OBLIGATIONS OF NON-STATE ACTORS IN RELATION TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS UNDER THE SOUTH AFRICAN CONSTITUTION

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1. Introduction

A feature that has earned the South African Constitution international admiration is the inclusion of a detailed catalogue of economic, social and cultural rights in its Bill of Rights. Already, South African courts have taken the lead in developing jurisprudence around these rights.[1]

However, most of the research and litigation has focussed on state obligations with very little attention being paid to the duties of the private sector. That non-state actors have come to occupy central positions in the provision of key services and goods essential for an individual's day-to-day life is beyond dispute (Freeman, 2001; Bergman, 2000, pp. 485). These have included, for example, the privatisation of municipal services, the role of banks in ensuring access to adequate housing, and the role of medical aid schemes and pharmaceutical corporations in facilitating access to health care.

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[1] The justiciability of these rights was confirmed in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South African Constitution* 1996 (4) SA 744 (CC)(*In re Certification*), 1996 (10) BCLR 1253 (CC), at paras. 76–78. Since then judicial enforcement of these rights has generated a number of cases including *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) (*Soobramoney*); *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) (*Grootboom*); *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (7) BCLR 652 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC) (*TAC*).

These new phenomena have found concrete expression in South Africa as in many other countries (Jeter, 2001; McDonald & Smith, 2002).

Although there is widespread consensus that the acts or omissions of private actors have serious implications for the enjoyment of economic, social and cultural rights,[2] the precise obligations of private actors in relation to these rights remain largely obscure. This paper de-mystifies the anti-horizontalist approach to human rights and argues that the South African Constitution imposes socio-economic rights obligations on non-state actors. It investigates the nature of these obligations drawing heavily on emerging international and domestic trends in this regard.

2. Application of human rights in the private sphere

2.1 Arguments against horizontal application

According to the traditional liberal tradition, a bill of rights is regarded as a bulwark against state intrusion into an individual's private life.[3] This view maintains a neat distinction between the 'public' sphere and the 'private' sphere. The former consists of a relationship between unequal parties, namely, the citizen and the

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[2] See, e.g., A. Clapham & S. Jerbi 'Categories of corporate complicity in human rights abuses' <http://www.business-humanrights.org/Clapham-Jerbi-paper.htm> (accessed 12 August 2002); Danish Human Rights and Business Project *et al* *Defining the scope of business responsibility for human rights abroad* 2000.

[3] E.g. Van Dijkhorst J in *De Klerk & Another v Du Plessis & others* 1994 (6) BCLR 124 at 130D-131D stated: *'Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental and individual liberty ... It would ... be correct ... to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.'* Hogg, commenting on the Canadian Constitution has also noted that *'[i]n deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government and it leaves to those institutions the task of ordering the private affairs of the people'*. Quoted in S. Woolman, (1999), 'Application', in M. Chaskalson *et al* (eds.) *Constitutional law of South Africa* Cape Town: Juta & C Ltd, pp. 10-19. Similar statements can be found in *Gardner v Whitaker* 1995 2 SA 672 (E) 683G; J. van der Vyfer, (1994), 'The private sphere in constitutional litigation' *THRHR*, Vol.57, pp. 378, 387-8.

state. The only way of ensuring individual freedom is by building powerful defences in the form of human rights around the individual so that he or she is protected from the heavy hand of the state. By contrast, the private sphere is believed to consist of relationships between free, equal and autonomous parties. The bill of rights is therefore irrelevant to these relationships (Cockrell, 2001, pp. 3A-3; Cockrell, 1993, pp. 227, 227ff).

The second objection to the application of human rights to private actors is premised on democratic principles. This objection posits that if state intrusion into the private sphere is to be permitted, such invasion should be made by the legislature. This branch of government is believed to be more representative of the people and therefore legitimately able to decide on issues relating to non-state actors. Furthermore, the legislature is regarded as being better equipped to decide on complex policy issues. By contrast, the judiciary consists of the unelected elite and lacks institutional competence to deal with conflicting and intricate policy choices. Thus, allowing the bill of rights to apply horizontally would result in an illegitimate shift of power from the legislature to the judiciary. This, the argument goes, would constitute an inexcusable violation of the tenets of modern liberal democracy.

The horizontal application of human rights is also resisted for fear of watering down the effectiveness of fundamental rights as a bulwark against state invasion. Adherents to this view hold that a floodgate of actions would result if a bill of rights were to apply to private relationships. According to Marshall:

> *'characterising every shouting match or every decision with whom to associate as actions that may lead to constitutional liability is to trivialise the meaning of constitutional protection and thereby to weaken the force of a claim of 'true' constitutional violation by overexposure'* (Marshall, 1985, pp. 558, 569).

Relying on this reasoning, the fear is expressed that a backlog of cases that would emerge from suits alleging horizontal violations of human rights would stretch the judiciary to the limit and thus leave the individual vulnerable to the vicissitudes of state power.

2.2 Demystifying 'anti-horizontalism'

The restriction of the application of a bill of rights to vertical relationships is undoubtedly a brainchild of the natural law tradition. Justifying the existence of natural rights in the Age of Enlightment, the natural law theory posited that every individual had 'inalienable' and 'unalterable' rights originating from a metaphysical source, for example, God or human nature (Shestack, 1998, pp. 201). Philosophers of the time portrayed a human being as egoistic and competitive, and therefore deserving of some sort of political governance to secure order in society.[4] For this purpose, people had to negotiate a 'social contract' whereby they pledged allegiance to state authority on condition that the state assumed the responsibility of ensuring their protection and promised to refrain from interfering into their private affairs in the pursuit of their enjoyment of property. As a measure of circumscribing state authority, natural rights constituted a firebreak to protect the individual from the reach of the state's repressive tendencies. The issue of whether social groups, corporations and other commercial entities could wield such power as to impede the enjoyment of rights by individuals or groups escaped the critical mind of the philosophers of the time.[5] In the context of the fledging capitalist market, the preoccupation was with freedom of the individual to enable him to compete in the market.

The above principles shaped and defined the rights that gained a presence in the celebrated English Bill of Rights (1689), the American Declaration of Independence (1776) and the French Declaration on the Rights of Man and Citizens (1789). These historic documents recognised traditional civil and political rights and admitted their

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[4] The social contract theory was coined in by John Locke and refined by Jean-Jacques Rousseau. See J. Locke, (1952), *The second treatise of government*; J. Rousseau, (1950), 'A discourse on the origin of inequality' in *Social contract and discourses* (Translated by GDH Cole) NewYork: Dutton; C.B. Macpherson, (1962), *The political theory of possessive individualism: Hobbes to Locke* Oxford: Oxford University Press.

[5] Cassese has noted for instance that beginning from the signing of the Peace of Westphalia in 1648 throughout the Enlightment Age, emphasis was placed on state autonomy versus the individual. This period was an epoch for state sovereignty and the individual found no place in international relations. See A. Cassese, (1990), *Human rights in a changing world* Cambridge: Polity Press, pp. 11. The vertical form that natural rights took is therefore not surprising.

vertical application only. When the decision was made at the United Nations (U.N.) to create an international bill of rights, it was taken almost as given that human rights only have application as between the individual and the state.[6]

However, there is a growing consensus that understanding human rights from the narrow viewpoint of the natural law/liberal tradition can be misleading or can downgrade the human rights ideology from relevance to irrelevance. Theorists have increasingly come to realise that natural law claims that human rights are 'universal' and 'timeless truths' have served to legitimise changes in political power in specific geopolitical contexts (Shivji, 1989, pp. 45-46; Fields & Narr, 1992, pp. 2-3; Stammers, 1995, pp. 488, 491-492). In present times, for example, the natural law/liberal conception of human rights operates to shield non-state actors from liability for egregious violations of human rights under the façade of vertical application of human rights.

Thus, an alternative understanding of human rights has emerged, and is gaining increasing ground, holding that human rights are social constructs generated by struggles against oppression by real people in various social and historical contexts (Shivji, 1989, pp. 45-46; Fields & Narr, 1992, pp. 4-6; Heyns, 2001, pp. 171). In the words of Stammers, to say that human rights are socially constructed

> *'is to say that ideas and practices in respect of human rights are created, recreated, and instantiated by human actors in particular socio-historical settings and conditions'* (Stammers, 1999, pp. 980, 981).

This perception departs radically from the natural law conception of human rights as pre-existing the state or the individual and is

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[6] The natural law theory was also used as a device for rejecting the expansion of human rights to include civil and political rights. Animated by the Cold War, the West was determined to project on to the world scene the home ideals of human rights and liberal democracy. For a discussion of the controversies surrounding the adoption of the international bill of rights and the role of the Cold War thereon, see M. Craven, (1995), *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* Oxford: Clarendon Press, pp. 6-16; Cassese, *ibid*, 24-45; K. Arambulo, (1999), *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and procedural aspects* Oxford: Intersentia, pp. 16-23.

flexible enough to extend the reach of human rights to horizontal relationships. In addition, it leaves sufficient room for the evolution of human rights so that they are kept relevant to changing social, political and economic circumstances.

The argument for the application of human rights to private actors is a typical response to such social changes. Since the end of the Cold War in 1989, the winds of globalisation have swept the world leaving behind 'fragmented centres of power', the exercise of which has had an appreciable effect on the daily lives of millions of people (Clapham, 1993, pp. 137; Du Plessis quoted in Woolman, 1999, pp. 10-47). The unrestricted pursuit of liberalisation and privatisation have seen the private sphere amassing unprecedented authority previously regarded as the exclusive preserve of the state. That horizontal relationships involve equal partners has therefore historically proved to be as fallacious as it was in John Locke's own time.[7] Given this significant power shift, the modern understanding of human rights, as social and historical constructs would strongly support the application of human rights in the private sphere. This is clearly in recognition of the fact that to prioritise circumscription of state power and leave the individual defenceless to the vicious non-state actor would render the very concept of human rights superfluous and virtually nugatory. In this connection, the contention that a floodgate of actions would emerge is premised on the 'fear of the unknown'. It seems to say that violations in the private sphere, no matter how repugnant, can be tolerated as long as state violations can be kept at bay. Besides, it amounts to saying that human rights can only be properly protected if courts handle a manageable caseload. A point that is often missed by opponents of the horizontal application of human rights is that the mere fact that there is a possibility for responsibility for a human rights violation might increase the overall observance of human rights by private actors.

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[7] Equality in the natural law paradigm had limited application. Slaves and women, for instance, did not enjoy any of the rights espoused by the natural law theory. In the words of Aristotle: 'From their birth some are marked out for subjection and others for rule ... It is both natural and advantageous for the body to be governed by the soul, and for the emotional part to be governed by the mind ... Also the male has a different nature than the female, the one being superior and the ruler, the other being inferior and the ruled.' Quoted in R. Gaet, (1993), *Human rights and the limits of critical reason* Aldershot: Dartmouth, pp. 114.

The argument that allowing the horizontal application of human rights would offend the pillars of liberal democracy is equally symptomatic of the limited liberal/natural law conception of human rights, which emphasises the negative obligations of the state regarding civil and political rights. It is no longer tenable to argue that civil and political rights do not engender positive obligations on the state or policy options for their realisation.[8] The question of lack of specificity of certain rights is as valid for civil and political rights as it is for economic, social and cultural rights. It is therefore submitted that the argument that policy issues are supposed to fall within the exclusive province of the legislature is not sacrosanct given that the adjudication of human rights issues by the judiciary naturally entails consideration of policy issues. It follows that the determination of human rights issues involving private relationships cannot be faulted for violating the cardinal principle of democracy. For human rights raise no more meaningful complex policy dilemmas when they apply horizontally than when they apply vertically. If a bill of rights is there to create a 'culture of justification' by those who wield political power (Mureinik, 1994, pp. 31), one would question the wisdom of letting those who wield other forms of power akin to

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[8] In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (*SERAC Case*), decided at the African Commission's Ordinary Session held from 13 to 27 October 2001, the African Commission confirmed that: *'Internationally accepted ideas of various obligations engendered by human rights indicate that all rights – both civil and political rights and economic, social and cultural – generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.'* For arguments in reply to allegations that civil and political rights entail negative obligations only, see D. Beetham, (1999), *Democracy and human rights* Cambridge: Polity Press, pp. 95-114; S. Liebenberg, (2001), 'The protection of economic and social rights in domestic legal systems' in A Eide *et al* (eds.), *Economic, social and cultural rights* Hague: Kluwer Law International, pp. 55; P. de Vos, (1996), 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution', *South African Journal on Human Rights*, pp. 67; N. Haysom, (1992), 'Constitutionalism, majoritarian democracy and social and economic rights', *South African Journal of Human Rights* 451; Scot and Macklem, (1992), 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution', *University of Pennsylvania Law Review*, Vol 141, pp. 44.

state power or of a nature resulting in violations of individuals' or group rights escape similar accountability.

The upshot of the foregoing discussion points to the fact that arguments against horizontality are misconceived.[9] They largely represent the limited liberal conception of human rights. If the vitality of human rights ideology is to be maintained, it should be responsive to changing circumstances and not spare any form of dominance that demeans human dignity.[10] State and non-state actors alike should bear human rights responsibilities including economic, social and cultural obligations.

3. Emerging trends in international law

International law has historically been concerned with the regulation of inter-state relations. However, it is now settled that this body of law has evolved from recognising states as its ultimate subject to conferring certain rights and duties on supranational institutions such as the United Nations (UN) and the Organisation of African Unity (OAU),[11] and other actors such as insurgent or rebel groups,[12] individuals and

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[9] Clapham has criticised the anti-horizontal application argument using a different route. He insightfully analyses the moral philosophies of human rights including the duty-based, goal-based and rights-based theories and concludes that all of them do not preclude the application of human rights to private relationships. See A. Clapham, (1993), *Human rights in the private sphere* Oxford: Clarendon Press, pp. 138-144.

[10] Christopher Weeramantry, a former judge of the International Court of Justice, has stated emphatically that: *'We must attune the international law of the future to accept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognise as inhering in them. The great corporations are a very important group of these new international actors whom the law of the future will recognise as accountable to the international legal system.'* International Council on Human Rights Policy, 2002), *Beyond voluntarism: Human rights and the developing international legal obligations of companies* Versoix: International Council on Human Rights Policy, pp. 76. As will be shown below, the change that Weeramantry envisioned is already underway.

[11] See *Reparations for Injuries Case* ICJ Reports, 1949, pp. 149.

[12] E.g., article 3 common to the Geneva Conventions unequivocally enjoins insurgent groups and state armies to protect prisoners and to respect prohibitions relating to attacks of civilians, hostage taking, terrorist attacks or the use of starvation as a mode of combat. The Optional Protocol to the Convention on the Rights of the

corporations.[13] The emerging jurisprudence on non-state actor responsibility for human rights establishes two kinds of accountability, one direct and the other, indirect. The focus in this paper will be on those norms touching on economic, social and cultural rights.

3.1 Direct obligations of non-state actors

The Universal Declaration of Human Rights (the Declaration) is internationally acknowledged as forming the bedrock of international human rights. It is remarkable to note that the Declaration explicitly imposes direct human rights obligations on private actors. According to the preamble:

> *'... every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...'* (emphasis supplied)

The obligations that the Declaration imposes on every individual and every organ of society are not restricted to a particular category of rights. The Declaration espouses not only civil and political rights but economic, social and cultural rights as well. It is also clear from the reference to 'progressive measures' that individuals and any organ of society may have to take positive steps in order to discharge those obligations. Neither 'organ of state' nor 'individual' can be said to exclude corporations. In the carefully chosen words of Henkin, a leading scholar in international law:

> *'Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all'* (Quoted in International Council on Human Rights, 2002, pp. 58).

Child on the Involvement of Children in Armed Conflict, adopted by the UN General Assembly on 16 November 2000 also places an obligation on armed groups including rebel forces to prevent children from participating in armed conflict. It also prohibits the recruitment of children into their armed groups.

[13] See, e.g., *Autronic AG v Switzerland*, Eur. Ct. H.R. Series A. 178 (1990); 12 (1990) E.H.R.R. 485, para 47.

International law norms establishing direct responsibilities for human rights on private actors have increased in volume since the adoption of the Declaration. The African Charter on Human and People's Rights (African Charter),[14] the African Charter on the Rights and Welfare of the Child (African Children's Charter)[15] and the American Declaration of the Rights and Duties of Man adopted in 1948, for example, impose duties directly on such subjects as individuals, children, parents and communities. Some of these duties relate to economic, social and cultural rights. These obligations are not exclusively negative in nature but also require positive steps of the relevant duty holders.

The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR) expressly declares that the individual is under 'a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'. The Committee on Economic, Social and Cultural Rights has in its recent general comments explicitly stated that non-state actors have obligations for the realisation of economic, social and cultural rights entrenched in the ICESCR. For example, with respect to the right to food, it has stated that:

> *'While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities in the realisation of the right to adequate food ...'* (para 20 of General Comment No 12 'The right to adequate food (Art 11)' 12 May 1999).

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[14] Adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986. Articles 27 to 29 impose duties on every individual to work and pay taxes, preserve positive African cultural values, to respect parents, to preserve the family, etc.

[15] Adopted by the OAU on 11 July 1990 and entered into force on 29 November 1999. Article 20 imposes the primary responsibility on parents regarding the upbringing and development of the child including the duty to secure conditions of living necessary to the child's development. Article 31 imposes obligations on the child to work for the cohesion of the family, assist parents in case of need, serve the national community, to preserve and strengthen social and national solidarity, to preserve and strengthen African cultural values.

The Committee has made similar remarks with regard to the right to health (Para 42 of General Comment No 14 'The right to the highest attainable standard of health (Art 12)', 4 July 2000). Read in the light of the preamble referred to above, it could be argued that the nature of the obligations of private actors alluded to by the Committee go beyond the duty to respect. They include positive obligations.

The statements of the Committee cited above find staunch support among several international declarations. These include the UN Declaration on the Elimination of All Forms of Racial Discrimination,[16] the UN Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief,[17] the Rio Declaration on Environment and Development,[18] the Beijing Declaration and Platform for Action,[19] and the Copenhagen Declaration on Social Development and Programme of Action.[20] These

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[16] Adopted on 20 November 1963 by UN General Assembly Resolution 1904 (XVIII). Art 2 thereof stipulates that *'No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.'*

[17] Adopted by the UN General Assembly Resolution 36/55 on 25 November 1981. Article 2(1) of the Declaration states prohibits States, institutions, groups of persons, or persons from discrimination against people on the basis on their religion or beliefs.

[18] Adopted by the UN Conference on Environment and Development, Rio de Janeiro on 13 June 1992, UN Doc: A/CONF.151.26 (Vol.1) (1992).

[19] Adopted by the Fourth World Conference on Women, Beijing, 4-15 September 1995. Among other things the Declaration places obligations on the private sector and employers regarding the prevention of violence against women, economic empowerment of women and the promotion of harmonisation between family responsibilities and work. See paras 125, 126, 177 and 180.

[20] Adopted by the World Summit for Social Development, Copenhagen on 12 March 1995, UN Doc: A/CONF.166/9 (1995). Para 12 of this Declaration states that economic growth and market forces conducive to social development requires the encouragement of *'national and transnational corporations to operate in a framework of respect for the environment ... with proper consideration for the social and cultural impact of their activities'*. Paragraph 45 states that *'[P]articular efforts by the public and private sectors are required in all spheres of employment policy to ensure gender equality, equal opportunity and non-discrimination on the basis of race/ethnic group, religion, age, health and disability, and with full respect for applicable international instruments.'*

declarations speak in unison that private actors have both negative and positive duties in respect of socio-economic rights.

The International Labour Organisation (ILO) has also gone a long way towards conferring direct obligations relating to labour rights on private actors. This has principally been accomplished through the adoption of the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[21] The preamble states:

> *'The Governing Body of the International Labour Office .... [h]ereby approves the following Declaration ... and invites governments of States Members of the ILO, the employers' and workers' organisations concerned and the multinational enterprises operating in their territories to observe the principles embodied therein'.*

Paragraph 8 of the Declaration proceeds:

> *'All the parties concerned by this Declaration ... should respect the Universal Declaration of Human Rights and the Corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation.'*

Among other things, the Tripartite Declaration calls upon multinational companies to take positive measures such as creating employment opportunities, promoting equality, ensuring security of employment, providing favourable work conditions and workplace safety and protecting freedom of association and the right to organise in host-countries. Although not binding and lacking in means of enforcement, its strength lies in the fact that governments, trade unions and employer organisations from all over the world have adopted it.

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises[22] also recognise

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[21] Adopted by the Governing Body of the ILO at the 20th Session in Geneva, November 1977.

[22] The OECD is an organisation comprising of 30 'Western countries' in a geopolitical sense. Its chief objective is the promotion of policies aimed at securing the highest sustainable economic growth for its members and expansion of free trade and economy globally. The Declaration aforementioned was first adopted in 1976 to protect the rights of investors. Due to enormous criticisms that these Guidelines were tilted in favour of the interests of multinational enterprises, Ministers from the OECD members revised these Guidelines in 2000.

that private actors have direct responsibilities regarding the realisation of economic, social and cultural rights. These Guidelines set out standards of practice for multinationals in the areas of information disclosure, workers rights and industrial relations, environmental protection, bribery and consumer interests, science and technology, competition and tax payment. Significantly, as revised in 2000, these Guidelines expressly state that:

> *'[Enterprises should] respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'* (para 11.2).

Not only do these standards entail obligations on multinational companies to refrain from interfering with the enjoyment of socio-economic rights but they also require of them positive measures in this regard.

Neither the ILO Tripartite Declaration nor the OECD Guidelines are legally binding. However, they may constitute evidence of an emerging customary rule that private actors have direct obligations engendered by economic, social and cultural rights.

Companies have also increasingly adopted voluntary codes of conduct that express commitment to respecting human rights including economic, social and cultural rights.[23] Although voluntary codes of conduct are obviously non-binding in nature, they constitute an acknowledgement on the part of the private sector that they are bound by human rights. Pledges made by these voluntary codes

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[23] Corporate codes of conduct are policy statements that define ethical standards for companies. Corporations voluntarily develop such codes to inform consumers about the principles that they follow in the production of the goods and services they manufacture or sell. Among the most popular codes include the Sullivan Principles, developed by the Reverend Leon H. Sullivan in 1977 and aimed at putting pressure on US corporations doing business in South Africa during the apartheid era to promote racial equality in employment; the McBride Principles, developed in 1984 by the Irish National Caucus to address allegations of anti-Catholic discrimination in employment in Northern Ireland; the Slepak Principles, issued in 1987 by the Slepak Foundation and aimed at U.S. corporations doing business in the former Soviet Union; and the Model Business Principles released by Bill Clinton, the former President of the US in 1995. See generally L. Saunders, (2001), 'Rich and rare the gems they wear: Holding De Beers accountable for trading conflict diamonds', *Fordham International Law Journal*, Vol. 24, pp. 1402.

oscillate between blanket commitments to implementing the Universal Declaration and specific promises according to the groups with which they have direct connections such as employees, sub-contractors, suppliers and host governments. Generally, they make specific commitments to respect for labour rights and non-discrimination, the protection of the environment and consultation with local communities affected by their operations (International Council on Human Rights Policy, 2002, pp. 70). Implicit in these obligations are the duty to respect, protect and promote these rights. It is also important to note that the UN is in the process of adopting a code of conduct for multinational corporations. Like other codes, the Draft Human Rights Code of Conduct for Companies (E/CN.4/Sub.2/2000/WG.2/WP.1/Add.1, 25 May 2000) imposes several obligations on companies relating to economic, social and cultural rights.

Thus far, international criminal law has been foremost in enforcing the direct human rights obligations of non-state actors.[24] Although most international offences relate to gross violations of civil and political rights, some, such as genocide,[25] grave breaches of the Geneva Conventions[26] and crimes against humanity,[27] involve

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[24] The creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, in 1993 and 1994 respectively and the International Criminal Court has firmly established that private actors have human rights duties. 77 States had ratified the Rome Statute of the ICC by 20 August 2002. In terms of article 28 of the Statute, the ICC became operational on 1 July 2002.

[25] This offence includes acts committed with intent to destroy in whole or in part a national, ethnic, racial or religious group. Such acts include deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in part or in whole, imposing measures intended to prevent births within a group and forcibly transferring children of a group to another group. See art 5 of the ICTY Statute and art 2 of the ICTR Statute.

[26] This crime involves such acts as devastation of property, plunder of public or private property, and destruction or wilful damage to institutions dedicated to religion or education. See Common art 3 of the Geneva Conventions.

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

infringements of economic, social and cultural rights. Thus, these offences are so defined as to criminalise conduct that results in violations of these rights as well.[28] Certain company officers such as company directors may therefore be individually responsible for international crimes involving violations of economic, social and cultural rights despite the fact that corporate liability for international crimes remains a contested issue.[29] Apart from criminal responsibility, international law has not yet developed other enforcement mechanisms for direct obligations of private actors.

However, it is clear from the foregoing that international law recognises private actors as bearers of duties implicit in economic, social and cultural rights. These precise obligations have not yet developed but the current practice points towards the growing clarification of such obligations. What also emerges from the jurisprudence discussed above is that contemporary international law recognises that private actors have both negative and positive obligations pertaining to economic, social and cultural rights.

3.2 Indirect obligations

As noted earlier, international human rights law has principally been concerned with interstate relations or state/citizen relations. International legal norms will therefore primarily impose human rights obligations on the state. One level of these obligations requires the state to take legislative and other measures to protect citizens or individuals under its jurisdiction from the harmful acts of others. Through the discharge of this duty, private actors become indirectly responsible for human rights.

A vast range of international and regional covenants expressly require States to regulate the conduct of non-state actors so that they do not violate economic, social and cultural rights. Article 2(e)

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[28] See n 45-47 above.

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

of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[30] for example, places an obligation on states 'to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise'. To clarify this duty, the Committee in charge of the supervision of the CEDAW has emphatically stated that:

> *'Discrimination under the Convention is not restricted to action by or on behalf of Governments ... Under general international law and specific human rights covenants, States may also be responsible for private acts ...'*[31]

Likewise, the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[32] enjoins states to 'prohibit and bring to an end ... racial discrimination by any persons, group or organisation' (art 2(1)(d)). Furthermore, although the Convention on the Rights of the Child (CRC)[33] and the African Children's Charter are premised on the understanding that parents or guardians have the primary responsibility for the upbringing of children, both of them require states to ensure that children are protected from acts committed in the private sphere.[34]

The Committee on Economic, Social and Cultural Rights has also emphasised the indirect obligations of non-state actors with regard to the enjoyment of economic, social and cultural rights. For instance, it has underlined that State parties 'should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food' (General Comment No 14, op. cit., para 27). Thus, 'failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of

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[30] Adopted by the UN General Assembly on 18 December 1979 and entered into force on 3 September 1981.

[31] General Comment 19, 'Violence against women', 30 January 1992, UN Doc: A/47/38, para 9.

[32] Adopted by the UN General Assembly on 21 December 1965 and entered into force on 4 January 1969.

[33] Adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.

[34] For example both the CRC and the African Children's Charter obligate States to regulate childcare institutions, protect children from child abuse, child labour and violence, and proscribe harmful traditional practices.

others' amounts to a dereliction of duty by the state engendered by the right to food (General Comment No 14, op. cit., para 19).

The issue of indirect responsibility for economic, social and cultural rights by private actors did not escape the minds of the international experts who drew up the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights adopted in 1997. Accordingly, they summed up the duty of States *vis a vis* private actors as follows:

> *'The obligation to protect includes the States responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights'* (para 18; also SERAC case para 57).[35]

Unlike direct obligations, it is arguable that international law has sufficient mechanisms for monitoring the implementation of indirect obligations of non-state actors. The state reporting procedure is obviously one of those mechanisms.[36] However, the judicial enforcement mechanism has proved to be an important supervisory mechanism. Thus, the Human Rights Committee, although charged with the monitoring of civil and political rights under the ICCPR, has imposed liability on states for failure to protect citizens from acts of private actors resulting in infringements of the negative obligation generated by economic, social and cultural rights using the family protection and privacy clause. In *Hopu and Bessert v France*,[37] for example, a local community from Tahiti lodged a complaint with the Committee against France, alleging that the construction of a hotel by a private business, Sociètè Hôtelière

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[35] See para 18. The African Commission has made a similar declaration in the *SERAC Case* (n 20 above) para 57.

[36] For example, the Committee on the Rights of the Child, whilst examining the Report of the Democratic Republic of Congo, noted and emphasised the *'role of numerous actors in the conflict, including the armed forces of several States... armed groups and numerous private companies'* in the armed conflict in the Democratic Republic of Congo as having contributed to the poor implementation of the rights of the child. See Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of Congo, 27th Session, UN Doc: CRC/C/15/Add.153, June 2001, para 6.

[37] Report of the Human Rights Committee, Vol., II, U.N. Doc. A/52/40, pp. 70-83.

RIVNAC, had encroached upon their tribal lands including their ancient burial ground and a traditional fishing ground that was a major source of subsistence. The Committee conceded that:

> *'The construction of [the] hotel complex ... did interfere with the right to family and privacy. The State party has not shown that ...[it] duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of [the] hotel complex'* (para 10.3).

Judicial enforcement of indirect obligations inherent in economic, social and cultural rights has also been relied upon at the regional level. The European Court of Human Rights, for example, has also relied heavily on the family protection and privacy clause of the European Convention for the Protection of Human Rights and Fundamental Freedoms[38] for holding non-state actors indirectly responsible for violations of economic, social and cultural rights. In *López Ostra v Spain*,[39] for instance, a complaint against Spain alleged that a waste treatment plant in a town called Lorca in Spain was deleterious to the neighbouring environment. The European Court determined that

> *'Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health'* (para 51).

Thus, Spain was held responsible for failing to regulate industrial pollution.[40] This case provides an instance of enforcement of indirect positive obligations of non-state actors.

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[38] Adopted by the Council of Europe on 4 November 1950 and entered into force on 3 September 1953.

[39] Judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, No. 303-C.

[40] *Guerra and Another v Italy*, Judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and Decisions 1998-1, No. 64, another case brought before the European Court, concerned toxic emissions from a fertiliser plant. These emissions were a living danger to many families around the factory. The wastes consisted of inflammable gas and such toxic substances as arsenic trioxide. At one point, 120 people were hospitalised due to an explosion that had

The Inter-American Court of Human Rights has also found states liable for infringements of economic, social and cultural rights by private actors. In *Yanomami v Brazil*,[41] for example, Brazil was found liable for failure to prevent settlers who had moved *en mass* to occupy certain areas in the Brazilian Amazon, which were occupied by various indigenous groups including the Yanomami. Apart from physical violence, this occupation disrupted the communal subsistence living of the indigenous groups and introduced new diseases to them, which caused them serious harm including death. The Court found Brazil to be in breach of the right to life and the right to health. By implication, the settlers had an obligation to refrain from interfering with the indigenous groups' enjoyment of the rights to food, life and health.

Similarly, the African regional human rights system has used its communication procedure to enforce compliance with indirect obligations of private actors. In the *SERAC Case* (above), the plaintiffs complained, among other things that the state-owned Nigerian National Company and Shell Petroleum Development Corporation (in which the former had a majority of shares) 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. As a result, water, soil and air contamination brought about serious short-term and long-term health problems such as skin infections, gastrointestinal and respiratory ailments, increased cancer, and neurological and reproductive complications. Further allegations were made relating to repressive measures such as the destruction of food sources, homes and villages by the military government aimed at quelling opposition to the oil companies' activities. The African Commission determined that:

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occurred because of arsenic poison from the plant's waste. Again, the European Court found Italy liable for failure to discharge the duty to protect the right to private and family life. The Court stated that in such a case 'it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their and family as guaranteed by Article 8'.

[41] Res. No. 12/85, Case 7615, reported in *Annual Report of the Inter-American Commission on Human Rights*, 1985.

> *'Governments have a duty to protect their citizens, not only through appropriate legislation but also by protecting them from damaging acts that may be perpetrated by private parties ... This duty calls for positive action on the part of governments in fulfilling their obligations under human rights instruments'* (para 57).

It was therefore held that Nigeria was responsible for violations by the oil companies in addition to those that had been committed by the government itself. From the nature of the allegations against the oil companies, it is clear that the companies were in violation of their positive duties to ensure that their operations did not result in health problems and environmental damage.

All the human rights systems referred to above follow the due diligence test developed by the Inter-American Court as an appropriate test for determining whether the state should be liable for acts of private actors. By this test, the Court considers whether the state took reasonable or serious steps to prevent or respond to a violation by a private actor, including investigation and provision of remedies such as compensation. A typical example is to be found in the *Velasquez Rodriguez case*,[42] where Manfredo Velasquez Rodriguez was kidnapped, forcibly disappeared and probably killed by the Honduran army. The Court stated that:

> *'An illegal act which violates human rights and which is 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 as required by the Convention'* (para 172).

It was held in this case that even if the attackers were private actors, the State was liable because of its failure to take steps to find the victim or perpetrators or to provide any remedy to the victim's family. Several supervisory bodies and various declarations have also acknowledged the usefulness of this test.[43]

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[42] Judgment of 29 July 1988, Inter-American Court on Human Rights, Series C, No. 4 (1998).

[43] E.g. art 4(c) of the UN Declaration on the Elimination of Violence Against Women obliges States to *[E]xercise due diligence to prevent, investigate and, in accordance*

The above demonstrates that all systems of human rights recognise that private actors have obligations to discharge in respect of economic, social and cultural rights. These obligations are enforceable indirectly through the State. In turn, the state is obliged to ensure that non-state actors honour their obligations. The discussion of the cases brought against states has revealed that states have been held liable for violations of both negative and positive obligations of non-state actors.

4. Emerging domestic trends

As the preceding section has shown, States are enjoined to ensure that private actors perform the obligations that are implicit in economic, social and cultural rights. Failure to do so gives rise to state liability in international law for acts or omissions of private actors. Disappointingly, domestic jurisdictions have rarely recognised obligations of non-state actors embodied in economic, social and cultural rights. This is probably because these rights have gained recognition only recently.

4.1 African constitutions

In Africa, most municipal constitutions adopted after the end of the Cold War have entrenched economic, social and cultural rights side by side with civil and political rights.[44] Some of these have

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with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.' Para 9 of General Comment 19 on Violence Against Women, 30 January 1992, UN Doc: A/47/38, states that: *'Under general international law and specific human rights standards, 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.'*

[44] Amongst those with the most elaborate provisions in this regard are the 1990 Constitution of Cape Verde, the 1996 Constitution of South Africa, the 1992 Constitution of Madagascar, the 1990 Constitution of Saõ Tomé and Principe, and the 1993 Constitution of Seychelles. There are several other African Constitutions with at least six economic, social and cultural rights. They include the 1991 Constitution of Burkina Faso, the 1990 Constitution of Benin, the 1992 Constitution of Burundi, the 1992 Constitution of Togo, the 1992 Constitution of Mali, the 1991 Constitution of Gabon and the 1992 Constitution of Niger. Others have a number of economic social and cultural rights in the bill of rights but they

gone further to admit the horizontal application of their bills of rights. Apart from the South African Constitution, the 1994 Constitution of Malawi, the 1996 Constitution of the Gambia, the 1990 Constitution of Cape Verde, the 1992 Constitution of Ghana and the 1992 Constitution of Mali are good examples in this regard. It is to be expected that litigation around these constitutions will contribute to the development of more specific obligations of non-state actors regarding economic, social and cultural rights.

4.2 The Alien Tort Claims Act

In the USA, the Alien Tort Claims Act (the Act)[45] provides a basis for accountability of private actors for human rights. This Act, which remained largely unused for almost two centuries, only gained

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also have directive principles of state policy in a separate chapter of the constitution. These include the 1992 Constitution of Ghana, the 1994 Constitution of Malawi, and the 1990 Constitution of Namibia. Constitutions adopted after 1990 with less than 4 economic, social and cultural rights include the 1991 Constitution of Rwanda, the 1991 Constitution of Mauritania, the 1992 Constitution of Morocco, and the 1992 Constitution of Djibouti, 1996 Constitution of Gambia. Others have directive principles of state policy and a property guarantee only. The 1999 Constitution of Nigeria and the 1991 Constitution of Sierra Leone are examples in this respect. See D.M. Chirwa, (2001), 'An overview of the impact of the international covenant on economic, social and cultural rights in Africa' available at:
<http://www.communitylawcentre.org.za/ser/docs_2002/Impact_of_Socio-economic_rights_in_Africa.doc> (accessed on 14 August 2002).

[45] This Act was enacted in 1789 as part of the Judiciary Act. Strictly speaking, the Act makes no express reference to legal rights in its text. Neither did its original form make any assertion about rights.[45] However, the key provision that has elicited increasing international attention stipulates that: *'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'* The fact the Act remained dormant for almost two centuries has made the identification of the original purpose of the Act difficult. 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 Act was intended to cover transitory or transboundary torts. See R.G. Steinhardt, 'Litigating corporate responsibility':
<http://www.globaldimensions.net/articles/cr/steinhardt.html> (accessed 21 July 2002).

relevance in 1980 when it was invoked to redress gross human rights abuses by a state official in the case of *Filartiga v Pena Irala* (630 F.2d 886, 887). Since then, the Act has generated a considerable number of suits alleging violations of international human rights by state and non-state actors committed outside America.

The jurisprudence that has evolved under this Act establishes two categories of acts for which a private actor may be held directly responsible. The first relates to liability for acts for which state complicity is a prerequisite. These include destruction of property, arbitrary detention and torture [*Kadic v Kuradzic* 70 F. 3d 232 (2d Cir. 1995)]. The other does not require state connivance because the acts falling in this category are such that they may be committed without the involvement of the State. These include, genocide, crimes against humanity, war crimes, economic plunder and mistreatment of civilians and prisoners of war [*Kadic v Kuradzic* 70 F. 3d 232 (2d Cir. 1995); Steinhard, 2002].

Thus far, most of cases brought under the Act have alleged gross violations of civil and political rights or international humanitarian law. However, a few have contained references to violations of economic, social and cultural rights although no finding of such violations has been made. The case of *Doe v Unocal* [963 F. Supp. 880 (C.D. Cal, 1997)], for example, included allegations concerning a violation of the duty to respect socio-economic rights. Farmers from Myanmar sued Unocal in connection with the joint venture of gas exploitation that the defendant corporation was involved in with the government of Myanmar. In order to clear the way for the pipeline, the government forcibly relocated villages, displaced local inhabitants from their homelands, and tortured and forced people to work on the project. It was therefore argued that Unocal was liable for these violations since it funded the repressive regime and the project with full knowledge of the abuses and thus benefited from the violations. The Court held that Unocal was not sufficiently linked to the state to establish joint action in the violations alleged. Although forced labour was considered not to require state complicity for a non-state actor to be held liable, the Court refused to hold Unocal liable for it on the mere basis that it had knowledge that government was engaging in forced labour. Unocal could have been found liable if evidence had been led of active steps in furtherance of such conduct or establishing participation of the private actor in the acts forming the basis of the suit.

Again, *Sequihu v Texaco, Inc.* [847 F.Supp. 61 (S.D. Tex. 1994)], plaintiffs alleged massive environmental damage caused by the defendant corporation's oil exploitation. The wastes from oil drilling operations had resulted in the illness and death of local people and forced local communities to relocate without compensation. The case was dismissed for want of *forum non conveniens*. However, the facts indicate that the thrust of the case revolved around the alleged breach by the corporation of the positive duty to protect the environment or to prevent wastes from its oil plant from spilling into the communities.

Wiwa v Royal Dutch Petroleum Co[46] also arose from environmental pollution by oil companies that resulted in various health hazards in Ogoniland in Nigeria. The main case brought under the Act seeks to establish responsibility of the oil companies for instigating, orchestrating, planning and facilitating, among other things, summary executions, crimes against humanity, torture, cruel, inhuman and degrading treatment; arbitrary arrest and detention; and violations of the right to peaceful assembly and association by the Nigerian government. However, the facts grounding this suit also reveal gross violations of economic, social and cultural rights. The violations of civil and political rights occurred following protests by the Ogoni people against environmental pollution by the oil companies, which caused illness to people and damage to the soil. It is arguable therefore that the protests served to underscore the fact that the oil companies were under a duty to take positive measures implicit in the rights to health and healthy environment, food and property (land) to prevent pollution of the environment. In suppressing protests, the duty to respect socio-economic rights was also breached in that the people's houses and food were destroyed, and livestock killed.

4.3 The duty of care principle

Similar litigation is taking place in other countries such as Canada, Australia, England and Spain (Ward, 2002; Shelton, 1999, pp. 89-

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[46] 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001). Discussed in AX 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.

90; Report of IRENE seminar on corporate liability and workers rights, 2000). In England and Australia, the foundation of such actions has been the 'duty of care' principle. This involves a consideration of whether the private actor had a duty of care to the plaintiffs, whether it breached that duty, and whether the breach caused the injury complained of.[47] In a case alleging environmental pollution by a company, which resulted in various health hazards, an Australian Court held:

> *'To my mind, 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.'*[48]

The 'heavy responsibility' referred to in the above dictum seems to imply not only the negative obligation to refrain from polluting water but also positive duties to prevent the pollution.

The above discussion clearly establishes that municipal legal systems are increasingly acknowledging the role of non-state actors

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[47] *Connelly v RTZ Corp Plc* [1997] 4 All ER 335 (H.L.). In this case for example, the plaintiff, a Scottish man, brought a suit in the United Kingdom alleging that he had contracted throat cancer because of the negligence of the defendant corporation. The plaintiff had worked for the defendant outside the UK in several mining operations including a uranium mine run by its subsidiaries in Namibia. The defendant sought to have the action dismissed for want of *forum non conveniens* arguing that the courts in Namibia were more suited to deal with the case. The House of Lords rejected this application on the ground that it was impossible for the plaintiff to maintain a suit in Namibia, as there was no legal aid in his favour. Other cases include *Lubbe & Others v Cape Plc* Judgment of 29 November 1999 (Court of Appeal, Civil Division), (unreported). This case contains allegations against the defendant corporation for breach of the duty of care following the health hazards caused by exposure to asbestos in South Africa. The House of Lords held that the case could properly be maintained in the UK.

[48] *Dagi: Shackles; Ambetu; Maun & Others v The Broken Hill Proprietary Company Ltd & Ok Tedi Mining Ltd* (No. 2) [1997] 1 Victoria Reports [VR] 428, 441. Discussed in C Scott, (2001), 'Multinational enterprises and emergent jurisprudence on violations of economic, social and cultural rights' in A. Aide *et al* (eds.) *Economic, social and cultural rights: A textbook* Dordrecht: Martinus Nijhoff Publishers, 2001, 563, 591-592.

in the realisation of socio-economic rights. The cases discussed have dealt with liability for violations of negative and positive duties engendered by such rights as food, health, healthy environment, shelter and housing by non-state actors. They also demonstrate that even in countries where constitutions do not provide for horizontal operation of a bill of rights, courts have been innovative enough to ensure that private actors do not escape accountability for their human rights obligations.

5. Non-state actors' obligations under the South African constitution

5.1 Horizontal application of the Constitution

The 1993 Constitution, the forerunner to the 1996 Constitution (the Constitution), did not contain clear provisions on the applicability of the Bill of Rights to horizontal relationships. Section 7(1) of that Constitution provided that the Bill of Rights bound 'all legislative and executive organs of the state at all levels of government'. The omission of 'judiciary' from this section generated mixed judicial pronouncements on whether the Bill had horizontal effect. Some admitted that the Bill had horizontal reach[49] while others held the opposite view.[50] A few more opted for the position that at least some rights had horizontal reach.[51] The remaining decisions were ambivalent.[52]

The Constitutional Court laid to rest this judicial scuffle in *Du Plessis v De Clerk* [1996 3 SA 850 (CC)]. The majority of the Court took the view that the interim Bill of Rights did not lend itself to direct horizontal application. Rather, it was stated that, as regards

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[49] E.g., *Mandela v Falati* 1995 1 SA 251 (W); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B).

[50] E.g., *Potgieter v Kilian* 1995 11 BCLR 1498 (N); *De Clerk v Du Plessis* 1995 2 SA 40 (T); *Holomisa v Argus Newspaper Ltd* 1996 2 SA 588 (W) 596-597; *Roux v Die Meester* 1997 1 SA 817 (T) 824H-I.

[51] *Gardiner v Whitaker* 1995 2 SA 672 (E) 680ff; *Motala v University of Natal* 1995 3 BCLR 374 (D) 381-382.

[52] *Kalla v The Master* 1995 1 SA 261 (T) 270E; *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W) 657G; *O v O* 1995 4 SA 482 (W) 486A-C 490B-F; *Knox D'Arcy Ltd v Jamieson* 1995 2 SA 579 (W) 603D-F; *Waltons Stationery Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O); *Kotze & Genis (Edms) Bpk v Portgieter* 1995 3 SA 783 (C).

private parties, the Bill was relevant indirectly and could only be consulted in the development and application of common law. However, Woolman and Davis (1996) have argued convincingly that, even on the basis of the provisions of the interim Constitution, the Constitutional Court should have held that the Bill had direct horizontal effect.[53]

The 1996 Constitution is one of the few constitutions in the world that goes beyond giving express recognition to economic, social and cultural rights to providing for the horizontal application of its Bill of Rights. Section 8 of the Constitution provides:

> *(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*
> *(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*
> *(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court:*
> *(a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to give effect to that right; and*
> *(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*
> *(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.*

This section is markedly different from the interim Constitution. It explicitly states that that a provision of the Bill of Rights binds a natural and juristic person. It goes further to recognise that juristic

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[53] Some still hold that even under the Final Constitution horizontal application of human rights is unacceptable. See, e.g., C. Sprigman & M. Osborne, (1999), '*Du Plessis* is *not* dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes', *South African Journal on Human Rights*, Vol. 15, pp. 25.

persons have certain rights. This section does not specify any category of rights for which the horizontal application is possible. The nature of each right and the duty it embodies are the ultimate determinants. There is also no distinction as to which private actors are amenable to accountability for human rights. These features comply perfectly with the emerging international and domestic norms regarding private actor responsibilities for human rights.

5.2 Applicability of socio-economic rights to private actors

Despite these clear provisions, suggestions that section 8 permits the application of economic, social and cultural rights in the private sphere have sparked spirited resistance. Cockrell (2001), for instance, has presented the following argument:

> *'(C)onsider social-welfare right such as the right to have access to sufficient food and water. As a matter of political morality, it is submitted that it would be wholly inappropriate for this right to be interpreted as imposing positive burdens on private agencies. Whatever view we may adopt regarding the existence of moral duties which require the rich to assist the poor, it would be intolerably far-reaching to endorse the proposition that rich persons have a constitutional duty to provide food to the impoverished... On the basis of this reasoning, it might be concluded that social welfare rights will, in general, not impose positive duties on private agencies'* (pp. 3A-13).

Likewise, Woolman (1999) has stated that 'the rights to property, housing, health care, food, water, social security, education, just administrative action and the rights of children' contain wording which limit the ambit of the rights to the vertical relationship (pp. 10-59). Cheadle and Davis (1996) have expressed similar sentiments.[54]

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[54] However, Liebenberg has more than once attempted to rebuff these assertions. See S. Liebenberg, (1999), 'Socio-economic rights' in M Chaskalson *et al* (eds.) *Constitutional Law of South Africa* Cape Town: Juta & C Ltd, pp. 41-45; S Liebenberg, (2002), 'South Africa's evolving jurisprudence on economic, social and cultural rights' <http://www.comunitylawcentre.org.za/ser/ docs_2002/Socio-economic_rights_jurisprudence.doc> (accessed on 15 August 2002).

The basis of their objection lies in the broad characterisation of socio-economic rights as entitlements that flow from a social democratic vision of the role of the state. This vision views the state as the sole provider of the basic services and goods necessary to facilitate basic equality of the citizenry, which in turn, is essential to achieving equal and fair participation in democratic processes. This duty is generally considered extremely onerous. Thus, they argue, the state is better placed to achieve these rights on a progressive basis.

However, the fact that socio-economic rights generally serve as a vehicle for facilitating social equality and that the State is the key player in securing that goal cannot be used to downplay the role that other actors play towards this bigger vision. Various socio-economic rights embodying different kinds of duties contribute to this ultimate objective in different ways. Such duties may not be as onerous as the overall duty to ensure social equality. In addition, the case for the application of socio-economic rights to the private sphere does not state that all private actors should hold same responsibilities for all socio-economic rights. Rather, it holds that the full enjoyment of certain rights requires that various actors discharge various levels of duty. For example, children's socio-economic rights can be realised better by concerted efforts of parents and the state.

Above all, this paper has amply demonstrated that international law has increasingly emphasised that non-state actors have obligations regarding the realisation of economic, social and cultural rights and that some domestic jurisdictions have already taken steps in compliance with this development. It is therefore argued that the argument that socio-economic rights are generally incapable of horizontal application is wrong in principle. Each right must be assessed on its own in the light of the duties it embodies to determine whether it has horizontal reach.

5.3 Nature of the obligations

It is settled that human rights generate four levels of duty: to respect, protect, promote and fulfil. The South African Constitution has expressly acknowledged these duties in s 7(2). For the most part, these duties have been defined in relation to the State. Thus, the duty to respect compels it to refrain from interfering in the enjoyment of all fundamental rights. The duty to protect requires the State to

protect right holders against other subjects by legislation and provision of effective remedies.[55] Furthermore, this obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic, and social interferences (*SERAC Case*, para 59). The duty to promote enjoins the State to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance, raising awareness and building infrastructures. The duty to fulfil is intricately connected with the duty to promote although the former entails more positive action on the State to move its machinery towards the actual realisation of the right (*SERAC Case*, para 59: General Comment 14 above).

In short, the duty to respect is negative in nature while the other three duties require positive action. These duties apply as much to socio-economic rights as they do to civil and political rights. It is submitted that they are, with some modifications, capable of application to private actors as well. Indeed, as shown above, international law and certain domestic jurisdictions recognise that private actors have both negative and positive obligations to discharge in relation to socio-economic rights.

More specifically, the South African Constitution, expressly or implicitly, intends certain positive obligations engendered by socio-economic rights to be borne by private actors. For example, section 9(4) expressly provides that '*No person* may unfairly discriminate directly or indirectly against anyone' on any ground listed in subsection 2. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, enacted to give effect to the right of equality and the prohibition of unfair discrimination provides in section 24(2) that 'All persons have a duty and responsibility to promote equality'. The Act has a schedule promulgated under section 29(1) that lists examples of prohibited unfair practices binding on the State and all persons.[56] These practices entail that positive steps are taken to ensure compliance with the Act.

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[55] See *SERAC Case*, *op. cit.*, paras 44-47. See also A. Aide, (2001), 'Economic, social and cultural rights as human rights', in A Aide *et al* (eds) *Economic, social and cultural rights: A textbook* Dordrecht: Martinus Nijhoff Publishers, pp. 9, 23-25.

[56] E.g. applying human resource utilisation, development promotion and retention practices which unfairly discriminate against persons; refusing to provide reasonable health services to the elderly or failing to reasonably accommodate the special needs of the elderly; etc.

Secondly, in terms of section 29(3) of the Constitution, everyone has the right to establish and maintain independent educational institutions at their own expense. However, the person who exercises this right assumes the duty to maintain standards of education that are not inferior to those of comparable public education institutions [section 29(3)(c)]. Thirdly, considering the international law jurisprudence referred to above, there is little room for arguing that private actors would not be bound to honour trade union rights and labour rights entrenched in section 23 and environmental rights recognised under section 25 of the Constitution. Compliance with these rights demands more than mere respect for the negative duty. A relevant duty holder is enjoined to take positive measures to give effect to the relevant rights.

5.4 Implications of the jurisprudence around ss 26 and 27

Section 26(1) entrenches the right to housing while section 27(1) guarantees the right of access to health care services, sufficient food and water, and social security. Subsection 2 of both sections enjoins the State to take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of these rights.

The Constitutional Court has on more than one occasion refused to hold that subsection 1 of either section 26 or 27 created self-standing rights. In *Soobramoney*, it stated that:

> *'What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources'* (para 11).

This position was reaffirmed in *Grootboom* and *TAC*. The Court reasoned, on both occasions, that the qualifications contained in subsection 2 to either section – 'progressive realisation', and 'within available resources'– could not be separated from those rights. In *TAC*, it stated that:

> *"Section 26 does not expect more of the State than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing*

> *immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants concerned, 'the State is not obliged to go beyond available resources or to realise these rights immediately"* (para 32).

This interpretation can be construed broadly to imply that it is the State alone that has obligations in respect of these rights since subsection 2 of either section singles it out as the sole duty holder. This construction does not sit well with the certain specific pronouncements in the same judgments and the emerging trend in international human rights law discussed above, which lucidly demonstrates that non-state actors have positive and negative obligations correlative to socio-economic rights. There is also no basis for precluding the application of the rights guaranteed in the two sections in the private sphere when the other socio-economic rights, as shown above, do.

A restrictive construction of the three judgments would lead to the opposite conclusion.

International law has demonstrably established that the negative duty to respect socio-economic rights is sacrosanct. This obligation exists independently from the internal modifiers of socio-economic rights. In South Africa, this negative obligation gained acceptance in *Re Certification of the Republic of South African Constitution* (above). However, the issue whether private actors are bound by this obligation was only made clear in *Grootboom*. In this case, the Constitutional Court held, in the context of the right to housing, that there exists 'at the very least, a negative obligation upon the State and *all other entities and persons* to desist from preventing or impairing the right to access to adequate housing' (para 34). In the same case, the Constitutional Court noted that the right of access to housing suggested that '*it is not only the State* that is responsible for the provision of houses' (para 35).

These dicta support the position that private actors have both negative and positive obligations relating to socio-economic rights. The existence of these duties rests on subsection 1 of the relevant sections. It is therefore argued that subsections 1 of sections 26 and 27 can stand on their own, at least as regards private actors. This contention does not mean that private actors are bound to meet the

onerous obligations that the State is required to discharge on a progressive basis. As argued below, private actors have positive obligations which, depending on the nature of the actor, its level of interference into people's socio-economic rights and other factors, they are enjoined to discharge.

5.5 Distinguishing levels of responsibility of various non-state actors

Section 8(2) states that a provision in the Bill of Rights might apply to natural and juristic persons 'to the extent' that it is applicable depending on, among other things, the nature of any duty embodied in the right. This provision does not mean that a private actor has to hold all the layers of duty for a given right to apply to it. What it means, however, is that rights might need concerted action by several actors for them to be fully realised. It also implies that some actors might bear more obligations than others. A criterion has therefore to be developed for distinguishing levels of positive obligations that various non-state actors should bear.

In the United States, the 'state action' law has conventionally been used to determine whether a given private actor should be held liable for human rights violations (see generally Ellman, 2001). Thus, a plaintiff cannot succeed in suing a non-state actor unless he establishes that the conduct of the non-state actor amounts to state action. A conduct constitutes state action if it is a public function or is connected to the exercise of public functions. Thus, private actors exercising the functions of the State would be held liable for human rights violations. The state action jurisprudence has been construed more broadly to make non-state actors wielding especially oppressive power, although not linked to the State, liable for human rights violations (Ellman, 2001).

This benchmark could be used to differentiate the positive obligations of various private actors depending on the right and the nature of the obligations involved. For example, a private actor carrying out the functions of the State would be responsible to bear the relevant socio-economic rights obligations that the State would have. Similarly, a private actor not linked to the State but exercising power akin to or more than that of the State should be bound by as much positive obligations as the State would have in the specific area of dominance. The 'state action' test could be extended to hold private actors who, however small, hold positions in society that can

result in serious denials or violations of socio-economic rights responsible for the relevant positive socio-economic rights obligations.

5.6 Enforcement

There are many ways through which the obligations of non-state actors discussed above may be enforced. Criminal law is one of them. As mentioned earlier, some violations of economic, social and cultural rights may be criminalised by domestic law. An individual or corporation may therefore be prosecuted for committing such offences. Environmental regulation and consumer protection laws may be other important ways of ensuring that private actors fulfil their obligations. Reliance on remedies provided in the law of torts could also be of great use. The reporting mechanism of the Human Rights Commission can also be a useful monitoring and enforcement measure of social-economic obligations of private actors.[57]

Whether or not a person can found a civil action against a private actor directly on a provision of in the Bill of Rights has elicited some controversy in South Africa. Some people that hold that one has to rely on existing common law causes of action as the means of enforcing human rights when they apply in the private sphere (Cockrell, 2001, pp. 3A-17). They read section 8(2) and (3) together to mean that the horizontal application can only be enforced through the development of common law. Rautenbach (quoted in Cockrell, 2001, pp. 3A-18), for example, has observed that solutions to what are perceived to be constitutional problems 'overlap with private law techniques and concepts which, for many centuries, have been used to resolve private disputes between equal parties'. He opines that private law will 'remain the main source of the resolution of private disputes between equal parties, even when both applicants and respondents rely on constitutionally protected rights.' (see also Jeffrey, 1997)

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[57] Under section 184(1) (a) of the Constitution, the Commission is empowered to monitor the observance of human rights in South Africa. In terms of sub section (3), the Commission is entitled to require relevant organs of state to furnish information on measures they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. The same power can be exercised in relation to private actors through section 25(2) of the Equality Act.

Admittedly, common law contains many causes of action that can be used to enforce human rights provisions. Examples include defamation, negligent misrepresentation, negligence, and nuisance. However, this view should not be pursued to the extreme. For one thing, common law has historically failed to guarantee full protection of human rights. In South Africa, for example, common law did little to alleviate gross human rights violations committed during the apartheid era. It is therefore risky to require that one should always fit a human rights violation in the existing common law causes of action for a remedy. It would also appear that actions involving the State might be based directly on the rights violated. This might bring about inconsistencies in human rights jurisprudence. Different principles may arise from decisions addressing similar violations simply because one involved private parties and had to be resolved using common law causes of action while another involving the state would be directly based on the Constitution. Section 8 should therefore be given a generous interpretation to allow causes of action to be grounded on the Bill of Rights except where it is obvious that common law provides sufficient remedy.

The trend internationally supports this direction. For example, the Bill of Rights of New Zealand has been interpreted to justify causes of action based on the Bill although there is no express provision in the Constitution empowering the courts to create new remedies (See e.g. *Simpson v A-G* [1994] 3 NZLR 667, 717.) Similarly, it has been held that 'the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons and its officials'.[58] Even the US courts permit constitutional torts although one has to prove 'state action' to find liability. In *Bivens v Six Unknown Agents of Federal Bureau of Narcotics* [403 US 388, 91 SCt 1999 (1971)], for example, it was held that petitioners have an implied right of action under the Fourteenth Amendment against state officials who violate those rights.

[58] See e.g. *JP Hosford v John Murphy & Sons* [1987] IR 621; *Glover v BLN Ltd* [1973] IR 388; *Hayes v Ireland & Others* [1987] ILRM 651.

6. Conclusion

Times have changed. We certainly live in the world that was lived in some two centuries ago. However, the circumstances are different. People now face different challenges in their day-to-day lives from those faced in the past. As with time, the human rights concept is not static. It has historically played the role of liberation from oppression. It certainly cannot resist emancipating the masses from the new forms of domination and oppression that have emerged in the globalised world.

Private actors have obligations to discharge in order to ensure meaningful enjoyment of socio-economic rights. International law and some domestic jurisdictions are painstakingly moving in the direction of imposing enforceable obligations in this regard. The South African Constitution offers a wider opportunity for holding private actors accountable for socio-economic rights.

Although still rudimentary, international law, certain municipal legal systems and the South African Constitution suggest that the obligations of non-state actors for socio-economic rights have both negative and positive aspects. In principle, there is no socio-economic right that can be said to bind the State only. All private actors are enjoined, at the very minimum, to respect socio-economic rights. The difficulty, however, lies in distinguishing the levels of positive obligations among private actors considering that these actors are of different character and nature. This paper has suggested the adoption of the 'state action' benchmark in this regard.

With litigation and more research on the subject, it is definitely not impossible for precise obligations of non-state actors relating to socio-economic rights to emerge.

The means of enforcing these obligations range from the use of criminal law to environmental laws, consumer law and common law. However, it is argued that civil suits against private actors based directly on the Constitution should be permitted in order to give human rights their moral and legal force.

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