Judicial Leadership in International Human Rights: Developments in the Law of State Responsibility In Human Rights

Nirmalan Wigneswaran

Introduction

Judicial bodies are not usually known for their creativity. In fact, consistency is viewed as one of the hallmarks of a good judiciary. Yet, surprisingly, some of the most creative leadership in the realm of human rights has been demonstrated by international judicial bodies. All too often States attempt to shirk their responsibilities towards their constituents by hiding behind the actions of private actors. State complicity, no doubt, entails responsibility. But proof of such complicity is hard to come by, especially in situations where independent verification of facts is nigh impossible. Holding States responsible for private action in certain circumstances, forces States to ensure that their monopoly on the regulation of their sovereign territory is not misused or underused.

This paper seeks to highlight the efforts of judicial bodies to ensure that States prevent the infringement of individual rights by private persons. It deals with the symbiotic development of international human rights law and the rules of State responsibility, which have resulted in an increased surveillance of government action by judicial bodies by focusing on the role of the State to regulate private conduct.

The approach adopted in this paper is two-pronged. First, the paper will trace the development of individual responsibility in international human rights law, alluding briefly to parallel notions in other spheres of international law. This section will also briefly outline the evolution of the concept of responsibility of the State and the increased acceptance of responsibility by States for private actions. Particular attention would be paid to the work by the International Law Commission on State responsibility.

In the second part, the paper will focus on the international human rights jurisprudence by looking at the leading international human rights institutions such as the European Court of Human Rights, the Human Rights Committee, the Inter-American Court of Human Rights and the African Commission. The analysis will demonstrate that there has been an increased awareness among legislators and judicial bodies that States have international responsibility in ensuring that the human rights of their constituents are upheld not only by State organs and officials but also by other private individuals.

The importance of this judicial activism is underscored by the fact that two well-established shackles were broken. The first was the notion of individuals being outside the scope of international law, and the second, that States cannot be held responsible for individual action. As will be demonstrated, the change was accomplished through cumulative efforts spread over a significant period of time. In fact it is an ongoing process that augurs well for the protection and advancement of human rights.

Regulation of Individuals in Human Rights Law

The fundamental and primary subjects of international law have been States, which along with insurgents are the traditional subjects of international law.[1] Even insurgents are viewed as being transient by definition, for they "either win and turn into fully fledged States or are defeated and disappear."[2] Though there were exceptions, such as laws permitting the prosecution of piracy and international treaties banning the slave trade, individuals were generally regarded as mere appendices of the State.[3]

The twentieth century saw a rise in the scope of international law, which sought to subject international organizations, national liberation movements and individuals.[4] This expansion has been occasioned principally by the advancement of human rights and its allied fields such as international criminal law and international humanitarian law.

1 Antonio Cassese, *International Law*, (Oxford ; New York: Oxford University Press, 2001) . p.46.
2 Ibid.
3 Ibid. p.350.
4 Ibid. p.47.

Other branches of international law such as international investment law[5] and international environmental law[6] too have contributed in this regard. However, the prime driver, as will be demonstrated, has been international human rights law.

The International Human Rights Law context

The regulation of individuals in the human rights arena is not without controversy. For instance, Obokota argues that:

> In order to hold that international human rights law imposes direct obligations upon non-State actors and that they can be held directly accountable, it must be shown that international human rights law is directly enforceable against them…In examining the current status of international human rights law, it becomes apparent that a horizontal application is not possible. As a result, non-State actors do not bear legal obligations and therefore cannot be held directly accountable.[7]

Andrew Clapham, on the other hand, argues that four major phenomena are important for understanding the relevance of the question of the obligations of non-state actors: globalization of the world economy, privatization of various previously state controlled sectors, increase in internal armed conflicts resulting in the fragmentation of States, and feminization of human rights.[8]

The increased power of large corporations, Clapham argues, and their limited responsibility with respect to human rights, highlighted the need to expand the scope of human rights responsibility.[9] Similarly, the fact that numerous, previously state-controlled activities, which had major implications on the human rights of individuals, had been

5 Vratislav Pechota, "The Limits of International Responsibility in the Protection of Foreign Investments," in *International Responsibility Today: Essays in Memory of Oscar Schachter*, edited by Maurizio Ragazzi (Leiden: Martinus Nijhoff, 2005), p.171.
6 *The Trail Smelter Arbitration (United States v. Canada)*, 3 UNRIAA 1911 (1941).
7 Tom Obokota, "Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law", *International Journal of Refugee Law* 17 (2005): 394.
8 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford; New York: Oxford University Press, 2006) pp.3–4.
9 Ibid.

transferred to private control meant that there was a greater need for regulation of private individuals in the human rights context. Non-state actors are often called upon to adhere to human rights norms. For instance the Committee on Economic, Social and Cultural Rights stated that international financial institutions "should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes."[10] The Special Rapporteur on Sales of Children, Child Prostitution and Child Pornography goes so far as to argue that "international human rights law has long imposed direct obligations on the private sector."[11] Numerous judicial dicta and practice indicate that corporations can be held liable for the violation of human rights, where they act in concert with a violator State.[12] Many international treaties are directly applicable to non-state actors.[13] Thus the narrow view adopted by Obokota seems inapposite.

Clapham identifies the fragmentation of the State due to internal armed conflicts as an important step in extending international humanitarian law norms to rebel movements. Many rebel movements have been increasingly requested to adhere to humanitarian norms. For instance, Amnesty International alleged that Hizbullah had violated international humanitarian law by firing Katyusha rockets indiscriminately into Israel during the bloodshed last summer and stated as follows:

> Hizbullah is bound by a number of rules and principles of international humanitarian law. Some of these obligations, including the requirement to treat humanely at all times people taking no active part in hostilities, are contained in common Article 3 of the four 1949 Geneva Conventions. Other principles and rules specific to the conduct of hostilities have been accepted by the international community—including Israel, Lebanon and most other states—as binding on all parties to international and non-international armed conflicts. These rules are encapsulated in the Additional Protocol I of 1977 to the Geneva Conventions.[14]

Similarly on November 21, 2006, Norway, the US, EU and Japan, the Co-Chairs of the Tokyo Donors Conference overseeing aid for the Sri Lankan peace efforts, issued the following statement:

> The Co-Chairs particularly condemn the LTTE for initiating hostilities from heavily populated areas and the Government of Sri Lanka for firing into such vulnerable areas and killing and wounding innocent civilians. The Co-Chairs call on *both sides to respect international humanitarian law* and set aside demilitarized zones to protect internally displaced persons.[15]

Clapham cites three bases for asserting that individuals are regulated directly by international law.[16] First he draws attention to scholarly works by jurists and international experts, which highlight the problems associated with protection of human rights in times of armed conflict.[17] Next, he cites the International Committee of the Red Cross study[18] of customary international humanitarian law norms, which includes a set of principles concerning the applicability of certain human rights norms in

10 General Comment Nos. 14 (*The Right to the Highest Attainable Standard of Health*) (*2000*) and 12 *(The Right to Adequate Food*) (1999), *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies*, HRI/GEN/1/Rev.5 (2002).

11 *Report of the Special Rapporteur on Sales of Children Child Prostitution and Child Pornography*, E/CN.4/2001/78, para. 52.

12 See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Beanal v. Freport-McMoRan*, 197 F.3d 161, 169 (5th Cir. 1999); *Doe v. Unocal Corp*. 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Iwanowa v. Ford*, 67 F. Suppp. 2d 424 (D.N.J. 1999).

13 See *Convention against Transnational Organized Crime*, 40 ILM 335 (2001); UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001), available at http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf; *Convention on Cybercrime*, ETS 185 available at http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm.

14 Amnesty International, *Israel/Lebanon Under Fire: Hizbullah's attacks on northern Israel*, AI Index: MDE 02/025/2006, 14 September 2006, available at http://web.amnesty.org/library/index/ENGMDE020252006.

15 Joint statement issued by Norway, the United States, the European Union, and Japan following their November 21, 2006 meeting as Co-Chairs of the Tokyo Donors Conference, available at http://www.tamilnet.com/art.html?catid=13&artid=20357.

16 Clapham, *Human Rights Obligations of Non-State Actors*, pp.14–15.

17 See T. Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument" *American Journal of International Law* 77 (1983): 589; T. Meron, *Human Rights in Internal Strife: Their International Protection* (Cambridge, Grotius: 1987); A. Eide, T. Meron, and A. Rosas, "Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards" in *American Journal of International Law* 89 (1995): 215; J.-D. Vigny and C. Thompson, "Fundamental Standards of Humanity: What Future?" *Netherlands Quarterly of Human Rights* 20 (2002): 185–199; UN Doc, E/CN.4/1998/87/Add. 1, January 12, 1998.

18 International Committee of the Red Cross, *Customary International Humanitarian Law—Volume 1: Rules* edited by J.-M. Henckaerts and L. Doswald-Beck, (Cambridge; New York: Cambridge University Press, 2005).

times of armed conflict.[19] Finally, Clapham points out that the fact that the June 1998 Rome Conference on Establishment of an International Criminal Court provides for obligations under international law for individuals whether acting on behalf of a State or as non-state actors is clear indication of the extension of human rights norms to non-state actors. In fact, a report of the Secretary-General states that Articles 8 (2)(c) and (e) of the Rome Statute, which takes account of war crimes that can be committed by individual non-State actors, "has been widely recognized as customary international law."[20]

The above, of course, are in relation to purely private actors and their individual responsibility. There are numerous methods by which international and national tribunals have demonstrated an increased pervasiveness of the human rights regime going beyond the State's regular responsibility for its direct violation of international law. The most dramatic step was in the context of international criminal responsibility for those who had been committed vast atrocities against humanity. Thus individuals who sought to hide behind the veil of State action were exposed. The following treaties, for instance, have been implemented to ensure such compliance:

- Convention on the Prevention and Punishment of the Crime of Genocide[21] (Genocide Convention)
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[22]
- Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity[23]

19 Ibid, pp.14–15.
20 *Report of the Secretary-General submitted pursuant to Commission Res. 1998/29*, December 18, 1998, UN Doc. E/CN.4/1999/92, para 12.
21 78 UNTS 277. Entered into force on January 12, 1951. Available at http://www.ohchr.org/english/law/genocide.htm.
22 G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); 754 UNTS 73; 18 ILM 68 (1979). Entered into force on November 11, 1970. Available at http://www.ohchr.org/english/law/warcrimes.htm.
23 G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); 754 UNTS 73; 18 ILM 68 (1979). Entered into force on November 11, 1970. Available at http://www.ohchr.org/english/law/warcrimes.htm.

- Statute of the International Tribunal for the Former Yugoslavia[24]
- Statute of the International Tribunal for Rwanda[25]
- Rome Statute of the International Criminal Court[26]

Article IV of the Genocide Convention provides that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials *or private individuals*."[27] The other conventions specified above make no distinction between acts committed by private individuals and government officials, bringing private action directly under the purview of international law. In fact, Article 6 of the Amended Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 5 of the Statute of the International Tribunal for Rwanda both provide that the Tribunal "shall have jurisdiction over natural persons…" These instruments clearly indicate the far-reaching nature of international law in this regard. Though this is, strictly speaking, international criminal law, it is easy to understand that the basis for the expansion of the scope of this area is based on international human rights considerations.

The reasons adduced by Clapham, *viz*. globalization, privatization, fragmentation and feminization, explain the greater focus on individuals as subjects of international law. Article 4 of the UN General Assembly Declaration on Violence against Women points to an interesting *approach* towards policing individuals. It provides for the holding of the State responsible for the acts of private persons. This is the area this paper seeks to address. It focuses on instances where States have been held liable for the infraction of human rights norms by purely private individuals. This would then be the reverse of many of the situations discussed earlier in this section, where individuals were held individually liable for their independent acts and acts committed on behalf of the State. Both situations result in the increased policing of individual action and greater

24 SC Res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993); 32 ILM 1159 (1993). Available at http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm.
25 SC Res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994). Available at http://69.94.11.53/ENGLISH/basicdocs/statute.html.
26 UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90. Entered into force on July 1, 2002. Available at http://www.un.org/law/icc/statute/romefra.htm.
27 Emphasis added.

enforcement of human rights—though the direction of responsibility is reversed. This paper argues that holding the State accountable for the failure to prevent, investigate and punish human rights violations by actors not connected to the State is an interesting innovation that augurs well for the human rights regime. In order to deal with the jurisprudence in this regard it is important to first address the rules of State responsibility involved.

Rules of State Responsibility

In order to appreciate the vast strides made in the realm of international human rights jurisprudence in the context of State responsibility for private acts, it is useful to trace briefly the evolution of the concept of State responsibility. In medieval times the distinction between States and its constituents were blurred, and acts of individuals not directed by the State could give rise to reprisals against the whole community.[28] Grotius, influenced by the natural law prevalent at the time and Roman law, laid down a theory of State responsibility, which resulted in State responsibility being invoked only in the event of complicity or some form of *culpa*.[29] Grotius argued that the state cannot be held responsible without a fault of its own, though it may become an accomplice through its own fault in two ways—*patientia et receptus*.[30] This notion of fault-based responsibility has had profound impact on the jurisprudence to this day.

In the aftermath of the World Wars and increased internationalization there were several attempts to codify the law relating to State responsibility. After more than 50 years of deliberation, in 2001, the ILC adopted the entire set of final draft articles on responsibility of States for internationally wrongful acts consisting of 59 articles as well as commentaries thereto. Though it is too early to comment on whether the ILC Articles would be accepted by States as customary international law, in view of the acceptance and endorsement among judicial tribunals, it will be considered authoritative for the purposes of this paper.

28 Clyde Eagelton, *The Responsibility of States in International Law*, (New York: New York University Press, 1928). p.76.
29 Ibid., citing Grotius, De Jure Beli et Pacis, Book II, Chap. XVIII, § 21; II, XXI, 1-4; II, XVII, and XX-XXIII.
30 Ibid., citing Grotius, De Jure Beli et Pacis, Book II, Chap. XXI, II, 2.

ILC Article 1 parsimoniously states that "every internationally wrongful act of a State entails the international responsibility of that State." In terms of ILC Article 2, an internationally wrongful act of a State exists where an act or omission:

(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State.

This approach to State responsibility rightfully declines to deal with the primary obligations of a State. Only two elements matter in ascertaining responsibility—attribution and the breach of an international obligation. It is important at this juncture to examine these two principal elements of attribution and breach of an international obligation.

Attribution

In order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State.[31] The general rule in international law, which forms the bedrock of the ILC Articles, is that the only conduct attributable to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[32] In the absence of a specific undertaking or guarantee, a State is not responsible for the conduct of persons in circumstances not covered by the ILC Articles.[33]

Generally, purely private acts will not engage the State's responsibility, although the State may, in certain circumstances, be liable for its failure to prevent those acts or to take action to punish the individuals responsible.[34] For instance, the Committee of Jurists, which looked into an incident between Italy and Greece involving the assassination of members of an international commission delimiting the Greek-Albanian border, stated that the responsibility of a State is involved "if the State has

31 *Yeager v., Islamic Republic of Iran* (1987) 17 Iran-U.S.C.T.R. 92, at pp.101-2.
32 United Nations, International Law Commission, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries*, compiled by James Crawford, (Cambridge, U.K. New York: Cambridge University Press, 2002). p.91.
33 Ibid, p.93.
34 *James (US v. Mexico)* (1926) 4 RIAA 82; cf *Noyes (US v. Panama)* (1933) 6 RIAA 308.

neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal."[35]

The commentary to the ILC Articles clearly indicates that a State may be responsible for the effects of the conduct of private parties even where there is no agency relationship. It is important to reproduce the relevant portion, which reads thus:

> The different rules of attribution… have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it. In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically different.[36]

This commentary goes further that the dicta in the *Case concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* case[37] only confirms the existence of responsibility on the basis of the *approval and adoption* of the harmful acts of individuals who are not, as such, agents of the Respondent State.

It is unfortunate that this very important element of State responsibility is buried in the commentary and not set out specifically in the text of the Articles themselves. It is important to understand that in terms of the commentary the State is responsible for the *effects* of the acts of the private parties and not just for its omissions in regulation, prevention or protection.

Breach of an International Obligation

It should be noted that there is no specific rule that determines the exact nature of all obligations in this realm. The ILC Articles abandon the

35 League of Nations, *Official Journal*, 5th Year, No. 4 at 524 (April 1924).
36 UN, International Law Commission, *Articles on State Responsibility*, 92.
37 I.C.J. Reports, 1980, 3 (paras 73–76).

distinction previously drawn between obligations of conduct, obligations of result, and obligations to prevent a particular occurrence.[38] ILC Article 12 provides that "there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

Thus the State could be found responsible for the violations of discrete obligations and the cumulative effect of several actions that constitute a separate obligation. In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*[39] it was held that the control exercised by the US over the *Contras* did not imply that the acts of the *Contras* is attributable to the US. The Court did find, however, that the arming and financing of the *Contras* was a breach of the duty to refrain from interfering in another State's affairs.[40] It also was found to be a breach of the obligation arising out of the prohibition on the use of force and an infringement of the territorial sovereignty of Nicaragua.[41] Thus even though the acts of the *Contras* were not attributable to the United States, the Court found that the United States had been in breach of other international obligations.

The Human Rights Jurisprudence

The analysis in the previous section demonstrates that the State can be held liable for the acts of individuals not connected with it. In the *Neer Claim* the US-Mexico Claims Commission opined that "the propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, in order to constitute and international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[42] However, the standards

38 Guy S. Goodwin-Gill, "State Responsibility and the 'Good Faith' Obligation in International Law," in *Issues of State Responsibility before International Judicial Institutions*, edited by Malgosia Fitzmaurice and Danesh Sarooshi (Oxford: Hart Publishing, 2004) p.77.
39 I.C.J. Reports, 1986, p 14.
40 Ibid, pp.123–125 (paras 239–42).
41 Ibid. pp.118–19, (paras 227–28), 128 (para 251).
42 *US v. Mexico* (1926) 4 UNRIAA, 60.

could vary with the primary obligation concerned. Thus it is important to look at the human rights jurisprudence and specific regimes therein to understand the specific standards applicable in this arena.

The European Convention on Human Rights

Article 1 of the European Convention on Human Rights[43] (European Convention) provides as follows:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

In *Costello-Roberts v. UK*,[44] where the corporal punishment in a private school was considered, the European Court of Human Rights (ECHR) held that the UK could not delegate its responsibility to ensure that the substantive rights provided under Articles 3 and/or 8 of the European Convention were enjoyed by *all* persons, both students of public and independent schools. Thus the ECHR established a significant marker in terms of the positive obligations owed by the State.[45]

The first sentence of Article 2, §1 of the European Convention requires that "everyone's right to life shall be protected by law…" The ECHR held this to impose an obligation on the State to implement effective criminal law provisions to deter the commission of offences against the person.[46] Mowbray posits that "One of the most prevalent types of positive obligation is the duty upon [S]tates to take reasonable measures to protect individuals from infringement of their Convention rights by other private persons."[47]

Conforti considers *Kiliç v. Turkey*[48] as an instance where the ECHR ruling could be interpreted to mean that the provisions of Turkish criminal law were unable to deter people from committing politically

43 ETS 5; 213 UNTS 221, available at http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=4/25/2006&CL=ENG.
44 Series A, No. 247C (1993).
45 Clapham, *Human Rights Obligations of Non-State Actors*, 356.
46 *Keenan v. UK* 3rd April 2001 para 88, available at www.echr.coe.int/Eng/judgments.htm.
47 Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, (Oxford: Hart, 2004) 225.
48 28 March 2000, paras 71–75, available at www.echr.coe.int/Eng/judgments.htm.

motivated murders and consequently entailing responsibility.[49] The case involved the killing of a journalist who had voiced Kurdish opinions. The ECHR commented on the defects in the criminal law protection in the region and, in particular, the lack of serious investigations.[50] The fact that the victim had asked for and not obtained protection was also considered as evidence on the failure of Turkey to fulfill its obligation under the European Convention. The ECHR stated that the event was predictable because the Turkish security forces in the region had been accused of committing several illegal activities, including the elimination of supporters of some groups.[51] This was a critical innovation towards ensuring that the State takes appropriate steps to police its territory.

The ECHR found the availability of the defense of reasonable chastisement for parents charged with assault of their children under English law to constitute a violation of positive obligations, where the assault in question reached the level prohibited by Article 3 of the European Convention.[52] This was a situation where legislation, instead of the administration of justice, was found to be insufficient as it did not do enough to curb parental chastisement in cases where such action would have exceeded the levels permitted by the European Convention. In a similar decision the ECHR held that the procedural barrier at the time under the Netherlands Criminal Code, which precluded handicapped victims of crime over the age of 16 from having a legal representative institute criminal proceedings on their behalf, was a violation, stating that effective criminal law provisions were indispensable to facilitate effective deterrence.[53]

In *Keenan v. UK*, the ECHR held in the context of Article 2 of the European Convention:

> For a positive obligation to arise, it must be established… 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

49 Benedetto Conforti, "Exploring the Strasbourg Case-law: Reflections on State Responsibility for the breach of positive obligations," in *Issues of State Responsibility before International Judicial Institutions*, edited by Malgosia Fitzmaurice and Danesh Sarooshi (Oxford: Hart Publishing, 2004), 131.
50 *Kiliç v. Turkey* para 71–75.
51 *Kiliç v. Tukey* para 65–68.
52 *A v. UK*, September 23, 1998, available at www.echr.coe.int/Eng/judgments.htm.
53 *X and Y v. The Netherlands*, 26 March 1965, available at www.echr.coe.int/Eng/judgments.htm.

> individual 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.[54]

After an analysis of the decisions of the ECHR, Conforti points out that the State is found responsible in the context of Article 2 of the European Convention if "the authorities 'knew or ought to have known' the risk to the life of a person and they failed to take measures which, 'judged reasonably', might have prevented the occurrence of the lethal event."[55] According to Conforti, the only instance where the ECHR had found that Article 2 was violated due to the lack of measures necessary to avoid foreseeable risk[56] was in *Kiliç v. Turkey* discussed above. The fact that the ECHR moves away from mere knowledge to constructive knowledge by referring to matters that "ought to be known" is a singularly important step, for it presupposes some standard that could be used to construct such knowledge.

In *Öneryildiz v. Turkey*[57] the Grand Chamber held that the obligation to take appropriate steps to safeguard the lives of those within the State's jurisdiction "must be construed as applying the context of any activity, whether public or not, in which the right to life may be at stake." The most basic duty entailed the putting into place of a legislative and administrative framework designed to provide effective deterrence against unlawful killing.[58] In *Öneryildiz* the Court held that the Turkish authorities had failed to heed the warnings concerning a rubbish tip that exploded due to a build-up of methane and other gases. The authorities were held liable despite the fact that the buildings were illegal, since government policy had been tolerant towards such buildings and the inhabitants had been provided with electrical and water supply and had been required to pay council tax.

At the procedural level, at least, the ECHR has set out several

54 *Keenan v. UK* April 3, 2001 para 81, quoting *Osman v. UK* 26 Oct 1998 para 116. (www.echr.coe.int/Eng/judgments.htm)
55 Conforti, "Exploring the Strasbourg Case-law,"132.
56 Ibid.
57 (App. 48939/99), Judgment of the Grand Chamber of November 30, 2004: (2005) 41 EHRR 325, para 93 of the judgment.
58 Ibid. para 89.

objective standards. The ECHR has required that persons independent from those who were implicated carry out investigations,[59] and on the basis of objective evidence.[60] It also requires the authorities to take the reasonable steps available to them to secure evidence.[61] In *Ergi v. Turkey*[62] the ECHR found Turkey responsible for the failing to plan and execute an ambush operation in a manner that would minimize or avoid risk to civilians from counter-attack by the PKK. This case involved a situation where the claimant's sister was killed in an ambush operation by Turkish forces against the PKK and the evidence was inconclusive as to who was directly responsible. These measures then reflect a move towards ensuring strict government compliance with their respective human rights commitments in more efficient and effective ways.

In *Colozza and Rubinat v. Italy*[63] where the issue involved the right to a fair trial, the ECHR said that Article 6 (1) of the Convention imposed an obligation of result: "The Court's task is … to determine whether the result called for by the Convention has been achieved…. For this to be so, the resources available under domestic law must be shown to be effective …"[64] In the determination, however, the ECHR looked at what Italy could have done to increase the effectiveness of the applicant's rights.[65] In *Plattform 'Ärzte für das Leben' v. Austria* the ECHR held that:

> While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used… In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.[66]

Thus even in the context of the European Convention it is to be

59 *Güleç v. Turkey* (App. 21593/93), July 27, 1998; (1999) 28 EHRR 121.
60 *Ergi v. Turkey* (App. 23818/94), July 28, 1998; (2001) 32 EHRR 388.
61 *Salman v. Turkey* (App. 21986/93), June 27, 2000; (2002) 34 EHRR 425.
62 *Ergi v. Turkey* (App. 23818/94), July 28, 1998; (2001) 32 EHRR 388.
63 E.C.H.R., Series A, No 89 (1985)
64 Ibid., 15–16 (para 30), citing *De Cubber v. Belgium* E.C.H.R. Series A, No 86, (1984), 20 (para 35).
65 Ibid., para 28.
66 *Platform 'Ärzte für das Leben' v. Austria*, E.C.H.R., Series A, No 139 (1988) p.12 para 34.

noted that "the precise extent to which a State may be liable for the conduct of a private individual must ultimately depend on the terms of the individual articles of the [European] Convention, and must be examined separately in relation to each of the rights guaranteed."[67]

Article 13 of the European Convention is also important for it provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. By removing any obstacles in seeking remedies for violations committed by official actors, the Article presupposes that "it cannot be a defence that it was committed by a private individual."[68]

The abolished European Commission on Human Rights imposed a stringent standard in 1995 in establishing the causal link by requiring that the injury caused should be a "direct consequence" of the failure of the State. In *Tugar v. Italy*[69] the Commission addressed a claim made by an Iraqi national who had been injured by an Italian land mine while clearing a minefield. He claimed that the insufficient regulation by the Italian authorities when selling the mines to Iraq made them liable. However, the Commission held:

> Applicant's injury can not be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the re applicant suffered.[70]

It should be noted that the improper regulation of the sales of weapons in this case do not seem to be a violation per se at the time. However, where improper regulation of arms sales is itself a violation of an international

67 Jacobs and White, *The European Convention on Human Rights*, edited by Clare Ovey and Robin White (Oxford ; New York : Oxford University Press, 2006) p.32.
68 Ibid., p.19.
69 Decision N° 22869 of October 18, 1995, DR, vol 83 A, 29.
70 Ibid.

obligation, precisely because such unregulated sale could result in indiscriminate use of such arms, it may be possible to contend that the State has failed in its responsibility to prevent trans-boundary harm.

Evans cautions that the language of State responsibility has been used in a quite different fashion in the context of human rights, particularly by the ECHR, to deliberately broaden the scope of substantive legal obligations.[71] He highlights the fact that State responsibility is being "used by the ECHR to extend the scope of the Convention 'internally', reflective of the 'ethical' approach to human rights that breaks down traditional boundaries."[72] This is a clear indication of the leadership of the ECHR in expanding the notion of State responsibility for the betterment of human rights. An analysis of some other jurisdictions would demonstrate that this practice is slowly gaining acceptance in other areas as well.

International Covenant on Civil and Political Rights

It should be noted that apart from the ECHR, several human rights organizations such as the Human Rights Committee (HRC) and the Inter-American Court of Human Rights (Inter-American Court) have used Article 2 of the International Covenant on Civil and Political Rights[73] (ICCPR) to hold States responsible for acts where such States could not be found to be directly responsible for the violation of the substantive rights in question.[74] Article 2 of the ICCPR expresses the general undertaking by States party to:

> Respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

71 Malcolm D. Evans, "State Responsibility and The European Court of Human Rights: Role and Realm," in *Issues of State Responsibility before International Judicial Institutions*, edited by Malgosia Fitzmaurice and Danesh Sarooshi (Oxford: Hart Publishing, 2004) p.140.
72 Ibid., p.160.
73 G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), available at http://www.ohchr.org/english/law/ccpr.htm.
74 Dominic McGoldrick, "State Responsibility and the International Covenant on Civil and Political Rights," in *Issues of State Responsibility before International Judicial Institutions*, edited by Malgosia Fitzmaurice and Danesh Sarooshi (Oxford: Hart Publishing, 2004) p.166.

In *Dermit Barbato v. Uruguay*,[75] for instance, the HRC held that the "inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or omission were responsible for not taking measures to protect his life, as required by Article 6 (1) of the Covenant."[76] The HRC also noted in its Concluding Observations on Hong Kong in 1995 the need for protection against violations of the Covenant by private parties, stating that it "notes with deep concern the absence of legislation providing effective protection against violations of Covenant rights by non-governmental actors."[77] The HRC also indicated in unequivocal terms that "the positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."[78] Clapham concludes that the rights contained in the ICCPR are "now firmly established as creating possible positive obligations for [S]tates where the threat to the enjoyment of those rights emanates from non-state actors."[79]

The American Convention on Human Rights

The American Convention on Human Rights[80] provides in Article 1:

> The States Parties to this Convention undertake *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, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[81]

75 A/38/40 Communication No. 84/1981, U.N. Doc. CCPR/C/OP/2 at 112 (1990), available at http://www1.umn.edu/humanrts/undocs/newscans/84-1981.html.
76 Ibid., p 124 para 9.2.
77 Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. CCPR/C/79/Add.117 (1999). A/51/40, Vol II, para 56 available at http://www1.umn.edu/humanrts/hrcommittee/hongkong1999.html.
78 Human Rights Committee, General Comment 31 (art. 2, the nature of the general legal obligation imposed on states parties to the Covenant), March 29, 2004, at para 8.
79 Clapham, *Human Rights Obligations of Non-State Actors*, 348.
80 OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), available at http://www.cidh.org/Basicos/basic3.htm.
81 Emphases added.

In the *Velásquez Rodriguez Case*[82] the Inter-American Court of Human Rights (IACHR) held Honduras responsible for the "lack of due diligence to prevent the violation or to respond as required by the Convention."[83] Though the IACHR did not hold Honduras responsible for the acts of the private individuals per se, it held Honduras responsible for the effects of its actions. Similarly, in the *Godinez Cruz Case*[84] the IACHR held that even where there was no evidence of direct State involvement in the disappearance of a school teacher and trade union leader, the failure on the part of the State to prevent the disappearances and punish the perpetrators was sufficient grounds to entail State responsibility. In *Paniagua-Morales et al v. Guatemala* the IACHR held that the "State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish authors of such violations."[85]

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*[86] the IACHR found Nicaragua to be responsible for failing to prevent an international firm from exploiting land belonging to the native Awas Tingni community. The Inter-American Commission similarly found that Brazil had failed to take "timely and effective measures to protect the rights of the Yanomamis" whose territory had been penetrated by corporations and other non-state actors on a large scale to their detriment.[87]

African Charter on Human and Peoples' Rights

It should be noted that the substantive provisions of law relied upon in the above jurisdictions were quite explicit in their requirement of "horizontal" protection of human rights as is evident from the relevant Articles cited above. It is interesting that despite the African Charter on Human and Peoples' Rights[88] not providing explicit "horizontal" guarantee of rights, the African Commission had taken the step of

82 *Velásquez Rodriguez Case*, Inter-Am Ct HR Decisions and Judgments 91 (ser C) No 4 (1988).
83 Ibid. p154.
84 *Godinez Cruz Case*, Inter-Am Ct HR Decisions and Judgments 85 (ser C) No 5 (1989).
85 Judgment of 8 March 1998, Inter-Am. Ct. H.R., (Ser. C) No. 37 para 91.
86 Inter-Am Ct HR Judgments and Opinions (ser C) No 79 (2001).
87 See *Yanomani v. Brazil*, Res. 12/85, Case 7615, March 5, 1985, available at http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm.
88 OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982), entered into force October 21, 1986, available at http://www.achpr.org/english/_info/charter_en.html.

finding the State responsible for private action where there has been a failure to provide security and stability in *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*.[89] The African Commission stated:

> Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that the 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. Chad therefore is responsible for the violations of the African Charter.[90]

In *SERAC v. Nigeria*,[91] a case involving the exploitation of the local Ogoni community by foreign investors, the African Commission stated that "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." Thus economic, political and social rights have all been deemed to be justiciable even with respect to actions of private individuals. This is an important step that could fuel further inroads by international tribunals to enforce human rights norms even where there is very limited textual support to regulate private action.

Conclusion

Clapham cautions that it would be a mistake to analyze the approaches of the different regional bodies by focusing on textual differences in the instruments they are applying.[92] Instead he argues that the approaches

89 African Commission Communication no 74/92 (1995), available at http://hei.unige.ch/humanrts/africa/comcases/74-92.html.
90 Ibid, para 22.
91 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African Commissions Communication No 155/96, paras 57–58 (2001)
92 Clapham, *Human Rights Obligations of Non-State Actors*, 436.

should be viewed vis-à-vis the threats faced in the individual jurisdictions.[93] Thus, for instance, the ECHR, faced with an open-ended set of responsibilities to protect people from private violence, has focused on what is reasonably foreseeable for the authorities.[94] As was noted previously, the African Commission has been able to incorporate horizontal application of the African Charter, even without textual support.

These approaches are certainly not the panacea for all human rights violations, but are very effective in smoking out States endeavoring to hide behind the acts of private individuals upon the belief that their tacit acquiescence or indifference will not come to light due to the inherent difficulties faced in adducing evidence to demonstrate such complicity. In the case of States, which are truly concerned about human rights protection, what the approach does is to hold States responsible for the systemic deficiencies that foster and encourage violations. This should slowly force States to change their attitudes and improve their regulation of private action. A State, which enjoys sovereignty over its subjects and territory, needs to have the accompanying responsibility that it will use its suzerainty to ensure that its regulatory infrastructure does not promote or protect human rights violations.

This paper certainly does not advocate that judicial bodies should hold States responsible for all violations of human rights by private persons. Such an approach is unwise for logistical and political reasons. The most effective measures, however, need to be adopted. This would depend on the context of the jurisdiction involved. It is not possible to expect the regulation in Western Europe to be replicated in Sub-Saharan Africa. Thus the standards of protection required by a particular State should be reflective of the geo-political constraints faced by that State. However, this does not mean that a minimum standard of protection cannot be achieved. The African Commission in *SERAC v. Nigeria* held that the practice in questions fell short of the "minimum conduct expected of governments" and was therefore in violation of Article 21 of the African Charter.[95]

93 Ibid.
94 Ibid.
95 *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African Commissions Communication No 155/96, para 58 (2001)

A minimum standard should not be a limit on the extent of State responsibility. The ideal standard should be ever-evolving, constantly striving to achieve a system that can better protect, foster and improve international human rights norms. In view of the leadership demonstrated by judicial bodies in this regard, it is likely that guidelines even in these complex areas will be laid down in future cases.

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