THE DOCTRINE OF STATE RESPONSIBILITY AS A POTENTIAL MEANS OF HOLDING PRIVATE ACTORS ACCOUNTABLE FOR HUMAN RIGHTS

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[The past few decades have witnessed an increase in the influence of private actors on domestic and international policies concerning the economy, welfare programs, taxation, trade, legislation, labour issues, education, development and other important aspects of life. This period has not only highlighted that the state alone is incapable of guaranteeing the protection of human rights, but also that human rights are prone to violations by many actors other than the state. These revelations have heightened the challenge to the conventional view that human rights obligations bind only the state but not private actors. This article argues that the doctrine of state responsibility represents an under-utilised device for ensuring that private actors respect human rights including economic, social and cultural rights. International, regional and domestic human rights jurisprudence is investigated in order to define the precise circumstances in which state responsibility might be incurred for violations of human rights committed by non-state actors. It is also argued, considering the potential obstacles to its efficacy, that recourse to the doctrine of state responsibility should be considered as a complementary mechanism to other methods of holding non-state actors responsible for human rights violations.]

CONTENTS

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I INTRODUCTION

The issue of private sector responsibility for human rights is most topical in contemporary human rights discourse. In an era of globalisation, the market-oriented policies of liberalisation of markets, privatisation of state-owned enterprises, 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 these principles.[2] Their wide adoption by states has seen them ceding more powers and competencies to private actors than was the case previously.[3] As a result, it has become increasingly clear that state action alone is not sufficient to 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 private actors, like state actors, can and often do violate human rights. MNCs, for instance, have been implicated in corruption and violations of trade union rights, International Labour Organization labour standards, environmental rights, the right to development, and civil and political 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

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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 sess, Provisional Agenda Item 4, [4], UN Doc E/CN.4/Sub.2/2001/10 (2001).

2 Ibid.

3 Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435, 435; W Michael 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* (1990) 1, 1.

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.

5 For the impact of private actors on the enjoyment of human rights, see generally Sub-Commission on Prevention of Discrimination and Protection of Minorities [now Sub-Commission on the Promotion and Protection of Human Rights], *The Realization 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*, UN ESCOR, 52nd sess, Provisional Agenda Item 4, UN Doc E/CN.4/Sub.2/1996/12 (1996); Diane Orentlicher and Timothy Gelatt, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China' (1983) 14 *Northwestern Journal of International Law and Business* 1, 66; Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001) <http://209.238.219.111/Clapham-Jerbi-paper.htm> at 1 May 2004; 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.

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 revelations have reinforced arguments against the traditional view that human rights bind the state only and that private actors have no human rights obligations.[7]

Debate on the applicability of human rights to private actors has tended to follow two main lines. One posits that private actors should be directly accountable for human rights at both domestic and international levels. Those who take this position view the recently adopted United Nations *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[8] as a formidable step towards that objective.[9] The other, supported by the business community and some states,[10] maintains 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 means as internal company policies and corporate codes of conduct.[11]

A relevant principle that is often not considered fully, or at all, in this debate is the doctrine of state responsibility. International human rights law imposes a duty on states to protect people from violations of their human rights by state 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'.[12] Through the discharge of this

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6 See, eg, Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (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* (1994) 85, 95.

7 For scholarship advancing these arguments, see, eg, 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* (2002); Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002).

8 Sub-Commission on the Promotion and Protection of Human Rights, UN ESCOR, 55th sess, 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. The future of the norms was to be decided at the annual meeting of the UN Commission on Human Rights, scheduled for 15 March–23 April 2004.

9 See, eg, Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (2004) 15.

10 Including the US, the United Kingdom, Egypt, India and Saudi Arabia: Frances Williams, 'Company Norms "Must be on UN Rights Agenda"', *Financial Times* (London, England), 8 April 2004, 9.

11 For an examination of the role and limits of voluntary approaches, see generally Ruth Mayne, 'Regulating TNCs: The Role of Voluntary and Governmental Approaches' in Sol Picciotto and Ruth Mayne (eds), *Regulating International Business: Beyond Liberalization* (1999) 235.

12 Commission on Human Rights, *Liberalization of Trade in Services and Human Rights: Report of the High Commissioner*, UN ESCOR, 54th sess, Provisional Agenda Item 4, Annex, [9], UN Doc E/CN.4/Sub.2/2002/9 (2002). 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': at [10].

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.

Without undermining the role that voluntary approaches and binding legal obligations can play, this article demonstrates how the doctrine of state responsibility can be utilised to enhance non-state actor responsibility for human rights. Part II 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 Acts*[13] 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. Part III surveys international and regional jurisprudence regarding the meaning of the state's obligation to protect human rights. It demonstrates that this duty entails three 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 and interdependence of all rights, Part IV demonstrates 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. Parts V and VI elaborate on this duty as it applies to host and home states respectively, and also explore the limitations of the doctrine of state responsibility.

II THE GENERAL RULES OF INTERNATIONAL LAW ON STATE RESPONSIBILITY

A *Definition of State Responsibility*

State responsibility is an age-old principle of international law that was developed to protect the rights of aliens.[14] It arises when a state commits an international wrong against another state.[15] This rule has now been elevated to the status of a general principle of international law.[16] In *Chorzów Factory (Germany v Poland) (Merits)*,[17] 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 make reparation for any breach of an engagement.[18] According to the Court, 'reparation is therefore the indispensable complement of a failure to apply a convention and there is no

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13 *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*').

14 Ian Brownlie, *System of the Law of Nations: State Responsibility: Part 1* (1983) 9.

15 Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 435–6.

16 Ibid 436.

17 [1928] PCIJ (ser A) No 13.

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

necessity for this to be stated in the convention itself'.[19] 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.[20]

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.[21] Other commentators have even suggested that the *Draft Articles* could have authoritative force considering that they represent the views of highly recognised publicists in international law.[22]

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.[23] It is clear, therefore, that state responsibility is dependent on the link between the state and the wrongful act — the conduct of a private actor must qualify as an 'act of a state'.

B *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 private actors is dependent on the definition of an 'act of a state'. According to art 3 of the *Draft Articles*, international law — not internal law — governs the characterisation of an act of

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19 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'.

20 Malcom Shaw, *International Law* (5th ed, 2003) 541.

21 Viljam Engström, Institute for Human Rights, Åbo Akademi University, Finland, *Who is Responsible for Corporate Human Rights Violations?* (2002) 13 <http://www.abo.fi/instut/imr/norfa/ville.pdf> at 1 May 2004.

22 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.

23 *Draft Articles*, above n 13, art 2. 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.

the state as internationally wrongful.[24] 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 private actors.

Firstly, art 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.[25] 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.[26]

Secondly, in terms of art 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.[27] Where conduct is authorised by the state, liability is incurred regardless of whether the person to whom authorisation is given is a private individual.[28] It also does not matter whether the conduct involves public functions or governmental activity.[29] What is required is proof of state authorisation. Under this principle, therefore, acts or omissions of private 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 private actors is narrower than under art 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.[30] 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.[31]

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24 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.

25 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (2002) 100.

26 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 art 5 of the *Draft Articles* as regards the execution of its charitable functions.

27 *Draft Articles*, above n 13, art 8.

28 Crawford, above n 25, 110.

29 Ibid.

30 Ibid.

31 Ibid.

The complainant shoulders the onerous burden of establishing state control. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*,[32] 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.[33] 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'.[34] 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*'.[35] 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 private actors under art 8 of the *Draft Articles*.

In the recent case of *Prosecutor v Tadic (Appeals Chamber Judgment)*,[36] 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.[37] It stated that, for the 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'.[38]

Although this case sought to reduce the threshold of control, it can be argued that many wrongful acts of private 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 private 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.[39] 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

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32 [1986] ICJ Rep 14 ('*Nicaragua Case*').
33 Ibid 58–63.
34 Ibid 62.
35 Ibid 64 (emphasis added).
36 Case IT–94–1–A (15 July 1999) ('*Tadic*').
37 Ibid [117].
38 Ibid [145] (emphasis in original).
39 Crawford, above n 25, 112.

veil of incorporation is used as an engine for fraud,[40] or where it can be shown that the corporation was exercising public powers,[41] or being used by the state to achieve a particular purpose.[42]

Under art 9 of the *Draft Articles*, the conduct of private 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' can be attributed to the state. 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.[43] The case of *Yeager v Islamic Republic of Iran*[44] illustrates the application of the principle under art 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 held that the conduct of these individuals, though not explicitly authorised by the Government, was attributable to the Islamic Republic of Iran.[45]

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.[46] These provisions clearly envisage state responsibility for acts or omissions of private 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 a lack of good faith or negligence in suppressing the insurrection.[47]

Lastly, under art 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,

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40 *Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 39.

41 *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.

42 *Foremost Tehran, Inc v Government of the Islamic Republic of Iran* (1986) 10 Iran–USCTR 228, 240–2.

43 Crawford, above n 25, 114.

44 (1987) 17 Iran–USCTR 92.

45 Ibid 103–5.

46 *Draft Articles*, above n 13, art 10(2).

47 *G L Solis (USA) v United Mexican States* (1928) 4 RIAA 358, 361.

in the *Diplomatic and Consular Staff Case*,[48] certain militants seized the US embassy and its staff in Iran without the authority of the Iranian Government. However, the Government issued a 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.[49]

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 private actors for the state to assume liability — the conduct of the private actor must constitute an 'act of a state'.

C *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 private actors has generated two opposing responses. According to one, propounded by such scholars as Andrew Clapham, these rules 'should not be … considered appropriate'[50] in the context of, for example, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[51] The other response, which the present author also supports, posits that the general rules on state responsibility have application to international human rights law. Many scholars including Nicola Jägers, Viljam Engström and Celina Romany, favour this position.[52]

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)*[53] 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'.[54] Likewise, in *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)*,[55] 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'.[56] This jurisprudence embraces the view that a violation of an international human rights obligation can give rise to state

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48 [1980] ICJ Rep 3.
49 Ibid 34–7.
50 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* (1993) 163, 170.
51 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*').
52 See, eg, Jägers, above n 7, 145–6; Engström, above n 21, 15; Romany, above n 6, 96.
53 (1990) 20 RIAA 217.
54 Ibid 251.
55 [1997] ICJ Rep 3.
56 Ibid 38.

responsibility. Moreover, Rick Lawson has demonstrated that, in practice, international human rights monitoring bodies apply the general rules of state responsibility to human rights cases, albeit without expressly referring to them.[57]

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'.[58] Since the international law principles of state responsibility are general in character,[59] and the human rights rules are more specific, the latter should take precedence over the former in the event of a conflict.[60]

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 many internationally 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.[61] 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.[62] 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.

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57 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, 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* (1998) 91, 115.

58 *Restatement (Third) of Foreign Relations Law*, part VII, introductory note.

59 Crawford, above n 25, 124.

60 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'.

61 Andrew Clapham, *Human Rights in the Private Sphere* (1993) 104–5.

62 Shaw, above n 20, 541.

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.

III STATE RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS BY PRIVATE ACTORS

A *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.[63] 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 private 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*[64] 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 private actors. The second is the duty to take remedial measures once the violations have occurred.[65]

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'.[66] 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'.[67] According to the HRC, states should also take 'specific and effective measures to prevent the disappearance of individuals'.[68] 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'.[69]

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63 Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd revised ed, 2001) 9, 23; Paul Hunt, *Reclaiming Social Rights* (1996) 31–4.

64 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

65 See especially ibid art 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 art 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.

66 Human Rights Committee, *General Comment 6*, as contained in *Report of the Human Rights Committee*, UN GAOR, 37th sess, Annex V, [2], UN Doc A/37/40 (1982).

67 Ibid [3].

68 Ibid [4].

69 Human Rights Committee, *General Comment 16*, as contained in *Report of the Human Rights Committee*, UN GAOR, 43rd sess, Annex VI, [1], UN Doc A/43/40 (1988).

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 implementation of the *International Covenant on Economic, Social and Cultural Rights*,[70] 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, 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'.[71] The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* contain a similar interpretation of the obligations of states.[72]

A further obligation implicit in the duty to protect is the obligation to control and regulate private 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.[73] 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'.[74] Similar statements have been made in respect of the right to freedom of expression.[75]

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'.[76] 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.[77] In the context of the right to health, 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'.[78] The state is enjoined, among other things,

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70 Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

71 CESCR, *Substantive Issues Arising in the Implementation of the* International Covenant on Economic, Social and Cultural Rights*: General Comment 15: The Right to Water*, UN ESCOR, 29th sess, Agenda Item 3, [24], UN Doc E/C.12/2002/11 (2002).

72 Adopted at Maastricht, 22–26 January 1997, [18] ('*Maastricht Guidelines*'). Although not legally binding, the *Maastricht Guidelines* have served as persuasive aids in the interpretation of economic, social and cultural rights.

73 Human Rights Committee, *General Comment 16*, above n 69, [9].

74 Ibid [10].

75 Human Rights Committee, *General Comment 10*, as contained in *Report of the Human Rights Committee*, UN GAOR, 38th sess, Annex VI, [2]–[3], UN Doc A/38/40 (1983).

76 CESCR, *Substantive Issues Arising in the Implementation of the* International Covenant on Economic, Social and Cultural Rights*: General Comment 12: The Right to Adequate Food*, UN ESCOR, 20th sess, Agenda Item 7, [27], UN Doc E/C.12/1999/5 (1999).

77 Ibid [19].

78 CESCR, *Substantive Issues Arising in the Implementation of the* International Covenant on Economic, Social and Cultural Rights*: General Comment 14: The Right to the Highest Attainable Standard of Health*, UN ESCOR, 22nd sess, Agenda Item 3, [35], UN Doc E/C.12/2000/4 (11 May 2000).

> 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.[79]

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 effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons'.[80]

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 private actors. The *European Convention*, for example, requires states to 'secure recognition to everyone within their jurisdiction' of the rights it recognises.[81] Likewise, the *American Convention on Human Rights*[82] 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'.[83] Although a similar provision is absent in the *African Charter on Human and Peoples' Rights*,[84] the African Commission on Human and Peoples' Rights ('African Commission') in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*[85] interpreted the duty to protect thus:

> Even where it cannot be proved that violations were 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.[86]

It can, therefore, be concluded that the duty of states to protect individuals or groups from violations of their human rights by private actors is well established in international law. This duty entails an obligation to take such preventive

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79 Ibid. See CESCR, *Substantive Issues Arising in the Implementation of the* International Covenant on Economic, Social and Cultural Rights*: General Comment 5: Persons with Disabilities*, UN ESCOR, 11th sess, 38th mtg, [11], UN Doc E/C.12/1994/13 (25 November 1994). The duty to protect also requires that vulnerable groups be given special protection. In relation to people with disabilities, for example, CESCR has stated:

> In a context in which arrangements for the provision of public services are increasingly being privatized 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.

80 Human Rights Committee, *General Comment 6*, above n 66, [4].

81 Ibid art 1(1).

82 Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 27 August 1979) ('*American Convention*').

83 Ibid art 1(1).

84 Opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 28 December 1988) ('*African Charter*').

85 African Commission, 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.

86 Ibid [22].

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 private 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 private actors directly and indirectly accountable at the domestic level.

B *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 Rodríguez v Honduras*,[87] 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.[88] More than 100 persons had been disappeared under similar circumstances during this period.[89] 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.[90] 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*'.[91] The Court held expressly that 'the existence of a particular violation does not, in itself, prove the failure to take preventive measures'.[92] However, the state must

87 [1988] Inter-Am Court HR (ser C) No 4.
88 Ibid [76].
89 Ibid.
90 Ibid [78]–[81].
91 Ibid [172] (emphasis added).
92 Ibid [175].

> 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 jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[93]

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.[94]

Furthermore, the Court held that the state has the obligation to 'investigate every situation involving a violation of the rights protected by the Convention'.[95] 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.[96]

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.[97]

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*.[98] 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.[99] As a result, water and soil contamination brought about serious short-term and long-term health problems such as skin

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93 Ibid [174] (emphasis added).
94 Ibid [175].
95 Ibid [176].
96 Ibid [177] (emphasis added).
97 Ibid [178].
98 African Commission, Communication No 155/96 (2001) ('*SERAC Case*').
99 Ibid [1]–[2].

infections, gastrointestinal and reproductive complications.[100] 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 opposition to the oil companies' activities.[101] 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.[102] The African Commission found the Nigerian Government to have violated the 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*.[103]

Martin Scheinin has argued that the European Court of Human Rights ('ECHR') has implicitly adopted this test.[104] This is apparent in the case of *Osman v United Kingdom*.[105] Here, the applicants argued that the respondent state had breached art 2 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 art 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'.[106] 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'.[107] 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.[108] However, the Court held that, where it is alleged that the authorities have violated their positive obligation to protect the right to life,

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100 Ibid [2].
101 Ibid [7], [9].
102 Ibid [60].
103 Ibid [59].
104 See Martin Scheinin, 'State Responsibility, Good Governance and Indivisible Human Rights' in Hans-Otto Sano and Gudmundur Alfredsson (eds), *Human Rights and Good Governance* (2002) 29, 35.
105 (1998) VIII Eur Court HR 3124; 29 EHRR 245.
106 Ibid 3159; 305.
107 Ibid.
108 Ibid.

> 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.[109]

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.[110]

It is worth noting that the ECHR, like the IACHR, has embraced the view that the 'reasonableness' of the measures taken is key in 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.[111] Article 4(c) of the *Declaration on the Elimination of Violence against Women*,[112] 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'.[113] The Committee on the Elimination of Discrimination against Women has reaffirmed this principle.[114] 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'.[115]

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

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109 Ibid 3160; 305.

110 Ibid 3162; 308.

111 Jägers, above n 7, 146–7; International Council on Human Rights Policy, *Beyond Voluntarism*, above n 7, 52.

112 GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/48/49 (20 December 1993).

113 The *Beijing Declaration and Platform for Action* adopted by the Beijing Fourth World Conference on Women reaffirmed this principle: *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).

114 According to CEDAW *General Comment 19: Violence against Women*, [9] as contained in UN Doc A/47/38 (1992): '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'.

115 *Maastricht Guidelines*, above n 72, [18].

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.

IV 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 private actors remains a debatable topic.[116] This is so despite the fact that the latter are more prone to violations by private 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 private actors. This Part of the article seeks to demonstrate that the doctrine of state responsibility also has application to violations of economic, social and cultural rights committed in private relations.

A *International Human Rights Law Cases*

The enforcement of the indirect obligations of private actors at the international level by judicial means has largely been constrained by a lack of recognition of the justiciability of economic, social and cultural rights. *ICESCR*, which is the main international human rights treaty on these rights, does not provide for a complaints procedure.[117] The same is the case with other conventions that contain economic, social and cultural rights such as the

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116 See, eg, Stuart Woolman, 'Application', in Matthew Chaskalson et al (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.

117 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, *Question of the Realization in All Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the* International Covenant on Economic, Social and Cultural Rights*, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights*, Res No 2003/18, as contained in Commission on Human Rights, *Report to the Economic and Social Council on the Fifty-Ninth Session of the Commission: Draft Report of the Commission*, UN ESCOR, 59th sess, Agenda Item 21(b), 12, UN Doc E/CN.4/2003/L.11/Add.3 (2003).

Convention on the Rights of the Child.[118] The *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*,[119] providing a complaints mechanism, was only adopted by the General Assembly on 6 October 1999.[120]

Nonetheless, international human rights monitoring bodies have employed several strategies to make states accountable for violations of these rights by private 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 art 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,[121] 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 the latter to quarry stone in part of an area traditionally owned by them.[122] 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.[123] Furthermore, the authors argued that the site of the quarry was a sacred place of the old Sami religion.[124] The HRC held that the quarrying in the amount that had already taken place did not constitute a denial of the authors' right under art 27 to enjoy their own culture.[125] However, it held that economic activities must not be carried out in a manner that infringed art 27 and that the state had a duty to ensure that any expansion of the mining

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118 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

119 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

120 *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, GA Res 54/4, UN GAOR, 54th sess, 28th plen mtg, Agenda Item 109, UN Doc A/RES/54/4 (6 October 1999).

121 *Ilmari Länsman v Finland*, Human Rights Committee, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (26 October 1994) ('*Länsman No 1*'); *Jouni Länsman v Finland*, Human Rights Committee, Communication No 671/1995, UN Doc CCPR/C/58/D/671/1995 (30 October 1996) ('*Länsman No 2*').

122 *Länsman No 1*, Human Rights Committee, Communication No 511/1992, [2.1], UN Doc CCPR/C/52/D/511/1992 (26 October 1994); *Länsman No 2*, Human Rights Committee, Communication No 671/1995, [2.1], UN Doc CCPR/C/58/D/671/1995 (30 October 1996).

123 *Länsman No 1*, Human Rights Committee, Communication No 511/1992, [2.3]–[2.5], UN Doc CCPR/C/52/D/511/1992 (26 October 1994). 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*, Human Rights Committee, Communication No 671/1995, [2.6]–[2.7], UN Doc CCPR/C/58/D/671/1995 (30 October 1996).

124 *Länsman No 1*, Human Rights Committee, Communication No 511/1992, [2.6], UN Doc CCPR/C/52/D/511/1992 (26 October 1994).

125 *Länsman No 1*, Human Rights Committee, Communication No 511/1992, [9.6], UN Doc CCPR/C/52/D/511/1992 (26 October 1994); *Länsman No 2*, Human Rights Committee, Communication No 671/1995, [10.5], UN Doc CCPR/C/58/D/671/1995 (30 October 1996).

activities in area did not constitute a violation of the authors' rights to enjoy their own culture.[126]

In *Bernard Ominayak, Chief of the Lubicon Lake Band v Canada*,[127] 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 means of subsistence.[128] 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'.[129] 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 art 1 of the *ICCPR* (which recognises the right to self-determination),[130] and had deprived the Lubicon Lake Band of its means of subsistence.[131] The HRC refused to base its decision on art 1,[132] but found that the conduct of the Government threatened the way of life and culture of the Lubicon Lake Band contrary to art 27 of the *ICCPR*.[133]

The right to privacy and family life has also been used to hold states responsible for acts of private actors that infringe certain economic, social and cultural rights. In *Francis Hopu and Tepoaitu Bessert v France*,[134] 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 violation of arts 17 and 23 of the *ICCPR*.[135] They also claimed that members of their family were buried on the site.[136] 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.[137] 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

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126 *Länsman No 1*, Human Rights Committee, Communication No 511/1992, [9.8], UN Doc CCPR/C/52/D/511/1992 (26 October 1994); *Länsman No 2*, Human Rights Committee, Communication No 671/1995, [10.7] UN Doc CCPR/C/58/D/671/1995 (30 October 1996).

127 Human Rights Committee, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 March 1990).

128 Ibid [2.1].

129 Ibid [2.2].

130 Ibid [2.3].

131 Ibid.

132 Ibid [13.3]–[13.4].

133 Ibid [32.1]–[33].

134 Human Rights Committee, Communication No 549/1993, UN Doc CCPR/C/60/D/549/1993 (29 July 1997).

135 Ibid [2.3], [3.2].

136 Ibid [3.2].

137 Ibid [10.3].

burial grounds for the authors in deciding to lease the site for the building of the hotel complex.[138]

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.[139] 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'.[140] 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 this time to treat states as guarantors of human rights in the private sphere in this strong sense.[141]

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.[142]

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 art 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 private 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*,[143] 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.[144] However, the respondent State did not take any steps to investigate the allegations or to protect the author.[145] The HRC held that the State Party was obliged under art 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'.[146] Furthermore, the State Party was 'under an obligation to take measures to prevent similar violations in the future'.[147] This

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138 Ibid.

139 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, 2001) 563, 582.

140 Ibid.

141 Ibid.

142 Ibid.

143 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.

144 Ibid [2.1], [3].

145 Ibid [3].

146 Ibid [10].

147 Ibid.

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'.[148] A similar observation can be made in respect of the various committees that oversee the implementation of the key international human rights treaties. CESCR, for example, has on several occasions commented on the adverse effects of structural adjustment programs formulated by the World Bank and the International Monetary Fund.[149] 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, 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 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.[150]

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148 International Council on Human Rights Policy, *Beyond Voluntarism*, above n 7, 86.

149 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, [10], UN Doc E/C.12/1/Add.44 (12 May 2000); 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, [10], UN Doc E/C.12/1/Add.62 (28 August 2001); 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, [9], UN Doc E/C.12/1/Add.60 (10 May 2001); 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, [9], UN Doc E/C.12/1/Add.74 (29 November 2001); 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, [10], UN Doc E/C.12/1/Add.57 (9 May 2001); 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: Brazil*, UN ESCOR, [16], UN Doc E/C.12/1/Add.87 (23 May 2003).

150 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, [21], UN Doc E/C.12/1/Add.8 (4 December 1996). 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, [24], UN Doc E/C.12/1/Add.37 (30 November 1999). 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[.]

In its concluding observations on the report of Nigeria, 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.[151] 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 private actors for economic, social and cultural rights. It may also serve the useful purpose of clarifying this doctrine even further.

B *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 private 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 judgments addressing state responsibility for violations of economic, social and cultural rights by private actors although, like the *ICCPR*, the *American Convention* does not expressly recognise the justiciability of economic, social and cultural rights. In *Yanomami v Brazil*,[152] the petitioners alleged that the Government had allowed massive penetration of outsiders into the area traditionally inhabited by the Yanomami Indians.[153] 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 influenza, tuberculosis, measles and venereal diseases.[154] 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-being[155] recognised under the *American Declaration of the Rights and Duties of Man*.[156] Apart from the facts, the recommendations made by the Inter-American Commission on Human Rights indicate quite clearly that

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151 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, [29], UN Doc E/C.12/1/Add.23 (1 May 1998).

152 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).

153 Ibid.

154 Ibid.

155 Ibid.

156 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).

the main issues in the case related to economic, social and cultural rights.[157] 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.[158]

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*,[159] 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 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.[160] 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.[161] 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.[162] Accordingly, the state was found to be in violation of art 25 as read with arts 1(1) and 2 of the *American Convention*.[163]

The ECHR has handled relatively more cases alleging state responsibility for infringement of human rights than the African Commission and the IACHR.[164] 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.

Costello-Roberts v United Kingdom[165] 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'.[166] Thus, while the treatment complained of in this case was the act of a headmaster of an independent school,

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157 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).

158 Ibid.

159 [2001] Inter-Am Court HR (ser C) No 79.

160 Ibid [2].

161 Ibid [103].

162 Ibid [127].

163 Ibid [139].

164 Many cases relating to civil and political rights are reviewed in Clapham, 'The "Drittwirkung" of the *Convention*', above n 50.

165 (1993) 247-C Eur Court HR (ser A) 50; 19 EHRR 112.

166 Ibid 58; 132.

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*.[167]

In *López Ostra v Spain*,[168] 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.[169] The Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question.[170] However, the municipality allowed the plant to be built on its land and the state subsidised the plant's construction.[171] It was held that Spain was responsible for failing to secure the right to private and family life under art 8 of the *European Convention*.[172]

Similarly, in *Guerra v Italy*,[173] a fertiliser factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide, in its production cycle.[174] In 1976, following an explosion at the factory, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped.[175] As a result, 150 people had to be hospitalised on account of acute arsenic poisoning.[176] 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.[177]

Association X v United Kingdom[178] 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.[179] 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'.[180] Andrew Clapham has submitted that, based on the reasoning of this decision, a state 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'.[181]

In short, although economic, social and cultural rights are not justiciable under *ICESCR*, the *European Convention* and the *American Convention*, this has

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167 Ibid 58; 133.
168 (1994) 303-C Eur Court HR (ser A) 41; 20 EHRR 277.
169 Ibid 54; 295.
170 Ibid 55; 295–6.
171 Ibid.
172 Ibid 56; 297.
173 (1998) I Eur Court HR 210; 26 EHRR 357.
174 Ibid 216; 359.
175 Ibid.
176 Ibid.
177 Ibid 228; 360.
178 (1978) 14 Eur Comm HR 31.
179 Ibid 33–4.
180 Ibid 32 (emphasis in original).
181 Clapham, '"Drittwirkung" of the *Convention*', above n 50, 178.

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.[182]

V HOST STATE RESPONSIBILITY

A *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 article 'host state' is used broadly to refer to the state where the violations occur irrespective of whether the private actor is of an international character or not.

The duty to protect human rights has long been governed by the principle of territoriality.[183] This principle obliges the state to exercise due diligence to prevent and respond to violations of human rights within its territorial boundaries. 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 private actors for human rights violations.

B *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 private actors for human rights can be listed. Firstly, this doctrine relies on a sound domestic legal system that will ensure that private actors are accountable for human rights either directly or indirectly. However, very few constitutions 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. In Africa, the *Constitutions* of South Africa,[184] Malawi,[185] Gambia,[186] Cape Verde,[187] Ghana[188] and Mali[189] are some of the few recently adopted constitutions that recognise that human rights can bind private actors. In other countries such as Germany and Belgium, constitutional and human rights principles may be considered when determining private law cases.[190] Without recognising the direct and indirect application of human rights in the private

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182 Jägers, above n 7, 175.

183 Mark Gibney, Katarina Tomasevski and Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harvard Human Rights Journal* 267, 267.

184 *Constitution of the Republic of South Africa* (1996).

185 *Constitution of the Republic of Malawi* (1994).

186 *Constitution of Gambia* (1996).

187 *Constitution of the Republic of Cape Verde* (1992).

188 *Constitution of the Republic of Ghana* (1992).

189 *Constitution of the Republic of Mali* (1992).

190 See Clapham, '"Drittwirkung" of the *Convention*', above n 50, 164–5.

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 private 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 private actors. In contemporary times, however, the state has lost much of its capacity to control and regulate certain private actors. As mentioned earlier, 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.[191] 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:

> growth 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 resources, than those corporations that it is supposedly regulating. This suggests that in fact the sovereign is no longer 'master of its own territory'.[192]

With these powers, private actors can easily stifle regulation and accountability. As Viljam Engström has argued, '[b]y threatening to relocate, [MNCs] can resist any domestic sanctions'.[193]

Regulation requires financial and human resources. For under-resourced or developing states, resource constraints present another difficulty for regulating and controlling private 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.[194] In the context of the privatisation of water, it has been estimated that the state could spend about 10 per cent of the total operation costs of the service if it were to monitor effectively the private service provider.[195] For longer concessions (15–30 years), problems of monitoring are exacerbated because the important information regarding the operation of the service is in the hands of the private service provider.[196]

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

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191 See Reisman, above n 3; Sur, above n 3; Bennet Freeman, *Corporate Responsibility and Human Rights* (2001) <http://www.lse.ac.uk/collections/globalDimensions/seminars/HumanRightsAndCorporateResponsibility/freemanTranscript.htm> at 1 May 2004.

192 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).

193 Engström, above n 21, 21.

194 Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000) 1349.

195 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 Mzikenge Chirwa, *Report on the Seminar on Privatisation of Basic Services, Democracy and Human Rights* (2003) 7 <http://www.communitylawcentre.org.za/privatisation/documents2003/SeminarReportFinal1.doc> at 1 May 2004.

196 Ibid.

chief means of attracting investment initiatives.[197] 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 on oil companies, which are considered to be the backbone of the Nigerian economy.[198]

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.[199]

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 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 private 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 Part of this article considers the legality of this option and its limitations.

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197 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 sess, Provisional Agenda Item 4, [30]–[40], UN Doc E/CN.4/Sub.2/2000/13 (2000).

198 Godfrey Odhiambo 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> at 1 May 2004.

199 Walker and Mendlovitz, above n 3, 1. 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. Johns has observed: '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'.

VI HOME STATE RESPONSIBILITY

A *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'.[200] Nicola Jägers and Viljam Engström, after reviewing a range of human rights instruments and cases, have pointed out that there is a movement away from the conventional view that human rights bind the state within its territorial frontiers only.[201] Two cases can be cited in support of this view. In *Lilian Celiberti de Casariego v Uruguay*,[202] the HRC has held that art 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.[203]

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.[204] 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 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 return for the withdrawal of a case alleging that it had lied about working conditions in its Asian factories.[205]

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 Act*[206] has been invoked to

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200 Brownlie, *System of the Law of Nations*, above n 14, 165.

201 Jägers, above n 7, 166–7; Engström, above n 21, 18.

202 Human Rights Committee, Communication No 56/1979, UN Doc CCPR/C/13/D/56/1979 (29 July 1981).

203 Ibid [10.3].

204 [1986] ICJ Rep 14, 64.

205 See BBC News, London, *Nike Settles "Free Speech" Court Case* (13 September 2003) <http://news.bbc.co.uk/1/hi/world/americas/3106930.stm> at 1 May 2004.

206 *Alien Tort Claims Act* 28 USC § 1350 (2004) ('*ATCA*').

hold corporations directly responsible for human rights wrongs committed outside its territory.

B *The* Alien Tort Claims Act

ATCA was enacted in 1789. None of its provisions explicitly mention human rights.[207] However, it has generated a range of suits against corporations for violations of human rights committed outside the US. It stipulates:

> 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.[208]

This provision was applied for the first time in 1980 in the celebrated case of *Filartiga v Pena-Irala*.[209] 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 fulfillment of the ageless dream to free all people from brutal violence.[210]

This case opened up opportunities for holding private actors accountable for human rights violations committed abroad in the private realm. As this author has observed elsewhere, most of the cases brought under *ATCA* have alleged gross violations of civil and political rights or international humanitarian law.[211] However, a few cases can be cited which included direct and indirect references to violations of economic, social and cultural rights. In *Doe v Unocal*,[212] 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.[213] The military forced villagers to work and entire villages to relocate for the benefit of the project.[214] While forcing villagers to work and

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207 Ralph Steinhardt, *Litigating Corporate Responsibility* (2001) <http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm> at 1 May 2004. Steinhardt has observed that the original purpose of the *ATCA* is difficult to ascertain. The little evidence available suggests that it was intended to give power to federal courts to preside over torts involving the interpretation of international law. It was believed at that time that any government that wished to be regarded as a serious international partner would commit itself to the law of nations. It has also been suggested that the *ATCA* was intended to cover transitory or transboundary torts.

208 *Alien Tort Claims Act* 28 USC § 1350 (2004).

209 630 F 2d 876 (2nd Cir, 1980).

210 Ibid 890.

211 See Chirwa, above n 7, 51.

212 963 F Supp 880 (CD Cal, 1997).

213 Ibid 883.

214 Ibid.

relocate, the military also committed acts of violence.[215] 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.[216] On 18 September 2002, the US Court of Appeals for the Ninth Circuit reversed the District Court's decision,[217] 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.[218] 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.[219] In February 2003, the Court of Appeals decided to rehear the appeal before a panel of eleven judges.[220]

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.

In *Aguinda v Texaco*,[221] the plaintiffs — citizens of Peru and Ecuador — alleged the defendant had 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 Circuit upheld, with some minor modifications, the decision of the District Court dismissing the case for *forum non conveniens*.[222]

In *Wiwa v Royal Dutch Petroleum Company*,[223] 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

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215 Ibid.

216 Ibid 885.

217 *Doe v Unocal* 2002 WL 31063976 (9th Cir, 2002) ('*Doe v Unocal Court of Appeal Judgment*').

218 Ibid 15, fn 32.

219 Ibid 14.

220 *Doe v Unocal* 2003 WL 359787 (9th Cir, 2003) ('*Doe v Unocal Court of Appeal Order*').

221 142 F Supp 2d 534 (SDNY, 2001).

222 303 F 3d 470 (2nd Cir, 2002).

223 226 F 3d 88 (2nd Cir, 2000); discussed in Aaron Xavier Fellmeth '*Wiwa v Royal Dutch Petroleum Co*: A New Standard for the Enforcement of International Law in US Courts' (2002) 5 *Yale Human Rights and Development Law Journal* 241.

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*.[224] The Court of Appeal held that the fact the plaintiffs were residents of the US was an important consideration in favour of accepting their choice of forum. It also held that the passage of the Torture Victim Prevention Act in 1991 indicated a 'policy favoring receptivity by our courts' to suits alleging violations of the law of nations. Thus, the Court held, torture committed under colour of law of a foreign nation in violation of international law 'not only violates the standards of international law but also as a consequence violates our domestic law'. This case essentially suggests that there a presumption in favour of jurisdiction over cases alleging torture unless the defendant succeeds in rebutting it.

These cases demonstrate that home states can play an important role in ensuring that their nationals and other actors under their control respect human rights, including economic, social and cultural rights.

C *The Duty of Care Principle*

Corporations are increasingly being sued for wrongs committed abroad in such other countries as Canada, Australia, England and Spain.[225] 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. 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:

> it 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*.[226]

The case of *Connelly v RTZ Corporation plc*[227] 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

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224 Ibid 108.

225 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) <http://www.indianet.nl/irene.html> at 1 May 2004.

226 *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 139, 590–2.

227 [1998] AC 854.

safe system of work affording protection from the effects of uranium ore dust.[228] The injury was sustained in Namibia where the plaintiff had worked for the second defendant (a subsidiary of the first defendant).[229] 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.[230] 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.[231] Similarly, in *Lubbe v Cape plc*,[232] 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.[233] 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*.[234] 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.

D *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,[235] 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.[236]

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228 Ibid 864.

229 Ibid.

230 Ibid.

231 Ibid 874.

232 [2000] 4 All ER 268.

233 Ibid 270.

234 Ibid 279–80.

235 Brownlie, *System of the Law of Nations*, above n 14, 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.

236 *Nicaragua Case* [1986] ICJ Rep 14, 58–63.

US courts have adopted a similarly high threshold for determining the responsibility of corporations for violations of human rights committed outside the US. As mentioned above, proof of state complicity is a prerequisite for a private 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 courts require the plaintiff to establish the existence of a considerable amount of cooperation between the government and the private actor concerned.[237] In other words, the private 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'.[238] 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.[239]

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 impossible, for example, to hold a home state responsible for advice given by specialised agencies to countries on state policies with full knowledge that it will result in violations of human rights.[240] 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. The decision of the US Court of Appeals for the Ninth Circuit in *Doe v Unocal*, on the standard for determining the liability for aiding and abetting, is worth adopting in this regard.[241]

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

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237 See Saunders, above n 5, 1458–9.

238 Gibney, Tomasevski and Vedsted-Hansten, above n 183, 284–5.

239 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* (1993) 265, 271.

240 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* (1987) 275, 287. In noting the inadequacy of the accountability of specialised agencies giving advice to developing countries, Shadrack Gutto has argued: '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'.

241 *Doe v Unocal Court of Appeal Judgment*, 2002 WL 31063976 (9th Cir, 2002), 14, 15.

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.[242] The US Government has responded to the increasing suits against corporations under *ATCA* by proposing to limit its ambit.[243] Even for those states that are willing to control private actors, problems of effective control over certain actors such as MNCs, cited in respect of host state responsibility, are also valid here.[244]

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.[245] 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.[246] 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.[247] 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 private actors operating abroad to legislation of the home state often meets with resistance from host states alleging infringement of the principle of state sovereignty. This problem has been raised 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'.[248]

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.[249] This means that a complainant has to exhaust the local remedies of the home state first before approaching the international forum. The cost implications of this procedure are obviously enormous for individual plaintiffs.

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242 Engström, above n 21, 22.

243 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 Alvrez-Machain* (9th Cir, 25 September 2003) (No 03-339).

244 See, eg, *The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations* (1998) 25 <http://www.humanrights.ch/cms/pdf/000303_danailov_studie.pdf> at 1 May 2004. Silvia Danailov has argued that 'no State today is capable of controlling adequately the phenomenon of the TNC on its own'.

245 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.

246 See generally, Saunders, above n 5; *International Shoe v Washington* 326 US 310, 316 (1945).

247 Saunders, above n 5, 1457.

248 *Mandela Criticizes Apartheid Lawsuits* (2003) <http://www.dispatch.co.za/2003/08/26/southafrica/bmadib.htm> at 1 May 2004.

249 Shaw, above n 20, 202–3.

VII 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 private 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 responsibility is particularly important given that corporations violating human rights in developing countries can be sued in their home states.

Both the host state and home state doctrines of responsibility have limitations. This fact highlights that other approaches aimed at enhancing private sector responsibility for human rights must not be ignored. A number of recommendations can be made regarding the doctrine of state responsibility. Firstly, this article 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 by the Court of Appeals for the Ninth Circuit in *Doe v Unocal*[250] is instructive in this regard. Secondly, it might be important to recognise the horizontal application of human rights at the domestic level. As a minimum, domestic courts must find means of applying human rights principles when resolving private disputes. At the international level, means of monitoring human rights other than the complaints procedure should be used optimally to improve compliance by non-state actors with human rights. This would assist in clarifying the precise obligations of private actors relating to human rights and raising awareness. With regard to economic, social and cultural rights, the efforts at recognising their justiciability should be supported. Without judicial remedies, it is difficult to enhance respect for these rights by private actors. Lastly, north–south networks among human rights activists and practitioners should be strengthened to ensure that violations of human rights by corporations in weak states do not go unpunished.

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250 *Doe v Unocal Court of Appeal Judgment* 2002 WL 31063976 (9th Cir, 2002), 14, 15.