rights including economic, social and cultural rights ought also to be recognised at the domestic level. Domestic legal systems offer the primary protection and remedies to rights holders and are generally more accessible to people than international regimes. Chapter 6 demonstrated that the ideal method of recognising the obligations of non-state actors would be at the constitutional level, whereby courts are allowed to receive claims alleging violations of human rights by non-state actors. Since common law or private law already recognises many causes of action that address human rights issues in the private sphere, such direct constitutional claims ought to be permitted where the common law or

private law causes of action are inadequate to address the right in question. The constitution could also empower the courts to develop common law where it fails to address a given human rights issue adequately. In addition to these provisions and in recognition of the fact that the divisions between public and private law are superficial as shown in chapter 2, it is also critical for a constitution to entrust the general power to courts to consider human rights when interpreting or applying common law or any other private law. Apart from the constitution, states can also recognise and enforce the obligations on non-state actors through legislation. The latter could promote voluntary standards by offering incentives to non-state actors who adhere to specific minimum human rights standards or make provision for enforcement mechanisms for these obligations.

6 THE NATURE AND EXTENT OF THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS OBLIGATIONS OF NON-STATE ACTORS

If the horizontal application of human rights were recognised, would economic, social and cultural rights also apply to non-state actors? If so, which obligations would bind non-state actors? Chapter 7 set out to answer these two important questions. While this study dealt with the question of non-state actors' responsibility for human rights generally, special attention was paid to economic, social and cultural rights for various reasons.³⁶ Economic, social and cultural rights have generally been neglected in terms of their recognition and protection compared to civil and political rights because of some

³⁶ Discussed more fully in chapter 1 section 4.

misunderstanding about the nature of these rights and their concomitant obligations. These misconceptions have also led to some to argue that even if the horizontal application of human rights were to be accepted, economic, social and cultural rights cannot bind non-state actors on the ground that they engender onerous obligations, which cannot be borne by these actors. Last, but not the least, while these rights are often violated by non-state actors, the literature on their possible application to non-state actors is scanty.

Chapter 7 argued that preconceived ideas about the category to which a right is traditionally associated is irrelevant to a determination whether the right ought to apply to non-state actors or not. Among the relevant factors that ought to be considered are the formulation and content of the right, whether it can be violated by non-state actors, and the circumstances of each case.³⁷ It was established using these criteria and the emerging jurisprudence in international human rights law and comparative constitutional law that almost all economic, social and cultural rights (including the right not to be discriminated against, labour rights, the rights to social security, adequate standard of living, food, water, health, adequate housing and education, and cultural rights) can bind non-state actors.³⁸

However, the question whether a given socio-economic rights will actually apply to a non-state actor in a given case will also depend on the nature of the duty. Chapter 7 demonstrated that while human rights duties have generally been developed in relation to the state, certain precise obligations for non-state actors can be discerned from the

³⁷ See chapter 7 section 2.3.

³⁸ See chapter 7 section 2.4.

emerging domestic and international norms on economic, social and cultural rights.³⁹ The first is the duty to respect economic, social and cultural rights. This duty is a fundamental one and requires a duty-bearer to refrain from acting or from violating rights. This duty can bind all non-state actors because it does not normally raise problems with regard to the feasibility of this duty and the ability of non-state actors to abide by it. The second is the duty not to be complicit in socio-economic rights violations. This duty is a species of the duty to respect but it can stand on its own because it mainly deals with a situation where a duty bearer contributes to a violation of a right. This duty means that a non-state actor must not support, solicit, or encourage states or other entities to violate economic, social and cultural rights. The third one is the duty to exercise rights responsibly in a manner that does not result in infringements of other people's socio-economic rights. This duty is mostly implicit in limitation clauses but it is sometimes recognised expressly as a duty.⁴⁰ Non-state actors may also be bound by the duty to protect economic, social and cultural rights. This duty requires a duty holder to take measures to prevent violations of human rights by other actors. It is mostly regarded as a duty of the state because it requires the state to adopt legislation and maintain a legal system to investigate violations of rights in the private sphere, prosecute and punish the perpetrators, and provide remedies to victims. Obviously, non-state actors may not have the financial,

³⁹ See chapter 7 section 3.2.

⁴⁰ Eg article 27(1) of the African Charter provides that 'The right and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' See also the preamble to the American Declaration, article 32(2) of the American Convention, and article 30 of the UDHR, article 5 of the ICESCR.

administrative, human and other resources to carry out such obligations. However, chapter 7 demonstrated that in certain limited circumstances, non-state actors could be bound by this duty. For example, where a private security company runs a prison facility, the company would have the obligation to prevent violations of prisoners' socio-economic rights by other prisoners. Where a private company provides rail commuter services, it may have the obligation to provide security on the trains to protect rail commuters from violations of their rights by non-state actors. Finally, non-state actors may also be bound by the duty to fulfil economic, social and cultural rights. This duty summons the duty-bearer to promote rights, facilitate their realisation, and to provide the rights where the rights holders are unable to realise their rights using their own means. These obligations may also involve greater resources which may not fall within the reach of most non-state actors. However, it has been argued that the duty to fulfil may not always require substantial resources for it to be discharged. One has to consider the right in question, the circumstances of the case, and the nature of the non-state actor at hand. For example, the duty to fulfil employment related rights such as the right to fair labour practices, maternity leave and benefits, and non-discrimination in the work place can bind non-state actors. Parents are also clearly bound to fulfil the socio-economic rights of their children. Circumstances such as privatisation may also render non-state actors responsible for the duty to fulfil socio-economic rights. For example, a non-state actor in charge of correctional services will be bound by the duty not only to respect and protect the socio-economic rights of prisoners, but also to fulfil these rights.

While all non-state actors may be bound by these obligations, these actors unlike states may not owe positive obligations to everyone. Chapter 7 suggested that courts ought to

consider the circumstances of each case carefully when determining whether a non-state actor has violated a given obligation in relation to economic, social and cultural rights and how much obligations the non-state actor should be held responsible for.⁴¹ More specific considerations could include the size and influence of the actor. The more powerful (socially, economically or politically) the non-state actor, it has been argued, the greater the obligations of the non-state actor. The nature of the activities of the non-state actor could also to be a relevant factor. The higher the risk the activities of a non-state actor pose to the exercise of economic, social and cultural rights, the greater the obligations of the non-state actor. Furthermore, if the duty sought to be enforced is forms an integral part of the core functions of the non-state actor, the latter ought to be bound by that obligation. It may also be important to consider the nexus between the claimant and the non-state actor concerned. A non-state actor could be enjoined to discharge greater obligations to persons with whom it is closely associated. For instances, a non-state actor could owe more obligations to their employees, persons living in the vicinity of an industrial plant, and consumers of its products than any other persons remotely connected to the non-state actor. Such proximity need not be physical. For example, a non-state actor could be bound by the duty to respect and fulfil the right to health of consumers living far away from it by ensuring that the its medical products are safe and culturally acceptable. The proximity could also be indirect such as in the case of joint ventures, whereby one actor could be held jointly or severally responsible for violations committed by another actor with whom it has close links. These factors ought to be considered together in the light of the facts of each case and, as such, no particular outcome can be predetermined.

⁴¹ See section 3.2.1.

In certain circumstances, non-state actors will plead the exercise of a right as a defence to a claim that they have violated obligations in relation to economic, social and cultural rights. This defence touches upon the obligation to exercise rights responsibly mentioned above. However, a determination of whether that obligation has been breached ultimately depends on a balancing of competing rights. As was made clear in chapter 6, domestic courts have already been involved in the task of balancing rights in the context of litigation between non-state actors.⁴² But there cannot be fixed guidelines as to how courts should determine such questions because cases will normally involve different facts. Nevertheless, some of the key factors that may be considered include the relative weight that the competing rights seek to protect. This factor may call upon courts to rank rights, a task which is not only difficult but also controversial. However, there is some measure of consensus that such values as human dignity, the achievement of equality, and democracy and the right to life are more fundamental than others.⁴³ This means that where the exercise of a right impairs these rights, such exercise will give rise to responsibility. The second factor that ought to be considered is the extent of the infringement. The more intrusive the effect of the non-state actor's activities on the socio-economic rights of others, the lesser the chances for upholding those acts. The third factor is whether there are less restrictive means of enjoying one's rights. This factor considers whether a non-

⁴² Eg see the German cases of *Lüth Case*, above n 15 & *Mephisto Case*, above n 16; and the South African case of *Victoria & Alfred Waterfront Ltd v Police Commissioner, Western Cape and Others* 2004 (4) SA 444 (C).

⁴³ See eg section 1(a) of the South African Constitution; *S v Makwanyane* 1995 (3) SA 391 (CC) para 144; Andrew Clapham *Human Rights in the private sphere* (Oxford: Clarendon Press, 1993) 146.

state actor can avoid impinging upon the right of others by using less restrictive means. The fourth factor is whether the exercise of one's right is closely connected to the general public. The closer the connection between the exercise of a right and the general public, the more difficult it will be to uphold that right where it has the effect of impinging upon other peoples' rights. These factors are not exhaustive and ought to be considered in the light of the particular circumstances of each case.

It can therefore be concluded that the view that non-state actors can be bound by economic, social and cultural rights has a sound theoretical basis. The emerging domestic and international standards on these rights suggest that the conventional view that human rights bind non-state actors only is no longer strictly adhered to. International treaties and domestic constitutions increasingly recognise that non-state actors have binding obligations in relation to human rights generally and to economic, social and cultural rights particularly. These obligations include the duties to respect, protect and fulfil these rights, to exercise rights responsibly, and not to be complicit in violations of rights. There is a notable move towards developing a framework for enforcing these obligations in international law and the emerging constitutional practices establish that these obligations can also be enforced within a domestic constitutional framework.

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