



**TRIGGERING STATE RESPONSIBILITY FOR HUMAN RIGHTS
VIOLATIONS PERPETRATED BY PRIVATE ACTORS
IN REGIONAL AND UNIVERSAL SYSTEMS**

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EXECUTIVE SUMMARY

This thesis deals with how States can be held accountable for the acts of private actors in violation of human rights both in regional and universal systems for the protection of human rights. There are many instances in which private individuals violate human rights. Transnational corporations, who sometimes have budgets bigger than some States' GDPs, often violate human rights in order to minimize costs and maximize profits, and the State very often does nothing about it, because it doesn't want to scare away foreign investment, or because it lacks the means to do so. Sometimes also the State is a shareholder in some of these companies, and has no interest at all in diminishing the corporation's profits. Other instances in which private individuals violate human rights is in the context of internal conflict, in which insurgent groups perform actions ranging from harassing the population and destroying property to murder, rape and forcible recruitment of children for their war. The first instance, however, in which the violation of human rights by a private individual has been to some extent given international recognition was violence against women, traditionally considered to belong to the "private sphere", into which the State should not interfere. Other instances include invasion of privacy by the press, and violations perpetrated by privatized public services. Regional and universal human rights bodies have responded to these instances, declaring the international responsibility of the State for the violation of human rights protected by each organ's respective instrument. I analyze the jurisprudence of three regional systems (European, Inter-American and African), as well as the activities, involving general comments and recommendations and some times jurisprudence, of six different UN Treaty Bodies (Human Rights Committee, Committee Against Torture,

Committee for the Elimination of Racial Discrimination, Committee for the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights and Committee on the Rights of the Child). In all these regional systems, as well as all these UN Treaty Bodies, some degree of recognition has been given to what I call “private triggering” – that is, the idea that the activities of private parties can trigger the responsibility of the State at the international level for violations of human rights. The jurisprudence is rich and diverse, but shares some important common features, such as the defense of due diligence, and the idea that the acts of private parties can trigger responsibility of the State for violating not only provisions requiring it to prevent or punish the violations, but also the substantive rights protected in each instrument. Lastly, I analyze the recent decision of the International Court of Justice in the *Genocide case*, involving the events in Srebrenica in 1995. While the decision of the Court for finding Serbia responsible for violating its duty to prevent genocide can be seen as a step forward, the decision is generally very conservative in terms of private triggering, and can have some harmful effects over the future development of this concept in human rights regimes.

INTRODUCTION

Colombia, July 15, 1997. After passing, three days before, by several military control posts without being stopped once, approximately 100 paramilitary soldiers belonging to the group of United Self-defenses of Colombia (*Autodefensas Unidas de Colombia* – AUC) reached the small village of Mapiripán. After taking control of the city, which included control of the city's public buildings and communications facilities, the AUC members pulled apart from the rest of the city's population 27 people, identified in a list in possession of the AUC as “collaborators” with the Colombian insurgent group FARC (*Forzas Armadas Revolucionarias de Colombia*, or Colombian Revolutionary Armed Forces). Throughout the next five days, members of the AUC interrogated, tortured, eviscerated and killed 49 people. Their corpses, or what was left of them, as many were cut into pieces so as to prevent future identification, were thrown into the nearby river.

So as to prevent the bodies thrown into the river from floating back to the surface, a very specific technique was applied in some instances: while the person was still conscious, the person's gut would be cut open with a knife, the intestines were removed and replaced by rocks, the person's skin would be stitched back together, and the person would then be thrown into the river. The technique was applied in a way so as to guarantee that people would still be alive at the time they were thrown into the river, and would then die of drowning.

Exactly eight years and two months after the AUC arrived at Mapiripán, on September 15, 2005, the Inter-American Court of Human Rights, in a ground-breaking judgment, declared that the State of Colombia was responsible for the deaths of the 49 people

who lost their lives in the hands of the paramilitary group.¹ According to the Court, the responsibility of the State in the case depended little on whether the actual killing could be attributed to State agents (even though it was well-known that many members of the armed forces belonged to the AUC, and there were strong indications that many of these were involved in the events in Mapiripán). What mattered, said the Court, is that the State had failed to protect the human right to life of those people under its jurisdiction, since there was a duty upon the State to protect the human rights of those under its jurisdiction, regardless of whether the threat came from State agents or third parties.²

The relatives of the fatal victims of the Mapiripán Massacre, and the other survivors, saw long waited justice in the judgment of the Inter-American Court. However, under a classic approach to the doctrine of State Responsibility in Public International Law, to concede that the State can be held responsible for an action it had been considered to have nothing directly to do with is at least a little bit far-fetched.

In this piece I analyze the ways through which international responsibility of the State can be triggered by the acts of non-State entities in the context of human rights violations. I take as a premise the contemporary understanding according to which human rights are no longer a State “gift” to individuals, or, alternatively, a demand from individuals to obtain certain guarantees regarding the treatment they should expect from the State they entered or created, as was the case of the establishment of individual rights during the French Revolution.

According to other advocates of the position I adopt, human rights are the axiological center of the legal order, its very foundation and goal, which allow for the entry of value considerations in a legal order at other times deemed value-free (see, for example,

¹ I/A Court H.R., *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134 [hereinafter “The Mapiripán Massacre Case”].

² In this text, “third parties”, “non-State actors” and “private actors”, as well as any variation of these terms, are used interchangeably, unless otherwise indicated.

the German Weimar Constitution).³ Being human rights, or better said, the human person endowed with inalienable rights,⁴ the center of the legal order, it is only natural to expect that they will require respect not only from the State, but from everyone. Human rights are necessary to impose certain boundaries on the pursuit of goals of the collectivity, and belong to each individual by the simple fact of being human. Because everyone has rights, and it is necessary that everyone has the chance to exercise these rights, the rights of all individuals coexist just as individuals coexist. As individuals interact, so must their rights; in other words, the duty to respect rights is not only imposed on the State as an intangible Leviathan, but also on all individuals who very concretely exist in society.

However, I concede that, in the current state of affairs of international law, the State is the only entity that can be brought before an international adjudicatory body for a violation of human rights (although the situation is changing in some specific emerging areas of international law, such as foreign investment law and international criminal law). This is particularly true in the context of human rights, where individuals can only claim that their rights have been violated by the State party to the relevant treaty.

I will address the issue of violations of human rights by private parties, then, from a different perspective than it is more often done in the literature. While most authors

³ One of the fiercest advocates of a value-free legal order, self-legitimizing, was Hans Kelsen, whose “pure theory of law” heavily influenced the constitutional theory of Weimar, and consequently influenced to a certain extent constitutional practice. *See, e. g.,* HANS KELSEN, *PURE THEORY OF LAW* (trans. Max Knight) (Berkeley and Los Angeles, University of California Press 1967). Another supporter of this conception was Gustav Radbruch, who, however, seeing the devastating effects of the Weimar Constitution in, to some extent, giving legal legitimacy to the National-Socialist government in Germany in the 1930’s and throughout World War II, converted to a position which sought to once again use natural law, full of axiological considerations. *See* Frank Haldemann, *Gustav Radbruch v. Hans Kelsen: A Debate on Nazi Law*, 18 *RATIO JURIS* 162 (June 2005); Stanley L. Paulson, *On the Background and Significance of Gustav Radbruch’s Post War Papers*, 26 *OXFORD JOURNAL OF LEGAL STUDIES* 17 (2006).

⁴ *See* Antônio Augusto Cançado Trindade, *The Emancipation of the Individual from his Own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*, in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO: 1979-2004* [“The Inter-American Court of Human Rights: A Quarter of Century: 1979-2004”] 159, 180-1 (San José, C. R., Corte Interamericana de Derechos Humanos 2005) (discussing the evolution of international law, from exclusion of the individual to its re-inclusion, which he attributes to the rediscovery of jusnaturalism in international law).

focus on the violation of constitutionally protected rights by private parties in internal orders,⁵ or municipal law tools for addressing violations of international human rights,⁶ or even try to discuss mechanisms for international accountability of certain non-State actors,⁷ my discussion will be centered on the ways in which a human rights violation by a private party entails the responsibility of the State.

My contention is that there are four ways through which responsibility can be attributed to the State for the acts of a non-State actor:

1. When the State fails with its duty to prosecute and punish perpetrators of human rights violations (which is then State responsibility for the failure of State institutions);
2. When there is a failure of the State in providing for an effective remedy (a notion treated separately in most human rights treaties, although usually closely connected to

⁵ For a collection of essays on the topic, see *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* (András Sajó and Renáta Uitz eds.) (Eleven International Publishing 2005) (discussing Germany, South Africa, Hungary and France). See also MURRAY HUNT, *USING HUMAN RIGHTS LAW IN ENGLISH COURTS* (Oxford, Hart Publishing 1998); and *HUMAN RIGHTS IN PRIVATE LAW* (Daniel Friedmann and Daphne Barak-Erez eds.) (Oxford, Hart Publishing 2001) (collection of essays addressing Canada, Germany and the United Kingdom).

⁶ For the redressing of violations perpetrated by corporate citizens, see, e.g., Carlos Manuel Vázquez, *Sosa v. Alvarez-Machain and Human Rights Claims against Corporations under the Alien Tort Statute*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 137 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005) (arguing that a 2004 decision of the U.S. Supreme Court clarified the narrow scope of application of the ATCA for redressing human rights violations), Lucien J. Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 *GEO. J. INT'L L.* 3 (2003) (arguing that the use of ATCA has not interfered with international policy to any impermissible degree, and that judicial decisions invoking the ATCA have given adequate guidance to multinational corporations as to prohibited conduct), and Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 *AM. U. INT'L L. REV.* 1009 (2003) (commenting on the Unocal decision by the Ninth Federal Circuit of the United States, concerning the actions of this company in Myanmar, in which the company was allied with the Myanmar military in the violation of the rights of residents of Myanmar in order to allow for the construction of a pipeline). For the redressing of violations generally in the context of the Inter-American system under the ATCA, see Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 *SANTA CLARA L. REV.* 889 (2005) (arguing that the ATCA provides an efficient mechanism for redress of human rights violations even for Latin American nationals who later go reside in the United States). See also, generally, *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* (Benedetto Conforti and Francesco Francioni eds.) (The Hague, Martinus Nijhoff Publishers 1997) (collection of essays discussing the situation in Italy, the United Kingdom, Germany, France, Chile, Argentina, Austria, The United States, Israel, Japan, Canada and China).

⁷ See, e.g., Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443, 463 (2001); and *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS* (Michael K. Addo ed.) (The Hague, Kluwer Law International 1999) (collection of essays addressing responsibility of transnational corporations before international human rights law).

the first case, except in cases of legislative omission, which do not usually have specific provisions in human rights treaties and regimes);

3. When the State fails with its duty to prevent such violations from happening in the first place (which is then what is known as "duty to protect", or responsibility engaged by the acts of private individuals, being this the substantive duty that anchors most of the topic);
4. When the actions of private individuals are imputable to the State under classic public international law mechanisms.

These four categories, I contend further, are seldom addressed in international decisions, thus forming a mass of decisions which address the Doctrine of State Responsibility in very different ways, but often unaware of the nuances, or unable to differentiate the cases into these categories, as the distinctions are often very hard to be made.

I accept the suggestion that perhaps the key concept for the purposes of the present text is the one embodied in the third category, which represents the only real substantive duty in those categories. However, given the fact that law is first and foremost reactive in nature, in the sense that it comes into play after the wrongdoing, it would be perhaps to provide an incomplete picture if I were to address only the third category, and I would be dismissing a rich and extensive body of jurisprudence that does not really embody, at least not exclusively, "duty to protect" considerations.

The idea that not only the State, but also private parties are bound by constitutionally protected rights is not original to international law, having been developed first in constitutional law, and known by the German term *Drittwirkung*, which roughly translates as "third-party effect". This notion was first developed by the German Federal Labor Court, under the guidance of Hans-Carl Nipperdey, and it contended that provisions in

the German Basic Law protecting fundamental rights could be directly invoked in a private dispute. This was known as direct third-party effect, or *unmittelbare Drittwirkung*.⁸

However, the Federal Constitutional Court did not accept such reasoning, as the Basic Law's fundamental rights provisions were only binding on the State. It developed then the idea that, the judiciary being a part of the State, it was bound by fundamental rights in its operation, and should therefore take into consideration these rights even when analyzing a dispute between private parties. This idea became known as indirect effect, or *mittelbare Drittwirkung*, and it was adopted by various jurisdictions worldwide.⁹

This scheme, although it influenced heavily the development of the international law phenomenon I am analyzing in this piece, is within the boundaries of constitutional law, and to try to apply *Drittwirkung* to international law would not be adequate, since constitutional law and international law are based on different premises. While constitutional law is concerned about an integrated set of values and institutions, international law deals with a fragmented institutional framework, reflecting also fragmented understandings of law and justice.¹⁰ Another reading for this argument raised elsewhere against the use of the

⁸ See Sir Basil S. Markesinis, *The Applicability of Human Rights as between individuals under German Constitutional Law*, in ALWAYS ON THE SAME PATH 175, 182 (Basil S. Markesinis ed.) (Oxford, Hart Publishing 2001); and JESÚS GARCÍA TORRES AND ANTONIO JIMÉNEZ-BLANCO, DERECHOS FUNDAMENTALES Y RELACIONES ENTRE PARTICULARES: LA *DRITTWIRKUNG* EN LA JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL 13 et seq. [*Fundamental Rights and Relations among Private Parties: Drittwirkung in the Jurisprudence of the Constitutional Court*] (Madrid, Civitas 1986).

⁹ *Id.* See also *supra* note 5.

¹⁰ One instance of this debate is the debate surrounding human rights topics in the World Trade Organization, involving Ernst-Ulrich Petersmann, using constitutional law considerations, and Philip Alston, approaching the issue from an international law perspective. For this debate, see: Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 621 (2002); Philip Alston, *Resisting the Merger and Acquisitions of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 815 (2002); Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously, Rejoinder to Alston*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 845 (2002). For an updated version of Petersmann's arguments, see Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29 (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi eds.) (Oxford, Oxford University Press 2005). For a brief synthesis of this debate, see Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, *Introduction*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 1, 7 (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi eds.) (Oxford, Oxford University Press 2005) (arguing that both perspectives are not necessarily irreconcilable, they just depart from different viewpoints, Petersmann using a Constitutional Law perspective, and Alston an International Law one).

doctrine of *Drittwirkung* is that it would make the debate more difficult instead of facilitating it, as the use of *Drittwirkung* by different constitutional orders reflects to a certain extent governmental priorities, which is not the issue at debate in international law, where what is important is to ensure effective protection of the rights in the relevant treaty.¹¹

Therefore, international law, before being concerned with establishing an “objective order of values”, seems to be concerned, under this argument, with simply protecting human rights in relations between private parties. The theoretical foundations and justifications for such mechanisms under international law are of secondary importance against the urgency of pragmatically responding to human rights violations. However, the mere fact that there is doubt as to whether all rights can be applied to private relations, and more particularly that these rights are applied in a sliding scale, seems to impose the need or at least the advisability of considering or establishing some sort of hierarchy of values, I contend. As this order of values pertains only to each specific institutional arrangement, though, depending on the values behind the founding of each system, one cannot really talk of uniformity in this sense, and the critique against the use of the term *Drittwirkung* and the values associated with it to explain this phenomenon in international law seems sound.

In furtherance, and perhaps in a more practical way, different conceptions of *Drittwirkung* are used to radiate the values of fundamental rights in disputes not concerning fundamental rights directly and not necessarily about the responsibility of the State. Horizontal effect, especially in its indirect form, implies fundamental rights considerations in disputes involving all different areas of law, such as contract law and corporate law, but not specifically human rights law. *Drittwirkung* is valid for international human rights law to the extent that it says that the State is bound to take fundamental rights into account at all

¹¹ See ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 180-2 (Oxford, Clarendon Press 1993).

instances, but is not necessarily valid to say that the State is liable for human rights violations perpetrated by third parties.

While some authors call the notion that the State can be held responsible for human rights violations perpetrated by private parties “diagonal effect”,¹² this expression does not seem very adequate either, as a diagonal is still a line connecting the State responsibility directly to the victim’s harm, which is not the case at least for the first two hypotheses outlined above. To use a geometrical metaphor, perhaps referring to these two situations as an “L-shaped” responsibility would be better, as the State is engaged by the acts of a private person against another. There is no direct connection between the victim and the State, there is another private party acting as an “intermediate”.

However, it would be rather tiresome to follow up with the discussion I intend to undertake if such a distinction is employed. In furtherance, this term is employed to refer to situations of State responsibility under municipal law, being synonym to indirect effect, in a sense.¹³

The idea of “positive obligations”, developed first within the European regional system, does not seem adequate for the present purposes either, and not only for being a term used almost exclusively within the European System. As it will be explained below,¹⁴ the doctrine of positive obligations refers to situations in which the failure of the State in attending to its obligation either gives rise to the responsibility of the State *per se*, or creates a situation in which private individuals can violate human rights. This covers the first three of the four situations outlined above, so it would seem to be an ideal concept for the situations I intend to address. However, not only does this concept not cover all situations within my universe of study, but it also refers to a different aspect than the one I am here analyzing:

¹² See Brice Dickson, *The Horizontal Application of Human Rights Law*, in HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY 59, 59 (Angela Hegarty and Siobhan Leonard eds.) (London, Cavendish Publishing Limited 1999).

¹³ *Id.*

¹⁴ See *infra* Chapter II.A.

while positive obligations generally refer to the substantive content of specific rights within relevant instruments, I am interested here in the ways the actions of private individuals trigger the responsibility of States for human rights violations, which is somewhat more “instrumental” in a way. Nevertheless, the idea of positive obligations is in many instances closely connected to the triggering of responsibility, and will be often mentioned. Therefore, I will refer to the situations where the international responsibility of the State for the violation of a human rights treaty is given rise to by the actions of an individual or group of individuals as “private triggering”.¹⁵

In order to undertake the query on the ways private triggering happens, I will first address instances in which human rights are most often violated by private parties. Some of the situations will be addressed only at later moments, when analyzing the specific case-law, but I will discuss the situation of multinational corporations and belligerent and insurgent groups towards human rights obligations. I will also analyze the issue of women’s rights, which is perhaps one of the first instances in which international lawyers trespassed, or at least saw as permeable, the “public/private” divide, which is a paradigm of most legal systems in the world. A discussion of racial discrimination will be briefly undertaken, as racial discrimination enjoys one of the strongest consensus regarding its impermissibility, regardless of whether the discrimination comes from public or private sources.

After that, I will undertake the analysis of the three regional systems for the protection of human rights (the European, the Inter-American and the African), analyzing primarily the case-law of their corresponding adjudicatory bodies (the European Court, the Inter-American Commission and Court, and the African Commission). The cases will be

¹⁵ This term has the advantage of being suitable for use in other regimes in which the violation of an international norm by a private party may give rise to the international responsibility of the State. In the context of European Union Law, *see*, for example, *Commission v. France*, Case C-265/95 [1997]; in the WTO context, *see* Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, Panel Report adopted by the DSB on April 22, 1998 (also known as the *Kodak-Fuji case*) (cited by JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 468 (Oxford, Oxford University Press 2005)).

analyzed under the four categories described above, and it will be seen that, while the idea that State responsibility can be engaged by the actions of private parties is present in all three systems, some topics are still unresolved, such as whether all rights protected by the relevant instruments are subject to be perpetrated by private parties, and, even for those rights to which this effect is recognized, how the triggering mechanism operates.

My contention is that regional bodies are rather reticent in giving full recognition to private triggering. This is presumable, though, especially in the Inter-American and African systems, which are still seeking for firmer grounds and a greater membership as compared to the membership of the regional organization within which they operate. To recognize that the State can be held responsible for the actions of private individuals gives rise to a whole new series of situations for which States can be publicly shamed and condemned to pay compensations, and this is hardly appealing for troublesome States with bad human rights records considering whether to join in to regional systems.

The same is valid for human rights bodies aspiring to universality, such as the UN Human Rights Committee (responsible for administering the International Covenant on Civil and Political Rights), the Committee Against Torture, and others. In these bodies, the situation is even more delicate in terms of their reach, as not all States parties to the relevant instruments have accepted the competence of the correspondent body to entertain individual cases.¹⁶ This situation is remedied in part by the publication of general comments or

¹⁶ The situation of the Human Rights Committee (HRC) is a successful exception, although not a total one, as out of the 160 parties to the ICCPR as of March 2007, 109 were also parties to the Optional Protocol that gives the HRC competence to analyze individual complaints. Regarding the Convention on the Elimination of all forms of Racial Discrimination (CERD), out of its 173 parties as of March 2007, only 49 had deposited the declarations pursuant to article 14 of the Convention, enabling the Committee on the Elimination of all forms of Racial Discrimination to examine individual complaints. As to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), out of the 144 States parties as of March 2007, 64 had accepted the competence of the Committee Against Torture to receive individual complaints. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), with 185 States parties as of March 2007, has an Optional Protocol giving the Committee for the Elimination of Discrimination Against Women the power to receive individual complaints. This protocol had been ratified by 85 States as of February 2007. The other instruments with monitoring bodies (the Convention on the Rights of the Child – CRC, the International Covenant on Economic, Social and Cultural Rights – ICESCR and the International Convention on

recommendations, or by comments made to State reports. Considering one overlooks the fact that compliance with reporting obligations in these bodies is rather low, these recommendations, however, while only being soft law or recommendatory, on the one hand, and therefore not binding, might also scare away prospecting States from ratifying the treaty and / or accepting the competence of the body.

In the context of UN Treaty Bodies, therefore, I will not only analyze the case law of bodies which receive individual complaints, but I will also analyze the comments and recommendations made by these bodies to all the States Parties, and also some instances of individual recommendations made through the State reporting mechanisms.

Before heading for my conclusions, I will briefly discuss the recent decision of the International Court of Justice in the *Genocide Case*,¹⁷ in which the ICJ found Serbia not to be responsible as a State for the perpetration of genocide, but nevertheless found Serbia responsible for not fulfilling its positive obligations under the Genocide Convention.¹⁸ After analyzing the judgment of the ICJ, I will make some brief comments on the possible implications of the affirmation of this doctrine in a forum of such visibility and authority, including some possible implications for general international law. I will then lay down my conclusions on the topic.

the Protection of the Rights of All Migrant Workers and Members of Their Families – CMW) either don't have a mechanism for individual complaints (ICESCR and CRC), or such mechanism is not in force yet due to a low number of States accepting the competence for individual complaints (CMW). The Committee on Economic, Social and Cultural Rights is currently negotiating a draft Optional Protocol to the ICESCR to create such possibility.

¹⁷ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 27 Feb. 2007 [hereinafter “The Genocide Case 2007”].

¹⁸ *Convention on the Prevention and Punishment of the Crime of Genocide*, New York, 9 Dec. 1948, 78 U.N.T.S. 277 (1948). Entry into force: 12 Jan. 1951. Number of parties as of December 2006: 140.

I – INDIVIDUALS AS PERPETRATORS OF HUMAN RIGHTS VIOLATIONS

Among the challenges of globalization to international human rights law, one of particular importance is the decentralization that comes along with globalization.¹⁹ Different actors arise and shift roles and importance, and, if one of the reasons behind the protection of human rights against the State was because the State was more powerful than the individual and human rights could provide for the necessary balancing, the situation has been altered. Not that the State is no longer more powerful than the vast majority of individuals, that is still true, and human rights are still justifiable on these grounds, but no longer solely on these. The alteration I mention corresponds to the presence of other individuals that, in one way or another, either replace the State and its might, or simply happen to be by themselves as powerful as some States, acting parallel to it.

A liberal conception of human rights sees the function of human rights as creating a “private” sphere into which the State could not interfere, the private sphere being equivalent to the space where fundamental freedoms are exercised, free from the State’s might and influence. However, the private sphere has been abused in many different contexts, by multinational corporations who abuse economic freedom to exploit workers and take advantage of the State’s caution in regulating economic activity to cause harm to their employees or other people affected by their activities,²⁰ by insurrectional movements sometimes promoting gross and systematic violations of the most basic human rights in the

¹⁹ Globalization is here understood as a phenomenon of liberalization of economies through privatization, shifting of power from state to private actors, and removal of national barriers with reference to market, capital, services, governance, etc. See Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT’L L. 1, 1 (2003).

²⁰ See Karen Engle, *Views from the margins: a response do David Kennedy*, 1994 UTAH LAW REVIEW 105 (referring to the way multinational corporations try to remain on the margins of international law so as to avoid regulation).

name of the greater cause of national liberation,²¹ or by men subjugating women,²² among other instances. To perpetuate the conception that the private is an absolute realm into which the State cannot interfere was therefore to ignore the new needs for the protection of human rights. A “privatization” of human rights was therefore necessary, and is undergoing.

This is to be discussed in the present section: the development of the force of private actors, and the possible relationship they have with society in general, namely the impact they can have on the enjoyment of human rights of other individuals somehow subjected to them.

A) Multinational corporations

Multinational corporations (MNCs) have played an ever-increasing role in international relations, and the force of these companies is doubtless. Some of these companies have annual revenues that surpass the revenues of some countries.²³ MNCs often perform their activities in spite of the State, although it possible that private companies replace the State in certain instances where the company exercises elements of governmental authority, and can be held individually responsible for its actions on behalf of the government,²⁴ although the most usual step would be for such actions to trigger State responsibility under certain conditions.²⁵

²¹ This happens in an odd Machiavelli-like irony, in which the means justify the ends, even if the means imply crippling the end, that is, the war of liberation impairing an entire people’s capacity of development, or even survival, ultimately.

²² For a critique in the context of women’s rights, see HILARY CHARLESWORTH AND CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 44 (Manchester, Juris Publishing 2000).

²³ See Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT’L L. J. 309, 309 (2004), Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador’s Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT’L L. & POL’Y 701, 701 (2004), and Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS* 553 (Philip Alston ed.) (Oxford University Press 1999).

²⁴ See, e.g., International Military Tribunal (Nuremberg), *Judgments and Decisions (1 October 1946)* reprinted in 41 AM. J. INT’L L. 172 (1947), at 241-3, cited by Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in *HUMAN RIGHTS AND*

The first way in which the responsibility of the State can be triggered is when the State fails to exercise an adequate degree of due diligence concerning the conduct of the MNC. This can even impose responsibility on the State for conduct of a foreign subsidiary of a parent company established in its territory if it is proven that the parent company exercises effective control over the subsidiary.²⁶ A second hypothesis is when the corporation exercises State authority either *de facto* or by delegation from the State, such as the case of privatized prisons or even in the case of private schools, when they are acting in the exercise of an activity the responsibility for which lies primarily on the government.

It seems important at this stage to define what a multinational corporation is. One of the characteristics of MNCs is their decentralization, which implies that little or no control can be effectively exercised over them by a single State, as they are based in several States simultaneously. This phenomenon is referred to as the “statelessness” of MNCs.²⁷ Often the State of nationality, which would be entitled to exercise control over the company,²⁸ refuses to do so, claiming there to be no sufficient connections between the acts

INTERNATIONAL TRADE 95 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005).

²⁵ See in this sense the COMMENTARIES TO THE DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, adopted by the International Law Commission at its fifty-third session (2001), U.N. Doc. A/56/10 [hereinafter ILC COMMENTARIES], article 5 and commentaries thereto. For this discussion, see also ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 241-4 (Oxford University Press 2006). In furtherance, John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, in his latest report to the Human Rights Council stated the central role of State Responsibility with regard to the acts of transnational corporations in violation of human standards. See JOHN RUGGIE, BUSINESS AND HUMAN RIGHTS: MAPPING INTERNATIONAL STANDARDS OF RESPONSIBILITY AND ACCOUNTABILITY FOR CORPORATE ACTS, UN Doc. A/HRC/4/35, 19 February 2007, particularly at para. 18 (pointing out that the duty of the State to protect from human rights abuses by non-State actors “is part of the very foundation of the international human rights regime”); and JOHN RUGGIE, STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE CORPORATE ACTIVITIES UNDER THE UNITED NATIONS CORE HUMAN RIGHTS TREATIES: AN OVERVIEW OF TREATY BODY COMMENTARIES, UN Doc. A/HRC/4/35/Add.1, 13 February 2007 (pointing out the ways in which transnational corporations have been mentioned by treaty bodies with respect to this triggering State Responsibility).

²⁶ See Menno T. Kamminga, *supra* note 23, at. 559.

²⁷ *Id.*, at. 553-4.

²⁸ See *mutatis mutandis* the decision of the International Court of Justice in the *Case Concerning the Barcelona Traction Light and Power Company, Limited (Second Phase) (Belgium v. Spain)*, 1970 I.C.J. Reports, para. 70, in which the Court held that only the State of nationality could exercise diplomatic protection to defend the interests of the company, and not the State of nationality of its shareholders. This gives rise to the idea that it is the State of nationality of a company, that is, the State in which the company is registered, that has power over it in international law.

of the company abroad and the State.²⁹ Another usual response to the issue, so as to avoid the exercise of jurisdiction, is the doctrine of *forum non conveniens*, typical of common law jurisdictions.³⁰

The difficulty of giving such a definition, it has been argued, is reflected on the fact that the two most important international regulatory regimes, designed by the International Labor Organization (ILO)³¹ and the Organization for Economic Co-Operation and Development (OECD),³² designed to regulate MNCs do not give a precise definition.³³ Recently, however, the United Nations, more specifically the Sub-Commission on the Promotion and Protection of Human Rights' Norms on Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, attempted to give a definition to the term.³⁴

The concept provided by the United Nations norms is the following: "[t]he term 'transnational corporation' refers to an economic entity operating in more than one country or a cluster of economic entities in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively."³⁵ This definition is still very vague, and lacks the element of control over activities, although

²⁹ See Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 463 (2001).

³⁰ For this discussion, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 239.

³¹ *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, ILO, 279th Sess., Nov. 17, 2000, at para. 6, 41 I.L.M. 186 (2002). The definition given is: "Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based."

³² *Declaration and Decisions on International Investment and Multinational Enterprises*, OECD, DAFFE/IME (2000) 20, para. I. 3, available at [http://www.oilis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/\\$FILE/00085743.PDF](http://www.oilis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/$FILE/00085743.PDF) (last visited Oct. 6, 2006). The definition given is: "These [MNEs] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another."

³³ See Surya Deva, *supra* note 19, at 5-6.

³⁴ Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., Agenda Item 4, *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 and E/CN.4/Sub.2/2003/12/Rev.3 (2003).

³⁵ *Id.*

such element could arguably be found in a broad interpretation of the term “operating”. The element of control is important to determine the responsibility of the entity,³⁶ as it is the necessary link between the subsidiary and the parent company.

Since we are dealing primarily with the concept of the acts of private actors as triggering State responsibility, the most important activities of multinational corporations for the present purposes are those that involve the actions of multinational corporations acting in complicity with the State. Such actions of complicity can happen in two distinct forms: complicity with the home State, which was determinant in cases such as that of the coup against Salvador Allende in Chile that led Augusto Pinochet to power;³⁷ and acts in collusion with the host State, which represent the vast majority of the most recent cases involving multinational corporations.³⁸

Acts of corporate complicity make the State worry about the enforcement of human rights, and this makes it harder to provide for national mechanisms in order to address the liability of the corporate person under national law. It is usually difficult for victims to redress the violations perpetrated in a context of corporate complicity at the national level, for either local courts are unable or ill-equipped to deal with the case, or the government does not have an interest in pursuing enforcement.³⁹ Cases in which the government does not want to pursue enforcement include States who are especially in need of foreign investment, and offer as a competitive advantage lower legal standards, which are translated into lower operational costs, and lower general supervision of the companies’ activities.⁴⁰ In countries where the

³⁶ See Surya Deva, *supra* note 19, at 6.

³⁷ The coup against Salvador Allende in 1973 happened in a wider context of the U.S. Foreign Policy of the time of supporting the establishment of dictatorial right-wing governments, so as to contain the “communist threat” in Latin America. Besides Chile, many countries were targeted by “Operation Condor”, as it was known, including the majority of Central America, Argentina and Brazil.

³⁸ See Menno T. Kamminga, *supra* note 23, at. 554.

³⁹ See Surya Deva, *supra* note 19, at 8-9. Although such is not the object of this thesis, it has to be pointed out that, under the Alien Torts Claims Act (ATCA), United States Courts are equipped with an important mechanism to redress human rights violations committed by corporate citizens. See *also supra* note 6.

⁴⁰ See Menno T. Kamminga, *supra* note 23, at. 554.

independence of the judiciary has not been achieved, this poses a serious obstacle to the victims.

A particularly emblematic example is that of a Texaco consortium with an Ecuadorian State-owned company for the exploitation of oil in the Eastern part of the Amazon rainforest of Ecuador.⁴¹ The exploitation of oil in Ecuador was uninhibited for a long while, for the lack of environmental laws and regulations in general.⁴²

In 1964, the Ecuadorian government invited Texaco to develop an oil field in the Eastern part of the Ecuadorian Amazon forest (known as “*Oriente*”). Three years later, oil was found in a region inhabited only by indigenous peoples and missionaries, and the drilling began in a consortium with a State-owned company. By 1980, the operations of the consortium had already built a pipeline across the country, and the State owned company, which had become the majority stakeholder in 1976, assumed the control of the pipeline in 1989 and of the drilling operations in 1990.⁴³

Among the consequences of the poor techniques employed by Texaco in the period during which it exploited the *Oriente* region, almost 17 million gallons of crude oil were spilled in the Amazon River, with no measures taken to minimize the effects or to prevent further spills. Enormous amounts of highly toxic wastes, containing benzene (a carcinogenic substance) have been dumped in nearby streams with no treatment or control.⁴⁴

A large area of over 10.000 square kilometers of rainforest was devastated for purposes ranging from land speculation and logging to agro-industry as a result of the roads opened by Texaco, what forced the indigenous populations living in the area off their lands. Additionally, these activities have further impacted indigenous populations, in the sense that

⁴¹ See Maxi Lyons, *supra* note 23.

⁴² *Id.*, at 703.

⁴³ *Id.*, at 703-4.

⁴⁴ *Id.*, at 704-5.

they were deprived of resources for hunting and fishing, impairing the very existence of these populations.⁴⁵

Texaco used its economic resources and political ties to maintain its operations with little or no governmental control or regulation. There are strong indications that Texaco executives dined with presidents and ministers, had privileged positions in trade missions and had contracts with military officials. It used also its economic power as a negotiation token, withholding due payments to ensure a favorable state of affairs. It also issued great loans in generous terms to the Ecuadorian government.⁴⁶ It is further indicated that the State-owned company part of the consortium was directly responsible for the elimination of environmental protection expenses from Texaco's operation budget, as a means of cutting down costs.⁴⁷

After the control of the consortium was taken over by the State-owned company exclusively, Texaco conducted a series of auditing procedures, and proceeded to a clean-up process, which was referred to as a being "[...] like treating skin cancer with makeup. They never dealt with the underlying problems."⁴⁸ In furtherance, the standards used by Texaco, which later in 2001 became ChevronTexaco, were double standards, in the sense that, while Texaco applied the same standard to all tropical countries where it conducted activities, these standards were significantly lower than those demanded in the U.S. operations.⁴⁹

This illustrates the potential harm that can arise from the activities of multinational corporations.⁵⁰ An important characteristic of human rights violations perpetrated by MNCs is that they usually occur in developing countries. On the one hand, this means that States lacking resources, because of their eagerness to welcome foreign

⁴⁵ *Id.*, at 706.

⁴⁶ *Id.*, at 707-708.

⁴⁷ *Id.*, at 708.

⁴⁸ T. Christian Miller, *Ecuador: Texaco Leaves Trail of Destruction: As ChevronTexaco Faces a Major Lawsuit, Evidence Portrays a Company and a Nation that for Years Showed Little Concern for the Environment*, L. A. TIMES, Nov. 30, 2003, available at <http://www.corpwatch.org/article.php?id=9249> (last visited November 25, 2006).

⁴⁹ See Maxi Lyons, *supra* note 23, at. 709-10.

⁵⁰ Another case of fundamental importance, involving Shell's oil operations in Nigerian, will be discussed below, in Chapter II.C, when discussing the African System for the Protection of Human Rights.

investment, will often overlook the activities of MNCs, not showing interest in the control of such activities, or simply lacking the resources to do so.⁵¹ Also, States can often exploit corporations to themselves violate human rights, such as the case in South Africa, where there was widespread cooperation between the public and private sectors during the apartheid régime.⁵²

On the other hand, looking at the victim's side, many times they are unaware of their rights, cannot afford the costs of litigation, or simply do not have the means to enforce international human rights law before national or international bodies.⁵³ These considerations are closely connected to the first set of issues. Although this is advanced as an additional argument for the international responsibility of MNCs,⁵⁴ an analysis that goes beyond the limits of this text, it can also be seen as a further reason for imputing responsibility to the State for its failure in providing means for reparation of violations, or because arguably the State would have an enhanced duty to protect its population when its general conditions are of a certain vulnerability so as to prevent them from even having knowledge about their rights. Such strategy, of maintaining the State as a relevant actor whose responsibility can be triggered by the conduct of transnational corporations, is adopted by the U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,⁵⁵ as the first paragraph of these norms determines the primary responsibility of the State in ensuring that MNCs respect human rights. The norms reflect current international standards applicable to States and assert that corporate citizens should

⁵¹ See Steven Ratner, *supra* note 29, at 462.

⁵² *Id.*

⁵³ See Surya Deva, *supra* note 19, at 9.

⁵⁴ *Id.*

⁵⁵ *Supra* note 34.

also respect them, in no way diminishing the responsibility of the State under international law.⁵⁶

Of course, the foregoing considerations presuppose an environment where Multinational Corporations do not respect human rights. This is not always the case, naturally, as there are many MNCs who voluntarily sign up for human rights standards that are higher than the ones required in the country of their operation, and help promote human rights outside the immediate scope of their activities. As legal practice is based on addressing problems, rather than pointing out good examples, discussions on MNCs and human rights tend to portray a worrisome picture that is not the complete one.⁵⁷

B) Insurgent groups and guerrillas

The question of whether insurgent groups and guerrillas can be held accountable under international law belongs primarily to the field of international humanitarian law. Although the activities of such groups can take place in a transboundary environment, it makes more sense to discuss them in the context of internal conflicts, which is (1) the situation in which most of these groups operate, and (2) where international humanitarian law refers to them.

These groups are often placed on a sliding scale according to the varying degrees of control over territory they obtain and the governmental recognition they receive.⁵⁸ Not all groups, however, are recognized as bearing obligations under international law. It is required that they fulfill a certain threshold, proving that they effectively control some part of

⁵⁶ See Karin Lucke, *States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 148, 158 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005).

⁵⁷ For a collection of examples of good practices, see JOHN RUGGIE, BUSINESS RECOGNITION OF HUMAN RIGHTS: GLOBAL PATTERNS, REGIONAL AND SECTORAL VARIATIONS, UN Doc. A/HRC/4/35/Add.4, 8 February 2007.

⁵⁸ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 271.

the territory of the State in which they are fighting, and that the actions of these groups reaches a certain intensity and duration. These are rather objective criteria to grant the belligerent status to armed groups, regardless of the willingness of the State in which the conflict happens.⁵⁹ Although this is the rule in international law, many States are reluctant in recognizing this status for groups operating within their territories, for such recognition would imply the admission that the government has lost control over its own territory.⁶⁰ On the other hand, however, most insurgent groups are more than willing to have their actions designated as occurring in the context of an armed conflict, as this gives them some international status.⁶¹

The granting of the belligerent status makes these groups similar in some instances to the State, and they therefore have the same rights and obligations of a State. One example of such groups is national liberation movements, that is, groups that seek the independence of their countries from colonial domination, or from racist régimes, in the exercise of self-determination.⁶² To address such groups as non-State actors is *per se* a little inappropriate, at least from the point of view of these groups, given their aspirations to becoming the State, and even their actions as a putative State.⁶³ In furtherance, the fact that these groups are mentioned in Protocol I to the 1949 Geneva Conventions, concerning international armed conflicts, and not Protocol II, concerning armed conflicts of a non-international character, further reinforces this view.

Another category of non-State actors in armed conflicts is the category of rebel groups, unrecognized insurgents and parties to an internal armed conflict, among others. More specifically, these are the categories that fall under the scope of Common Article 3 and Additional Protocol II. The threshold criteria for Common Article 3 and the Additional

⁵⁹ See ANTONIO CASSESE, *INTERNATIONAL LAW* 125 (Oxford University Press 2005).

⁶⁰ See ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 272.

⁶¹ *Id.*, at 275.

⁶² See Art. 1(4) of Additional Protocol I to the 1949 Geneva Conventions (1977).

⁶³ See ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 273.

Protocol II are different, however, since the Additional Protocol II requires for its application that a certain degree of control over the territory is exercised,⁶⁴ while Common Article 3 would arguably apply to all internal conflicts, regardless of their intensity.⁶⁵

The application of human rights law, and not only humanitarian law, to these non-State actors is somewhat controversial. It is clear that, under humanitarian law, the extent of rights and duties of private individuals is the same as that of the State.⁶⁶ The situation is not the same for human rights law, especially in the context of armed conflicts of a non-international character that fall outside of the scope of Additional Protocol II. In these situations, the application of Common Article 3 binds the parties to the conflict to rules common to humanitarian and human rights law. Arguments for the application of human rights can be summarized under four basic claims: (1) individuals are bound as nationals of the State in which they operate; (2) where a group is exercising governmental powers, these should include powers oriented towards the protection of human rights; (3) human rights treaties alone impose obligations on individuals; and (4) the obligations of Common Article 3 are aimed at armed groups as well as the State.⁶⁷

Since armed groups usually have a claim to accede to power and become the State, it is natural to expect that they should aspire to “qualify as acceptable parties in national and international society”.⁶⁸ These groups are interested, presumably, in gaining the sympathy and support of the international community for the event their movement succeeds, and committing to human rights is arguably a good way of gaining this support.

⁶⁴ See Art. 1(1) and (2) of Additional Protocol II to the 1949 Geneva Conventions (1977).

⁶⁵ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 277.

⁶⁶ See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Y. Sandoz, C. Swinarski and B. Zimmermann eds.) (ICRC / Nijhoff 1987), at para. 4444.

⁶⁷ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 279-80.

⁶⁸ Theo van Boven, *Non-State Actors: Introductory Comments [1997]*, in HUMAN RIGHTS FROM EXCLUSION TO INCLUSION: PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORK OF THEO VAN BOVEN (F. Coomans, C. Flinterman, F. Grünfeld, I. Westendorp and J. Willems eds.) (Kluwer 2000), as cited by ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 282.

When the movement does succeed, the responsibility for the acts of the insurgent group becomes the responsibility of the new State, retroactively, in a sense. This is justified by the “continuity between the organization of the movement and the organization of the State to which it has given rise”.⁶⁹ The State should be responsible for the acts committed in pursuance of its own establishment, because this State represented from the very beginning a changing national will.⁷⁰ This rule of international law, however, does not apply when the insurrectional movement entered into an agreement with the previous government. It is necessary that the totality of the previous State has been replaced by the insurrectional movement.⁷¹ The obligations of the insurrectional movement, thus, should be the same as those of the State, and therefore include human rights obligations.⁷²

A successful insurrectional movement is responsible, under the ILC rules, even for the failure of the previous State, when the State was in a position to adopt measures against the then insurrectional movement and failed to do so.⁷³ These measures should include any steps not adopted towards the insurrectional movement, including obviously action concerning human rights protection.

There are many instances in which insurgent groups can violate obligations ordinarily assumed to fall under the title of human rights. These include, for example, the recruitment of child soldiers in violation of the Optional Protocol to the United Nations Convention on the Rights of the Child.⁷⁴

It is estimated that currently over 300.000 children are recruited as soldiers by governments, opposition groups or paramilitary forces. Child soldiers are used in 33

⁶⁹ ILC COMMENTARIES, *supra* note 25, article 10 and commentaries thereto (para. 6).

⁷⁰ See *Bolivar Railway Company case*, 9 UNRIAA 445, 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, 9 UNRIAA 510, 513 (1903), both cited in ILC COMMENTARIES, *supra* note 25, article 10 and commentaries thereto (para. 12)

⁷¹ See ILC COMMENTARIES, *supra* note 25, article 10 and commentaries thereto (para. 7).

⁷² See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 285.

⁷³ See ILC COMMENTARIES, *supra* note 25, article 10 and commentaries thereto (para. 15).

⁷⁴ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted in New York on 25 May, 2000. Entry into force: 12 February 2002. Number of parties as of November 2006: 110.

countries, according to NGO estimates.⁷⁵ Provisions concerning the use of child soldiers are to be found as well in ILO Convention no. 182 (Worst Forms of Child Labor Convention), prohibiting the use of children in the military, and comparing the forced drafting of children into the armed forces to slavery.⁷⁶ The use of children as soldiers also violates many other rights protected under the Convention on the Rights of the Child, such as the right to be protected from hazardous work,⁷⁷ the protection from physical and mental violence,⁷⁸ and the right not to be forcibly separated from the parents.⁷⁹ The violation of these rights can be attributed to the State for its omission in failing to protect children.⁸⁰

In furtherance, other actions perpetrated by insurgent groups can also give rise to violations of human rights imputable to the State, such as the right to life and the right to physical integrity, besides the imputation of responsibility on the State for failure to provide for effective judicial remedies for the victims.⁸¹

⁷⁵ See HUMAN RIGHTS WATCH, FACTS ABOUT CHILD SOLDIERS, available at <http://www.hrw.org/campaigns/crp/facts.htm> (last visited Nov. 26, 2006); and HUMAN RIGHTS WATCH, WHERE CHILD SOLDIERS ARE BEING USED, available at <http://www.hrw.org/campaigns/crp/where.htm> (last visited Nov. 26, 2006).

⁷⁶ International Labor Organization, Worst Forms of Child Labor Convention (Convention 182), “**Article 3.** For the purposes of this Convention, the term *the worst forms of child labour* comprises: (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; [...]” (emphasis in the original).

⁷⁷ Convention on the Rights of the Child, “**Article 32. 1.** States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. [...]”

⁷⁸ *Id.* “**Article 19. 1.** States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. [...]”

⁷⁹ *Id.*, “**Article 9. 1.** States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. [...]”

⁸⁰ See HUMAN RIGHTS WATCH, “YOU’LL LEARN NOT TO CRY”: CHILD COMBATANTS IN COLOMBIA 120 (Human Rights Watch 2003).

⁸¹ In this sense, the recent cases against Colombia before the Inter-American Court of Human Rights are especially relevant. These will be analyzed, however, in the relevant section. See *infra* Chapter II.B.

C) Women's rights and the private realm

Although the actions of multinational corporations and insurgent groups are the most apparent instances in which private actors violate human rights, they are not the only ones. The fact that these are more often referred to in current literature concerning human rights and private actors⁸² is perhaps not only because the actions perpetrated by these actors have more of a “public” character attached to them, but also because they occur in a more widespread pattern, or at least with one or a small number of actors affecting a multiplicity of victims, which makes it easier to confer some magnitude and increased concern over the situation. More important perhaps to justify the greater importance given to the acts of multinational corporations and insurgent groups is the idea that these actors have somewhat of an international character attached to them, by their very legal status and by the scope of their activities.

The main topic of interest at this point is domestic violence and violations against the rights of women in general. In this regard, the first conceptual problem one is faced with is the public/private distinction. The “private”, for these purposes, is often associated with the home, family, and domestic life, while the “public” is identified with the interactions of a working life: salaried employment, business, professions, the give and take of the market, being ‘out in the world’.⁸³ Women, in this sense, are often confined to a succession of private spheres, for they many times even lack access to the public sphere by performing exclusively family work, which is private, in contrast with a job in the marketplace, which has a public element attached to it.⁸⁴

⁸² See e.g. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25 (discussing only multinational corporations and insurgent movements as private actors who can bear responsibility for human rights violations).

⁸³ HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 211 (Oxford University Press 2000).

⁸⁴ *Id.*, at 221.

The fact that international law for quite some time avoided to discuss women's issues is widely criticized, for, if States argued in their defense that they did not want to intervene in "private spheres", on the other hand the fact that international fora would enter the private sphere to regulate the family, or even to impute to states certain actions performed by private parties, such as forced disappearances, contradicts this claim.⁸⁵ In furtherance, not to intervene with matters that would fall into the realm of the "private", such as certain religious traditions, would open room for the domination of women.⁸⁶

Although it can be argued that keeping some aspects within the private sphere can have a "liberating potential",⁸⁷ as being outside the scope of international law can mean greater autonomy and some extent of empowerment, the critique that a distinction between public and private in international law has adverse consequences for women is valid.

The acts that deny women certain human rights begin with acts of private organs, when women bear the status of daughters, sisters and wives, and reflect in the discrimination women suffer in the public sphere, being somewhat of a parallel of it. The denial of rights to women in the private sphere is, therefore, part of the overall subjugation of women. To eliminate violations in the private sphere is therefore a complementary goal to the elimination of violations in the public sphere, not an alternative to it.⁸⁸

One topic often talked about when analyzing women's rights is the topic of clitoridectomy, also referred to as female genital mutilation or female circumcision.⁸⁹ This practice consists of the extirpation, total or partial, of a woman's clitoris, and is regarded as a mandatory initiation ritual to lead the girl into womanhood in many countries, particularly

⁸⁵ See Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda Dallmeyer ed.) (1993).

⁸⁶ See HILARY CHARLESWORTH AND CHRISTINE CHINKIN, *supra* note 22, at 57.

⁸⁷ See Karen Engle, *After the Collapse...*, *supra* note 85, at 148-9.

⁸⁸ See Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93 (Dorinda Dallmeyer ed.) (1993).

⁸⁹ For an explanation of this terminology, see Karen Engle, *Female Subjects of International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1510 (1992).

Muslim countries in Africa.⁹⁰ This ritual is most often conducted in the home or the village, and performed by private persons with some degree of religious authority that authorizes them to “turn girls into women”.

Another issue is that of domestic violence. Domestic violence is deeply within the private realm of women’s lives, and is for that reason still not dealt with appropriately in many parts of the world. Victims of domestic violence are subjected to practices varying from beatings and psychological abuse to restriction of movement and even deprivation of food in some instances. These actions have effects that lead to serious physical and psychological injury and even death sometimes, often affecting the children in the household.

These practices are often condoned with by national governments, using the argument that these issues should be dealt with at home, and not in front of a public authority. This further victimizes the woman, for her actions, in case she decides to file a complaint against an abusive husband or partner, are at the very best frowned upon by the community and the public authorities.⁹¹ This pattern of governmental tolerance can give rise to the responsibility of the State for its failure to provide adequate remedies, as well as for perpetuating a situation of discrimination against women.⁹²

D) Racial discrimination

⁹⁰ *Id.*

⁹¹ See, for example, country reports on Kyrgyzstan and Palestine produced by Human Rights Watch. HUMAN RIGHTS WATCH, RECONCILED TO VIOLENCE: STATE FAILURE TO STOP DOMESTIC ABUSE AND ABDUCTION OF WOMEN IN KYRGYZSTAN (2006), available at <http://hrw.org/reports/2006/kyrgyzstan0906/kyrgyzstan0906web.pdf> (last accessed Nov. 27, 2006), and HUMAN RIGHTS WATCH, A QUESTION OF SECURITY: VIOLENCE AGAINST PALESTINIAN WOMEN AND GIRLS (2006), available at <http://hrw.org/reports/2006/opt1106/opt1106web.pdf> (last accessed Nov. 27, 2006).

⁹² See in this sense the discussion on the *Case of Maria da Penha Maia Fernandes v. Brazil*, decided by the Inter-American Commission of Human Rights in 2000, *infra*, Chapter II.B.

Racial discrimination was the instance in which international law more strongly developed private triggering,⁹³ and this extended of course to other impermissible grounds of discrimination. The situation with racial discrimination is very similar to discrimination against women, in the sense that discrimination also happens in a small scale, by isolated individuals. The key difference, which seems to have played an important role in the earlier development of private triggering regarding racial discrimination, at least when compared to women's rights, is the idea that racial discrimination has its effects more immediately felt in the public sphere, so the “public/private divide” discourse was early on discarded as a shield to preventing interference with these “private” activities. To the extent that racial discrimination usually takes place in public spaces, as opposed to violence against women, that most commonly happens in the privacy of the home, it seems to be only natural that national and international action against racial discrimination preceded equivalent action regarding the protection of women's rights.⁹⁴

One of the most interesting instances of widespread racial discrimination perpetrated not only by State actors, but also by individuals, is the South African Apartheid regime.⁹⁵ While it is not my intention to investigate the processes leading to the legal legitimization of human rights violations at the domestic level, it must be said that, in this sense, the South African Apartheid, and to a certain extent the discrimination policies of Nazi Germany, belong to a distinct and peculiar category of human rights violations perpetrated by private individuals. While it is the rule that, when these acts happen, the State's responsibility is triggered for not acting upon it, or for not putting in place policies designed to prevent the

⁹³ In this sense, *see particularly* the discussion on the *Case of Simone André Diniz v. Brazil*, decided by the Inter-American Commission of Human Rights in October 2006, *infra* Chapter II.B, and the discussion on the Committee for the Elimination of Racial Discrimination, *infra* Chapter III.C.

⁹⁴ *See* in this sense the critique of HILLARY CHARLESWORTH AND CHRISTINE CHINKIN, *supra* note 22, at 229-31 (arguing that, while efforts against racial discrimination focused on eliminating discrimination focused on the “public sphere”, thus disregarding the “private” concerns of women’s rights, which is especially accentuated in the fact that the language against discrimination contained in the CEDAW was mostly simply copied from the CERD).

⁹⁵ For a further discussion of this in the context of the UN Committee on the Elimination of Racial Discrimination, *see infra* notes 338-340 and accompanying text.

discrimination from happening in the first place, in the South African and German examples the discrimination perpetrated by private actors was in fact a State policy, and to a certain extent required by State laws, or at least welcomed.

However, most of the human rights violations perpetrated during the Apartheid, or at least during the fight that led to the end of the regime, were perpetrated by non-State actors in the context of an internal armed conflict, and thus the considerations on guerrillas and insurgent groups apply.⁹⁶ A discussion of racial discrimination perpetrated by private individuals in times of peace will be undertaken when analyzing the United Nations Committee on the Elimination of Racial Discrimination below.⁹⁷

E) Final remarks on private actors as perpetrators of human rights violations

As it was seen, private actors perpetrate acts of violence against other individuals in various ways, and the discussion undertaken here merely illustrates some of these instances. Other instances would include, for example, actions happening in a private school,⁹⁸ and the unsettled relationship between freedom of expression and the right to privacy or private life.⁹⁹

Although there is a trend to try to create mechanisms to impute responsibility at the international level against these groups or individuals, for our current purposes this

⁹⁶ See REPORT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, available at <<http://www.info.gov.za/otherdocs/2003/trc/>> (last accessed June 20, 2007) [hereinafter “TRC REPORT”].

⁹⁷ See *infra* Chapter III.C.

⁹⁸ See European Court of Human Rights, *Costello-Roberts v. United Kingdom*, Judgment of 25 March 1993. For a further discussion of this case, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 355-6.

⁹⁹ For an expansion of this idea, as well as particular examples, especially in the context of the European Court of Human rights, see *infra* Chapter II.A. See also particularly the case of Caroline of Monaco before the European Court of Human Rights, in which German court decisions upholding freedom of press to publish pictures of her in several private situations were considered to violate her right to private life. *Von Hannover v. Germany*, Judgment of 24 June 2004.

approach will not be explored, and the focus will remain on the ways through which international responsibility of the State can be triggered. International law as a rule cannot regulate directly the actions of private individuals, but rather imposes a duty on the States to do so, therefore being still the State the subject that should respond for such violations at the international level.¹⁰⁰

In the following part, I will analyze how regional human rights bodies have dealt with actions perpetrated by these actors, and the mechanisms adopted to impute responsibility on States.

¹⁰⁰ See HENRY J. STEINER AND PHILIP ALSTON, *supra* note 83, at 222.

II – PRIVATE TRIGGERING IN REGIONAL SYSTEMS

In this part I will analyze the way private triggering is dealt with in three different regional systems for the protection of human rights: the European system, under the Council of Europe (the European Court on Human Rights); the Inter-American System, under the Organization of American States (the Inter-American Commission and the Inter-American Court of Human Rights); and the African system under the African Union (the African Commission on Human Rights, as the Court is still to decide its first case). In this analysis, one would wonder whether some consideration should be given to the differences between each of the systems, not only in terms of their institutional features, but mainly in terms of the values that the instruments reflect.¹⁰¹ However, even though there are some specific features in all of these systems, particularly evident in the African instruments, the way in which these instruments have been construed is largely convergent, and it is possible to think about a universal human rights jurisprudence derived from regional bodies.

Taking this into consideration, I will analyze the principal instruments of each system, in the way they have been interpreted by their adjudicatory or quasi-adjudicatory bodies. Generally, I will analyze the extension to which private triggering has been applied, and the way their jurisprudence relates to general international law regarding the responsibility of States for acts of non-agents. I will also pursue the inquiry of whether all rights protected under the instruments are potentially capable of being violated by private individuals.

¹⁰¹ In this sense, the preambles of the relevant instruments are considered especially important, as they announce the values taken into consideration in the drafting of each instrument. They “narrate” values, and are an important guide when interpreting the instruments, being considered “narrative norms”. For an explanation of narrative norms as a phenomenon of post-modern law, *see generally* Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne – Cours General de droit international privé*, [Cultural identity and integration: the postmodern private international law] 251 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 11 (1995).

Due to the vast amount of jurisprudence of the European system, and the Inter-American Commission, the analysis of these bodies' case law will be done based on some selected examples. The jurisprudence of the Inter-American Court and African Commission is going to be analyzed exhaustively in relation to private triggering.¹⁰²

In furtherance, it is necessary to analyze the ways through which States can “avoid” the triggering of responsibility by private individuals. I argue that these mechanisms operate on a sliding scale, meaning that the standards vary according to the right involved, and certain criteria are applied in some instances to determine the degree of stringency of the test, although this is not systematized in the jurisprudence of either one of these bodies.

A) The European System

The European system was created by the Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁰³ the first comprehensive human rights treaty after World War II, heavily influenced by the political climate of moral condemnation of acts perpetrated during the war. Another important feature behind the drafting of the European Convention was the perception at the time that there was such a thing as an “European approach” to human rights, a common European legal and political heritage that reflected in human rights law.¹⁰⁴

This political heritage is represented by the State in Europe exercising the role of an active actor in the promotion of welfare. This led to the development, within the

¹⁰² But please note that, at the time of writing, the jurisprudence of the African Commission was not available on the Commission's website. I will thus rely on the decisions published in the AFRICAN HUMAN RIGHTS LAW REPORT.

¹⁰³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, C.E.T.S. 005, opened for signature on November 4, 1950, entry into force on September 3, 1953 [hereinafter “the European Convention” or “ECHR”].

¹⁰⁴ See the ECHR Preamble: “Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”

supervisory organs of the ECHR, of the idea of “positive obligations”,¹⁰⁵ which is a concept closely related to the one under analysis in this paper, and one that was arguably developed under the European System as an alternative to horizontal application of the Convention.¹⁰⁶

Positive obligations represent a positive function of the civil and political rights protected by the Convention.¹⁰⁷ In this sense, the European Court of Human Rights (ECtHR) has adopted the view, in the *Airey case* of 1979,¹⁰⁸ that civil and political rights are extensions of the social and economic order, and that the rights protected by the Convention should be interpreted accordingly.¹⁰⁹ Therefore, originally the idea of positive obligations within the European system came into being as a tool for the promotion of social welfare. The notion of positive obligations responds to the needs of welfare State, characteristic of most European nations in the second half of the twentieth century. This means an interpretation of the Convention oriented towards giving more effectiveness¹¹⁰ to the rights protected by the Convention, even if for such purpose it is necessary to find “social and economic rights-like” features in the civil rights protected by the ECHR.

The doctrine of dynamic interpretation of the European Convention also justifies the concept of positive obligations, and perhaps in a more relevant way. It is common

¹⁰⁵ For a detailed analysis of positive obligations in the European system generally, and including some aspects of private triggering, see ALAISTAR R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* (Oxford, Hart Publishing 2004) (analyzing the right to life, the prohibition of torture, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the prohibition of discrimination and the right to an effective remedy).

¹⁰⁶ See Lech Garlicki, *Relations between Private Actors and the European Convention on Human Rights*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 129, 132 (András Sajó and Renáta Uitz, eds.) (Eleven International Publishing 2005).

¹⁰⁷ See Frédéric Sudre, *Les “obligations positives” dans la jurisprudence européenne des droits de l’homme* [“The ‘positive obligations’ in the European human rights jurisprudence”], in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE – STUDIES IN MEMORY OF ROLF RYSSDAL* 1359, 1359 (Paul Mahoney, Franz Matscher, Herbert Petzold and Luzius Wildhaber eds.) (Berlin, Carl Heymanns Verlag KG 2000).

¹⁰⁸ *Airey v. Ireland*, Judgment of 9 October 1979.

¹⁰⁹ See Frédéric Sudre, *supra* note 107, at 1361.

¹¹⁰ The principle of effectiveness (*effet utile*) is commonly used to expand the scope of the ECHR and adapt it to the evolution of external conditions which influence the issue of whether something falls within the scope of the European Convention. See, for example, *Matthews v. United Kingdom*, Judgment of 18 February 1999, at para. 34 (using the principle of effectiveness to include European Community Law, to the extent it is implemented by the Member State, within the jurisdiction of the European Court of Human Rights).

knowledge in international human rights law that instruments should be interpreted dynamically, as opposed to an interpretation in accordance with their drafting history, since human rights instruments should respond to the needs of the society they are to operate in, not the society in which they were created, if they are to fulfill their objectives appropriately. That being the case, there are two different instances in which a dynamic interpretation of the European Convention operates: by the transformation of the provisions, and by expounding what is inherent in them.¹¹¹

The latter instance, known as “inherence theory”, helps justify concerns related to the democratic deficit of private triggering. It is clear in the drafting history of the European Convention (and this is valid for all instruments analyzed in this piece, either regional or universal), that States never clear and explicitly agreed to provide for any positive measures when they signed the treaty. According to the inherence theory, positive aspects of rights once seen as merely negative were always there, they belong to the very nature of the right involved. To demand “positive obligations” from a State in terms of human rights then is not judge-made international human rights law, but rather something within the essence of the right being invoked. Judges, by determining the existence of a positive obligation, are not creating new law, but rather just untapping aspects of the rights that were not discussed before.¹¹²

Positive obligations can be interpreted in two different ways, engaging the responsibility of the State for its failure to actively adopt positive measures: when such a failure is by itself a violation of the European Convention, or when it gives the opportunity to private individuals to violate the rights of other individuals. The latter case is the one relevant in this analysis.

¹¹¹ *Id.*, at 1362.

¹¹² *Id.*, at 1364.

There are two mechanisms to “control” the concept of positive obligations and prevent it from becoming an uncontrollable extension of the Convention imputing responsibility to the State for all acts within its jurisdiction, whether perpetrated by the State or by individuals. These are actually the mechanisms used for negative obligations as well, as the principles applicable are comparable.¹¹³

The first of these mechanisms is the margin of appreciation doctrine, according to which State courts are in a better position than the international judge to make factual findings and derive legal conclusions from them.¹¹⁴ This principle is a reflection of the general subsidiarity of international law and institutions over national law and institutions.

The second criterion, proportionality, is more pervasive than the margin of appreciation doctrine, for the principle of proportionality is used to determine the very existence of a positive obligation connected to a certain right.¹¹⁵ Currently, both mechanisms are applied jointly in cases concerning positive obligations.¹¹⁶ This means that, for the doctrine of positive obligations to give rise to State responsibility, it needs to pass through a two-step threshold. First, it needs to be something that the Court deems it should analyze, under its functions as the supervisory organ of the Convention. The Court passes through the

¹¹³ See *Gül v. Switzerland*, Judgment of 19 February 1996, at para. 38; *Ahmut v. The Netherlands*, Judgment of 28 November 1996, at para. 63; and *Sen v. The Netherlands*, Judgment of 21 December 2001, at para. 31 (in the context of the right to family reunification under Article 8 ECHR).

¹¹⁴ See Frédéric Sudre, *supra* note 107, at 1369-70 (explaining the evolution of the doctrine, from the expression “free choice of means” for the application of the Convention to the current “margin of appreciation”, which came into being in *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment of 28 May 1985); and HOWARD CHARLES YORROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (The Hague, Kluwer Law International 1996).

¹¹⁵ *Id.*, at 1372 (referring to *Rees v. United Kingdom*, Judgment of 17 October 1986). Generally, proportionality analysis under the ECHR is undertaken when the provision of the Convention protecting a certain right makes explicit reference to permissible interferences with the right, indicating that the right is not absolute. This can be seen in Articles 8 through 11 of the Convention. Generally, in order for an interference with a right not to amount to a violation of the ECHR, the interference must be (1) justified by law, (2) in pursuance of a legitimating ground (as a rule, public safety, public order, health, the rights of others, although some other legitimating grounds can be found in each specific article), and (3) being necessary in a democratic society. In this latter prong, the Court usually analyzes the proportionality *stricto sensu* of the measure, asking: whether the limitation was justified in principle, that is, whether there is a connection between the restriction and the means adopted for it; whether the means used were the least restrictive; and whether the benefits arising from the restriction are greater than the burden of it.

¹¹⁶ See for example *Powell and Rayner v. United Kingdom*, Judgment of 21 February 1990.

margin of appreciation doctrine and proceeds to the analysis of the case at hand by affirming that the margin of appreciation doctrine does not mean that States go unsupervised in their implementation of the Convention. After that, the Court analyzes the proportionality of the imposition of a positive obligation, using the test it applies to verify whether a State has restricted a right excessively; only, this time, a finding of lack of proportionality goes in favor of the State.

As to the rights that can give rise to private triggering, a good part of the jurisprudence of the court focuses on procedural rights¹¹⁷ and the right to an effective remedy.¹¹⁸ Under these rights, the responsibility of the State is triggered not because the State is held responsible for the actions of the private individual, but because it did not take the appropriate judicial or administrative measures to prevent, stop or punish the violation,¹¹⁹ or simply because the victim lacked a remedy for the violation perpetrated by the individual.

It is interesting to note, however, the example of the *Airey case*¹²⁰ with respect to the right to a legal remedy. The case referred to the lack of legal aid for a woman who

¹¹⁷ “**Article 6. Right to a fair trial** 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b to have adequate time and facilities for the preparation of his defence;

c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

¹¹⁸ “**Article 13. Right to an effective remedy** 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.”

¹¹⁹ See for example *MC v. Bulgaria*, Judgment of 4 March 2004 (concerning the failure of a prosecution for rape, in which the Court found that the failure to prosecute and punish the perpetrators amounted to a violation of the right not to be subjected to ill-treatment – art. 3 of the ECHR) and *Steel and Morris v. United Kingdom*, Judgment of 15 February 2005 (involving the failure of the State in providing equality of arms for London Greenpeace Campaigners sued by MacDonald’s).

¹²⁰ *Airey v. Ireland*, *supra* note 108.

sought to get a decree of judicial separation (as divorce was prohibited in Ireland at the time), alleging that her husband was cruel to her and their children. There was no legal aid for the purposes of separation in Ireland, and she could not afford the costs of the proceedings. The European Commission declared that there had been a violation of the right to a fair trial, and decided not to analyze the question under the right to effective remedy as it had already declared a violation of the European Convention.¹²¹ The Court, after reviewing the findings of the Commission, said that there had been a violation of the right to a fair trial, but when analyzing the issue of lack of remedy, decided that this lack of remedy entailed a violation of the right to private life,¹²² and by declaring a violation of the right to private life decided not to analyze allegations under the right to an effective remedy, especially because it overlapped in that case with article 6.¹²³

The ECtHR, in this case, said that the lack of a remedy against a violation by a private individual (in the case of Mrs. Airey, her abusive husband) entailed a violation not of the right to a remedy, but of a substantive right.¹²⁴ The same line of thinking has been adopted by the ECtHR in the case of *X and Y v. The Netherlands*, one of the most paradigmatic cases of the European Court.¹²⁵ The difference is that in *X and Y* the Commission did not find a violation of article 13, but only of article 8 on the grounds of the lack of remedy.¹²⁶

¹²¹ *Id.*, at para. 14.

¹²² “**Article 8. Right to respect for private and family life** 1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Airey v. Ireland, *supra* note 108, at para. 33.

¹²³ *Airey v. Ireland*, *supra* note 108, at para. 35.

¹²⁴ This was also the case in *MC v. Bulgaria*, *supra* note 124.

¹²⁵ *X and Y v. The Netherlands*, Judgment of 26 March 1985.

¹²⁶ This could be related to the adoption by the Commission of the Court’s precedent in the *Airey case*. See *X and Y v. The Netherlands*, *supra* note 125, at para. 19.

This startling line of thinking can perhaps be explained if one takes into account again the notion of the European Convention as forming a common European law of human rights, an “European standard”. Of the 21 States parties to the ECHR in 1985,¹²⁷ when *X and Y* was decided, none of them had provisions regarding a right to a remedy as such, in the way the ECHR provides for. This could suggest that, because there was no right to a legal remedy in the way framed by the European Convention available internally in most countries, the European Court might have felt it better to determine a violation of a right common to most of the States parties, the right to private life. The right to a remedy is still controversial, as it can be seen, for example, in the fact that the UK Human Rights Act of 1998 expressly excluded the incorporation of the right to an effective remedy,¹²⁸ and because, of those 21 States parties, still none has recognized a right to a legal remedy in terms equivalent to article 13 of the ECHR.¹²⁹

Another possible explanation, which can be related to this argument, is the existence of a “procedural side” to all substantive rights of the European Convention. This means that, deriving partly from the positive obligations entailed into each right protected by the ECHR, there is a requirement of making the right judicially effective. If such is not accomplished, the right becomes dead letter for the persons in the State Party, and the State breaches its obligations to ensure observance of the rights prescribed in the Convention.¹³⁰

In furtherance, there are several instances in which the violation of substantive rights protected by the European Convention has been found against the State for acts perpetrated by private individuals without referring to remedies or judicial rights. These

¹²⁷ Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and The United Kingdom.

¹²⁸ See Human Rights Act 1998, section 1.1.a.

¹²⁹ Most countries, however, have rights the language of which resembles the provisions of article 6 of the European Convention with respect to access to courts to determine rights and obligations. See, for example, the Constitutions of Greece, Italy and Portugal, to name just a few.

¹³⁰ See *infra* notes 139-141 and accompanying text.

include the right to life,¹³¹ to freedom from torture and/or ill-treatment,¹³² the right to private life,¹³³ freedom of association¹³⁴ and assembly,¹³⁵ among others.¹³⁶

About the right to life, it is interesting to note that the Court has generally been highly reluctant to recognize that this right can be perpetrated by a private individual and still trigger State responsibility. The two instances in which this has happened cited above are cases in which there was a possibility that the killing was committed by a State agent,¹³⁷ or because the individual was under the custody of the State,¹³⁸ a situation in which it is widely understood that there is generally an enhanced duty upon the State to safeguard the individual deprived of liberty. These are both rather extreme situations, suggesting a higher threshold for private triggering for rights of greater importance, which accompanies the higher threshold generally for declaring any violation, perpetrated by private individuals or State agents alike, of Article 2 of the ECHR.

Finally, the general obligation of article 1 of the European Convention¹³⁹ imposes a general duty on the State to guarantee the rights of people within their jurisdiction.

¹³¹ See for example *Ergi v. Turkey*, Judgment of 28 July 1998 (concerning a killing of a civilian during a counter-terrorism operation, not being determined whether the killing was perpetrated by a State agent or a non-State actor) and *Paul and Audrey Edwards v. United Kingdom*, Judgment of 14 March 2002 (concerning the murder of an individual in prison by his cellmate).

¹³² See *Ahmed v. Austria*, Report of the Commission, 5 July 1995 (concerning deportation of a foreigner to Somalia, where he risked being subjected to torture by private individuals, as the Somali State was considered then a “failed State”, this situation therefore falling into classic mechanisms of public international law), and *Z and others v. United Kingdom*, Judgment of 10 May 2001, as commented by Hector L. MacQueen and Douglas Brodie, *Private Rights, Private Law and the Private Domain*, in *HUMAN RIGHTS AND SCOTS LAW* 141, 158 (Alan Boyle, Chris Himsworth, Andrea Loux and Hector MacQueen eds.) (Oxford, Hart Publishing 2002).

¹³³ See *Hatton and others v. United Kingdom*, Judgment of 2 October 2001 (regarding the interference in the private life of individuals caused by pollution emitted by private actors).

¹³⁴ See for example *Gustafsson v. Sweden*, Judgment of 25 April 1996 (concerning a blockade imposed by a union upon a restaurant owner that refused to make his employees sign a collective agreement that gave them terms less favorable than the ones offered by Mr. Gustafsson).

¹³⁵ See for example *Plattform “Ärzte Für das Leben” v. Austria*, Judgment of 21 June 1998 (concerning anti-abortion demonstrations and the alleged insufficient police protection against attempts of disruption by pro-abortion groups).

¹³⁶ For a more extensive research and analysis of the case law, see generally ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 352-419.

¹³⁷ *Ergi v. Turkey*, *supra* note 131.

¹³⁸ *Paul and Audrey Edwards v. United Kingdom*, *supra* note 131.

¹³⁹ “**Article 1. Obligation to respect human rights** The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Although this is often seen more as a jurisdictional provision,¹⁴⁰ it has important substantive effects by imposing this general obligation.¹⁴¹ This article is parallel to article 1.1 of the American Convention on Human Rights, which also imposes a general obligation for the respect of human rights. In the Inter-American System, however, as it will be seen, the general obligation of article 1.1 is invoked jointly with the violation of any other right of the American Convention.

B) The Inter-American System

While the European system took some time to accept the possibility of private triggering, the same cannot be said of the Inter-American system, or at least this is not entirely true. Founded primarily on democratic values,¹⁴² the Inter-American system was created by the American Convention on Human Rights,¹⁴³ and is composed of two different supervisory bodies: the Inter-American Commission (seated in Washington, D.C., USA) and the Inter-American Court of Human Rights (seated in San José, Costa Rica). While the Court is exclusively an adjudicatory body, which can operate only in relation to those States who have recognized the competence of the Court under the American Convention,¹⁴⁴ the Inter-

¹⁴⁰ See for example *Banković and others v. Belgium and other 16 Contracting States*, Decision on Admissibility of 12 December 2001 (regarding the jurisdictional application of the Convention over part of the former Federal Republic of Yugoslavia bombed by NATO).

¹⁴¹ See for example *Young, James and Webster v. United Kingdom*, Judgment of 26 June 1981 (using article 1 to impose an obligation on the State to safeguard freedom of association in private employment) and *Cyprus v. Turkey*, Judgment of 10 May 2001 (engaging Turkish responsibility for the acts of Cypriot insurgents supported by Turkey, and employing a less stringent test of control over individuals than the test of the ICJ's *Nicaragua Case*). See also the discussion in the accompanying text to note 130, *supra*.

¹⁴² See for example the Preamble of the OAS Charter.

¹⁴³ American Convention on Human Rights "Pact of San José, Costa Rica". Adopted on November 22, 1969. Entry into force: July 18, 1978. Number of States Parties: 24 [hereinafter "American Convention" or "Pact of San José"].

¹⁴⁴ In accordance with article 62 of the American Convention: "**Article 62**

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

American Commission has a wider range of functions,¹⁴⁵ although I will focus on the analysis of individual complaints, both under the American Convention and the American Declaration of the Rights and Duties of Man.¹⁴⁶

In an early case before the Inter-American Commission, this body seems to have adopted a rather progressive approach towards private triggering in at least two cases. The first case concerned a demarcation of territory in favor of an indigenous tribe in Brazil, the Yanomamis.¹⁴⁷ In this case, the Commission analyzed the responsibilities of Brazil under the American Declaration,¹⁴⁸ and declared the responsibility of Brazil for the violation of the

2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.

3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.”

¹⁴⁵ In accordance with article 41 of the American Convention: “**Article 41**

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.”

¹⁴⁶ Approved by the Ninth International Conference of American States, Bogotá, Colombia, 1948 [hereinafter “American Declaration”]. The Commission has three categories of competences, according to its Statute: the first competence referring to all member States of the Organization of American States (art. 18); the second category referring to States Parties to the American Convention (art. 19); and the third category referring to member States of the OAS which are not parties to the American Convention (art. 20). For the present purposes, it suffices to say that the Inter-American Commission can receive individual complaints against States not parties to the American Convention, only that then the considerations will be restricted to the interpretation of the American Declaration. Currently, of the 34 member States of the OAS (Cuba is a suspended member, and would be the 35th member State), 10 are not parties to the American Convention, mostly North-American and Caribbean States: Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, St. Vincent & Grenadines, Trinidad and Tobago (the only State to ever denounce the American Convention), and the United States.

¹⁴⁷ Case 7.615, March 5, 1985, *available at* <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (last accessed March 11, 2007).

¹⁴⁸ At the time of the case, Brazil had not yet ratified the American Convention. *See supra* note 146 for an explanation of the competence of the Inter-American Commission towards a State not a party to the Pact of San José.

right to life of the Yanomami Indians (because private individuals, due to the failure of the State in adequately regulating the Yanomami situation, had entered into Yanomami territory bringing diseases), among other rights.

Private triggering was also an issue in the first contentious case ever decided by the Inter-American Court. In the *Velásquez Rodríguez case*,¹⁴⁹ the Court analyzed the issue of enforced disappearances in relation to the Inter-American Convention. In the case, the enforced disappearance of Ángel Manfredo Velásquez Rodríguez had been perpetrated by State officials, as was the allegation of the Commission,¹⁵⁰ and the Court had considered that the practice of enforced disappearances was generally assumed by the Honduran population at the time as being perpetrated by the State.¹⁵¹ In furtherance, the Court considered to be a proven fact that Mr. Velásquez Rodríguez was kidnapped by government officials,¹⁵² disappearing after that, and even referred to the fact that State agents were in charge of the victim as a determining factor for finding the State in breach of the provision prohibiting torture and ill-treatment.¹⁵³

The Inter-American Court, however, relied generally on very ambiguous language when determining the responsibility of the State for the disappearance of Mr. Velásquez Rodríguez, which gives most commentators the impression that the Court used private triggering in its first contentious case.¹⁵⁴ This, associated with very strong *obiter dictum* referring to private triggering,¹⁵⁵ raises serious doubts as to whether the Court relied

¹⁴⁹ I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C No. 4 [hereinafter “Velásquez Rodríguez case”].

¹⁵⁰ *Velásquez Rodríguez case*, *supra* note 149, at para. 119.b.

¹⁵¹ *Id.*, at para. 147.c.

¹⁵² *Id.*, at para. 147.f.

¹⁵³ *Id.*, at para. 187.

¹⁵⁴ See for example Cecilia Medina Quiroga, *Las Obligaciones de los Estados bajo la Convención Americana sobre Derechos Humanos* [“The Obligations of States under the American Convention on Human Rights”], in LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO: 1979-2004 [“THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A QUARTER OF CENTURY: 1979-2004”] 207, 236-7 (San José, C. R., Corte Interamericana de Derechos Humanos 2005); and ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 425.

¹⁵⁵ *Velásquez Rodríguez case*, *supra* note 149, at para. 172.

on its factual findings when deciding the legal issue, or if it chose not to address directly factual findings drawn sometimes from mere inferences, rather than proof beyond reasonable doubt.

The Inter-American Court also said that, under the American Convention, the burden of proof was upon the State to prove that it had fulfilled with its general obligation to ensure respect and protect the human rights of all individuals in its territory, an obligation defined in article 1.1 of the Pact of San José.¹⁵⁶

The Court established in this case what has been called the “objective” responsibility of the State under the American Convention.¹⁵⁷ It was determined that it was not important whether the disappearance of Mr. Velásquez Rodríguez had been undertaken by State agents; what was important is that the State failed to protect him, and therefore it was responsible for his disappearance, which, in the view of the Court, entailed multiple violations of substantive provisions of the American Convention.¹⁵⁸ Because States could be held accountable for the acts of private individuals, one commentator has said that there are two different forms of attribution of responsibility under the Inter-American Court’s jurisprudence: *direct* responsibility, when the perpetrators are State agents; and *indirect* responsibility, when the perpetrators are private individuals.¹⁵⁹

¹⁵⁶ “**Article 1. Obligation to Respect Rights**

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.”

¹⁵⁷ See Cecilia Medina Quiroga, *supra* note 154, at 236-7 (referring to the *Velásquez Rodríguez case* as the landmark in setting the objective responsibility of the State).

¹⁵⁸ *Velásquez Rodríguez case*, *supra* note 149, at para. 155. According to the Court, enforced disappearances violate articles 7 (right to liberty and personal security) and 5 (personal integrity) of the American Convention, and in many instances also article 4 (right to life). For a detailed analysis of the idea of enforced disappearances as multiple violations of human rights, see MARCO GERARDO MONROY CABRA AND HERMES NAVARRO DEL VALLE, *DESAPARICIÓN FORZADA DE PERSONAS [“Enforced Disappearances of People”]* 1-13 (Bogotá, Ediciones Libería del Profesional 2001) (putting particular emphasis on the State’s duties to prevent and investigate and prosecute people responsible for these acts).

¹⁵⁹ See Cecilia Medina Quiroga, *supra* note 154, at 237 (drawing an analogy to the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts).

After the *Velásquez Rodríguez* case, which was followed by other two cases against Honduras on very similar factual and legal issues,¹⁶⁰ the Inter-American Court changed, or at least temporarily abandoned, its jurisprudence regarding indirect responsibility. While in these three Honduran cases there seemed to be a greater willingness to use private triggering to attribute responsibility for the violation of substantive provisions of the Pact of San José to States, no more cases came before the Inter-American Court concerning private triggering for many years. Other cases involving enforced disappearances, for example, although relying on the dictum of the *Velásquez Rodríguez* case, always imputed responsibility to the State because State agents were involved in the perpetration of the violation of the substantive rights.¹⁶¹

A later case before the Inter-American Commission is illustrative of a different understanding.¹⁶² In this case, concerning domestic violence, Mrs. Maria da Penha Maia Fernandes was repeatedly beaten by her husband, who also harassed their three daughters. Ultimately, he attempted to kill her with a gunshot while she was asleep, which made Mrs. Fernandes undergo several surgeries, which could not save her from paraplegia, though.¹⁶³ Two weeks after this attempt against her life, according to the petitioners, her husband tried to kill her again, this time by electrocution.¹⁶⁴ The Inter-American Commission analyzed several provisions of the American Declaration (since Brazil was not a party to the Convention when the attempted killings took place), and concluded that the failure of the

¹⁶⁰ I/A Court H.R., *Case of Godínez-Cruz v. Honduras*. Judgment of January 20, 1989. Series C No. 5; and I/A Court H.R., *Case of Fairén-Garbi and Solís-Corrales v. Honduras*. Judgment of March 15, 1989. Series C No. 6.

¹⁶¹ See, for example, I/A Court H.R., *Case of 19 Tradesmen v. Colombia*. Judgment of July 5, 2004. Series C No. 109 (concerning the disappearance of 19 merchants in Colombia perpetrated by paramilitary groups which were proven to be supported and partly composed by State officials).

¹⁶² Case 12.051, *Maria da Penha Maia Fernandes v. Brazil*, April 16, 2001, available at <http://www.iachr.org/annualrep/2000eng/ChapterIII/Merits/Brazil12.051.htm> (last accessed March 11, 2007) [hereinafter “Maria da Penha case”].

¹⁶³ *Maria da Penha* case, *supra* note 162, at para. 8.

¹⁶⁴ *Id.*, at para. 9.

State in providing her with an effective remedy against domestic violence amounted to a violation of the Declaration.

The Commission went on, however, and analyzed certain provisions of the American Convention, as well, since it is a common perception in the Inter-American system that situations in which the failure of public authorities to investigate and prosecute is a continuing violation, which therefore allowed for the use of the Pact of San José starting from the date it entered into force for Brazil. It then found a violation of articles 8¹⁶⁵ and 25¹⁶⁶ of the American Convention, which are analyzed jointly and represent the right to access to justice, encompassing fair trial rights and the right to a remedy.¹⁶⁷

¹⁶⁵ **“Article 8. Right to a Fair Trial**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
 - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

¹⁶⁶ **“Article 25. Right to Judicial Protection**

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.”

¹⁶⁷ For an explanation of the evolution of this understanding of the Court, through which it analyzes these two rights jointly, *see* the Separate Opinion of Judge Cançado Trindade in I/A Court H.R., *Case of the Pueblo Bello*

Finally, the Commission also analyzed several provisions of the Inter-American Convention on Violence Against Women,¹⁶⁸ and reached the conclusion that the violation of certain provisions of this instrument requiring positive measures from the State towards eradication of violence against women¹⁶⁹ were not only *per se* a violation, but also gave rise to a violation of a provision entitling women to a life free from violence.¹⁷⁰ However, the finding of a violation of the Convention of Belém do Pará¹⁷¹ concerned mainly the rights requiring action of the State in the investigation, prosecution and punishment, being related to fair trial and judicial guarantees.¹⁷²

An Advisory Opinion on the Rights of Children¹⁷³ brought the topic of private triggering back to the Inter-American Court not very intensely, although it had some repercussion.¹⁷⁴ In this Opinion, the Inter-American Court said that States have obligations to

Massacre v. Colombia. Judgment of January 31, 2006 Series C No. 140 [hereinafter “Case of the Pueblo Bello Massacre”].

¹⁶⁸ *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, “Convention of Belém do Pará”*, Adopted on June 9, 1994. Entry into force: May 4, 1995. Number of parties (as of March 2007): 32 (all active OAS members, except for Canada and USA) [hereinafter “Convention of Belém do Pará”].

¹⁶⁹ “**Article 7** The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;
- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
- g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.”

¹⁷⁰ “**Article 3** Every woman has the right to be free from violence in both the public and private spheres.”

¹⁷¹ *Maria da Penha case*, *supra* note 162, at para. 58.

¹⁷² *Id.*, at para. 44.

¹⁷³ I/A Court H.R., *Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002*. Series A No. 17 [hereinafter “Advisory Opinion on the Rights of the Child”].

¹⁷⁴ See for example the reference to it in the Committee on the Rights of the Child General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), 21 August 2006, para. 24.

protect children from violence even within the family,¹⁷⁵ and that it has the duty to adopt positive measures to ensure the effective exercise of the rights of children.¹⁷⁶

The Advisory Opinion on Migrant Workers represented a new impulse in developing private triggering in the Inter-American system. While analyzing the obligations of States under the Pact of San José, the Inter-American Court said that the obligations to respect and ensure human rights also extend to the relations between individuals, referring particularly to the duty of non-discrimination, which, according to the Court, is an emerging *jus cogens* norm and has *erga omnes* effects, thus requiring the State to take measures affecting private relations for the protection of persons against discrimination.¹⁷⁷ The Court referred explicitly to the term *Drittwirkung*,¹⁷⁸ and has used this reasoning in later contentious cases.

One of these cases was referred to above.¹⁷⁹ In the *Mapiripán Massacre case*, the Inter-American Court invoked private triggering as deriving from the general obligation of States under article 1.1 of the Pact of San José.¹⁸⁰ The idea that the acts of individuals can give rise to violations of the American Convention was attributed to the notion that its provisions should be interpreted in an evolutionary way so as to guarantee its effectiveness,¹⁸¹ in a fashion similar to the European Court of Human Rights (from the jurisprudence of which the Inter-American Court has often drawn inspiration)¹⁸² when analyzing one of the possible

¹⁷⁵ *Advisory Opinion on the Rights of the Child*, *supra* note 173, at para. 87.

¹⁷⁶ *Id.*, at para. 91.

¹⁷⁷ I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. *Advisory Opinion OC-18 of September 17, 2003*. Series A No. 18, at para. 110 (commented by ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 429-32).

¹⁷⁸ *Id.*, at para. 140.

¹⁷⁹ *See supra* Introduction.

¹⁸⁰ *Mapiripán Massacre case*, *supra* note 1, at para. 111.

¹⁸¹ *Id.*, at paras. 105-6.

¹⁸² *See*, for example, I/A Court H.R., *Case of López-Álvarez v. Honduras*. Judgment of February 01, 2006. Series C No. 141, at para. 106 (discussing the standards for guaranteeing the right to personal integrity of people deprived of liberty under the European Court's jurisprudence).

justifications for the doctrine of positive obligations as being an evolutionary interpretation of the instruments.¹⁸³

A very similar approach, and perhaps relying more on private triggering, was adopted in the *Pueblo Bello Massacre case*,¹⁸⁴ decided shortly after the *Mapiripán Massacre case*, with a similar factual and legal background. In both of these cases, private triggering was used to justify the responsibility of the State in general, which reflected in findings of violations both of substantive and procedural rights provisions of the American Convention.

Private triggering was also an issue in the *Ximenes Lopes case*.¹⁸⁵ In this case, Damião Ximenes Lopes, a mental patient in a private hospital, was beaten up to death by hospital personnel.¹⁸⁶ However, as the private hospital received income exclusively from the federal government, the Inter-American Court used normal rules of public international law on State responsibility to attribute responsibility to the State,¹⁸⁷ partly relying on private triggering *obiter dicta* from the cases cited above.¹⁸⁸

More recently, the Inter-American Commission analyzed private triggering in the context of employment discrimination. In the case of Simone André Diniz,¹⁸⁹ Mrs. Diniz responded to a job advertisement posted in a wide circulation newspaper in Brazil. The ad was for a job as maid, and said that candidates should be “preferably” white.¹⁹⁰ When Mrs. Diniz called the telephone number indicated in the add, she was asked about her skin color,

¹⁸³ See *supra* text accompanying note 111.

¹⁸⁴ *Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 167.

¹⁸⁵ I/A Court H.R., *Case of Ximenes-Lopes v. Brasil*. Judgment of July 4, 2006 (Only in Spanish). Series C No. 149 [hereinafter “Ximenes Lopes case”].

¹⁸⁶ *Id.*, at para. 112.9-112.16.

¹⁸⁷ *Id.*, at para. 86-90 (citing the ILC Articles on State Responsibility). It is interesting to note, however, that in the Mapiripán Massacre case the Inter-American Court rejected the application of general rules of State responsibility under public international law by considering that the American Convention was *lex specialis*. See the *Mapiripán Massacre case*, *supra* note 1, at para. 107.

¹⁸⁸ *Ximenes Lopes case*, *supra* note 185, at para. 85.

¹⁸⁹ Case 12.001, *Simone André Diniz v. Brazil*, October 21, 2006, available at <http://www.iachr.org/annualrep/2006eng/BRAZIL.12001.htm> (last accessed March 11, 2007) [hereinafter “Simone André Diniz case”].

¹⁹⁰ *Id.*, at para. 27.

and, upon saying she was black, the person interviewing her on the phone immediately told her she was not qualified for the job.¹⁹¹

The Inter-American Commission analyzed provisions of the Pact of San José regarding non-discrimination and judicial guarantees, and decided that the failure of the State in providing an effective remedy for Mrs. Diniz against the discrimination she suffered violated both article 24 (non-discrimination)¹⁹² and articles 8 and 25 of the American Convention.¹⁹³

The mechanism of private triggering is still not mature in the Inter-American system (despite the fact that it was first mentioned in a judgment of a contentious case at the Inter-American Court 20 years ago), and it has been used for the finding of violations of both substantive and procedural rights, usually at the same time, which reflects a general trend within the Inter-American system of analyzing in almost all cases both these sets of rights. It also indicates, however, that the system is not shy about conferring responsibility on the State for violations of substantive rights perpetrated by private individuals, which is private triggering by excellence. Moreover, although it seems that defenses are partly already being devised against an over-use of “indirect responsibility”,¹⁹⁴ these mechanisms are still very incipient, as is the jurisprudence of the system concerning private triggering generally (a fact that can be altered as soon as cases filed after these recent decisions on private triggering are judged by the Inter-American bodies).

In furtherance, the fact that the justifications for private triggering seem to be evolving in the same direction as the European system suggests that defenses could evolve in the same direction as they have in the European Court too. This helps reinforce the suggestion that the jurisprudence of regional systems relies on a common basis, thus being

¹⁹¹ *Id.*, at para. 28.

¹⁹² “**Article 24. Right to Equal Protection** All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

¹⁹³ *Simone André Diniz case*, *supra* note 189, at paras. 109 and 134.

¹⁹⁴ *See generally* Cecilia Medina Quiroga, *supra* note 154, at 237-8.

closer to a universalist rather than cultural relativist model. I will now analyze the situation in the jurisprudence of the African Commission of Human and Peoples' Rights.

C) The African System

Before referring to the African system and its jurisprudence, it is important to say a few words about the debate over human rights in traditional Africa, as this debate heavily influences the interpretation of the African Charter,¹⁹⁵ which refers explicitly to traditional African laws and customs.¹⁹⁶ The debate over the existence of human rights in traditional Africa is divided by two opposite propositions, one advocating that human rights as a concept cannot be said to have existed in pre-colonial Africa, and the other arguing that such concept existed. Advocates of the first position argue that to say that human rights existed in Africa means confusing human rights with human dignity. According to this position, the concept that is called to be a concept of human rights in Africa is actually a concept of the value of the person in his/her relations with society. Dignity, in this sense, can be protected even in a society not based on rights.¹⁹⁷

The critique to this conception that advocates the non-existence of human rights in traditional Africa also gains momentum when criticizing the assumptions of the “non-existence advocates” when they fall short of seeing human rights within the communal

¹⁹⁵ *African (Banjul) Charter on Human and Peoples' Rights*, Adopted June 27, 1981 by OAU Doc. CAB/LEG/67/3 rev. 5. Entry into force October 21, 1986. Number of States parties as of March 2007: 53 (all member States of the African Union). 21 I.L.M. 59 (1982) [hereinafter “African Charter” or “Banjul Charter”].

¹⁹⁶ African Charter, *supra* note 195, Preamble (“Taking into consideration the virtues of their historical tradition and **the values of African civilization** which should inspire and characterize their reflection on the concept of human and peoples' rights;”) and Art. 61 (“The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, **African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law**, general principles of law recognised by African States as well as legal precedents and doctrine”) (emphasis added).

¹⁹⁷ See VINCENT ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS* 11 (2001) (citing Rhoda Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, in *HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES* (Abdullah An-na-im and Francis Deng eds.) (1990)).

characteristics of African societies.¹⁹⁸ The idea of human rights should not depend on an essentialized cultural model that has as one of its components a Western-like political organization, but it is universal, and failing to see this can lead to new forms of imperialism, but of a cultural-ideological type.¹⁹⁹

The existence of human rights in traditional Africa can be found in many customary practices widely documented, such as the judicial organization of certain indigenous societies.²⁰⁰ However, they existed more as a concept than as a list of rights.²⁰¹ It was an abstract idea, but it was powerful enough to permeate the entire social structure.

This notion of the uniqueness of the African conception of human rights, however, cannot be overplayed so as to open room for an exaggerated cultural relativism. The mere fact that it was not defined in a set of predetermined rights does not preclude the existence of these rights. Although traditional structures recognized notions of human rights, these were only formally articulated in Western thought, after World War II.²⁰²

Even though the uniqueness of the African conception of human rights is not to be overstated, it exists, and is explored in the Banjul Charter, when it refers extensively to peoples' rights²⁰³ and individual and collective duties attached to the enjoyment of human rights.²⁰⁴ This turns the African Charter more permeable to private triggering, since it is acknowledged that individuals have duties under human rights law. By recognizing that individuals have duties in relation to human rights, it is easier to acknowledge that they can breach these duties in prejudice of other individuals.

¹⁹⁸ See VINCENT ORLU NMEHIELLE, *supra* note 197, at 12 (2001).

¹⁹⁹ On the other hand, to focus excessively on the relativization of the Western model of democracy can lead to several abuses being perpetrated under the banner of "cultural relativism", as warns Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 652 (1996), giving several examples from Africa and Asia.

²⁰⁰ See VINCENT ORLU NMEHIELLE, *supra* note 197, at 14 (2001).

²⁰¹ *Id.*, at 16.

²⁰² *Id.*

²⁰³ See African Charter, *supra* note 195, articles 19-24.

²⁰⁴ *Id.*, articles 27-29.

However, the similarity in language between many of the key rights in the African Charter and its counterparts in other regional instruments hints at the suggestion that there is an idea of something that can be described as universalism within regionalism. Even though regional systems have some peculiar characteristics, still most of their jurisprudence and thus underlying understanding of human rights is common.²⁰⁵

The African system established under the Banjul Charter is comprised essentially of the African Commission on Human and Peoples' Rights (hereinafter "African Commission"). A Protocol to the African Charter established an African Court on Human and Peoples' Rights,²⁰⁶ but, at the time of writing, the Court is still to hear its first case. The Commission, in interpreting private triggering under the African Charter, has more often than not only used this mechanism as a subsidiary argument when declaring the international responsibility of States.

In *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*,²⁰⁷ the leading case in private triggering under the African system, the African Commission analyzed claims of torture, killings and enforced disappearances that happened in the context of civil war in Chad. What the Commission said was that, *even if* the human rights violations could not be directly linked to the State, the State had still failed with its "responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders".²⁰⁸ The responsibility of the State was found, however, based solely on the allegations of the petitioners, as the State failed to respond to the allegations against it.²⁰⁹ Based on the

²⁰⁵ See in this sense JOSÉ E. ALVAREZ, *supra* note 15, at 496 (suggesting that, because of the similarity of definitions of human rights in regional and universal instruments, there is some sort of "trans-judicial communication").

²⁰⁶ *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Adopted in July 1998, entry into force January 2004. Number of parties as of March 2007: 15.

²⁰⁷ *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* (1995), 2000 AHRLR 66.

²⁰⁸ *Id.*, at para. 22.

²⁰⁹ *Id.*, at para. 26.

allegations of the petitioners, the African Commission declared violations of both substantive and procedural rights provisions of the Banjul Charter.²¹⁰

In *Amnesty International and Others v. Sudan*, the African Commission also used private triggering as a subsidiary argument for imputing responsibility on the State for violations of the right to life²¹¹ in the context of civil war in Sudan, since it was not proven whether the summary executions were perpetrated by military officers or by insurgents.²¹² The same happened in *Malawi African Association and Others v. Mauritania*,²¹³ with respect to the right to peace,²¹⁴ violated by insurgent groups in Malawi.²¹⁵ Analyzing other situations in the larger context of the general human rights situation of the country (as the African Commission seems to do often in its case law, which accepts petitions containing multiple individual cases of possible violations of human rights), the African Commission also found private triggering with respect to the right not to be held in slavery.²¹⁶ Differently from the right to peace analysis, however, when analyzing this specific right the African Commission

²¹⁰ The rights violated in the view of the Commission were the following:

“**Article 4.** Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 5. Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 6. Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7

1. Every individual shall have the right to have his cause heard. This comprises:

- a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
- c. The right to defence, including the right to be defended by counsel of his choice;
- d. The right to be tried within a reasonable time by an impartial court or tribunal.

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

[...]

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.”

²¹¹ See article 4, *supra* note 210.

²¹² *Amnesty International and Others v. Sudan* (1999), 2000 AHRLR 297, para. 50.

²¹³ *Malawi African Association and Others v. Mauritania* (2000), 2000 AHRLR 149.

²¹⁴ “**Article 23.** 1. All peoples shall have the right to national and international peace and security. [...]”

²¹⁵ *Malawi African Association and Others v. Mauritania*, *supra* note 213, at para. 140.

²¹⁶ See article 5, *supra* note 210.

did not refer to the possible perpetration of the violations by State agents, as they were undoubtedly committed by private parties.²¹⁷

In *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, however, the African Commission took a slightly different approach, by linking private triggering to the general obligations provision of the Banjul Charter,²¹⁸ but finally basing its finding of a violation of the right to life on the fact that the State had not responded to the complaint, which led to an assumption of responsibility.²¹⁹

The paradigmatic case for private triggering in the African system, however, is *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*,²²⁰ concerning the harm caused to the Ogoni indigenous community by the actions of an oil company of which Nigeria was the majority shareholder.²²¹ Although the complaint tried to impute responsibility primarily to the State by its own actions, either by alleging that the State was the majority shareholder of the oil consortium,²²² by arguing that the human rights violations had been perpetrated by the military put at the disposal of the oil consortium,²²³ or ultimately that the government had a direct participation in the oil development that cause the harm to Ogoniland,²²⁴ the African Commission decided the case using private triggering.

After elaborating on the four different levels of human rights obligations imposed on States by the Banjul Charter,²²⁵ the African Commission went on to analyze the substantive rights provisions of the Charter. When analyzing, for example, the right to

²¹⁷ *Malawi African Association and Others v. Mauritania*, *supra* note 213, at para. 134.

²¹⁸ “**Article 1.** The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”

²¹⁹ *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso* (2001), 2001 AHRLR 51, para. 42.

²²⁰ *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria* (2001), 2001 AHRLR 60.

²²¹ *Id.*, at para. 1.

²²² *Id.*

²²³ *Id.*, at para. 3.

²²⁴ *Id.*, at para. 9.

²²⁵ *Id.*, at paras. 44-47. These four obligations are the obligations to respect, to protect, to promote and to fulfill the rights protected in the Banjul Charter. For a commentary on the extent of these obligations in light of this decision, see Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 130-7 (2004).

sovereignty over natural resources²²⁶ the African Commission found that the consortium, as a private entity, had violated the right of the Ogoni people to its natural wealth.²²⁷ Private triggering, in the reasoning of the African Commission, derived from the failure of the State in protecting individuals from violations perpetrated by private parties. Referring to the jurisprudence of the Inter-American²²⁸ and European Courts,²²⁹ as well as to its own,²³⁰ the African Commission determined a violation of the right to sovereignty over natural resources.

In this case, also, the African Commission seems to have developed a rudimentary test through which States can avoid private triggering: as long as States perform the “minimum conduct expected” in guaranteeing the rights protected by the Banjul Charter, their responsibility should not be triggered.²³¹ What exactly “minimum conduct expected” means is still to be construed in further cases. Finally, the African Commission also used private triggering as the primary reason for finding violations of the right to food²³² and the right to life, the violation of which was found as the result of all the other violations declared by the African Commission.²³³

Private triggering is generally applied under the African system, then, as a mechanism for declaring violations of provisions on substantive rights of the Banjul Charter.

²²⁶ “Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

5. State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.”

²²⁷ *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, *supra* note 220, at para. 55.

²²⁸ *Velásquez Rodríguez case*, *supra* note 149.

²²⁹ *X and Y v. The Netherlands*, *supra* note 125.

²³⁰ *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, *supra* note 207.

²³¹ *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, *supra* note 220, at para. 58.

²³² *Id.*, at para. 65.

²³³ *Id.*, at para. 67.

Although it has more often than not been used as a subsidiary mechanism for attribution, in the sense that the responsibility of the State would still be engaged under private triggering even if no connection between the violations and State agents could be found (although in most cases such connection was found or presumed), this situation appears to have changed under the latest case law, which has had a wide impact for private triggering and is the paradigmatic case.²³⁴

The fact that the African Commission used private triggering only as a subsidiary tool in its first cases could suggest a reluctance with expanding the extent of States' obligations under the Banjul Charter. However, the case of the Ogoni community has certainly expanded the scope of the African Charter to include private triggering. It is to be noted, however, that, since the decisions of the African Commission are only recommendatory, it is still to be seen whether and to what extent the new African Court, the decisions of which will be binding, will rely on the arguments developed by the African Commission in its case law.

²³⁴ See for example ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 434-5.

III – PRIVATE TRIGGERING IN UNIVERSAL SYSTEMS

In this section I will analyze private triggering in systems aspiring to universal participation. The focus will be on organs created by human rights treaties administered by the United Nations, known as UN Treaty Bodies, even though the inquiry could extend to other instances, particularly the International Labor Organization's committees.²³⁵ The reason why I will center the inquiry in UN Treaty Bodies is merely a pragmatic one, as these bodies follow roughly similar procedures and organization, thus making it easier to group them together and analyze them comparatively.

A lot of the assumptions and concerns expressed when analyzing the regional systems are still valid, and now the presumption in favor of universality is even stronger. As these are universal instruments, much of the influence of particular regional values in the wording of instruments, which is not necessarily reflected in their application, is diluted for the sake of homogeneity of the language of the instrument.

I will analyze the instrument administered by each of the treaty bodies, especially in the way this instrument has been construed by the bodies' analysis of individual communications, when this option is available,²³⁶ and by the general comments and recommendations approved by each body. A few references to State reporting will also be made regarding some of these organs.

The analysis of the four Treaty Bodies which at the time of writing receive individual complaints (HRC, CAT, CERD and CEDAW) will be done first, and then the

²³⁵ Some of the ILO's committees of relevance would possibly be: the ILO Commission of Inquiry, the ILO Committee of Experts on the Application of Conventions and Recommendations, the ILO Conference Committee on the Application of Conventions, and the ILO Governing Body Committee on Freedom of Association. This list was extracted from the compilation made by CESARE P. R. ROMANO, *THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS – SYNOPSIS CHART*, available at http://www.picti-pecti.org/publications/synoptic_chart/Synop_C4.pdf (last accessed March 13, 2007).

²³⁶ See *supra* note 16.

bodies which do not receive individual complaints (CESCR and CRC). Because the jurisprudence of these bodies is smaller and accessible, I was able to do a thorough analysis of the jurisprudence of each of the first four bodies, which will give me the chance to present some statistics regarding private triggering. A final preliminary note is that I excluded the analysis of the Committee on Migrant Workers (CMW) on purpose, since at the time of writing it is still waiting for the entry into force of its mechanism for individual complaints, and it is overall a very recent body, which is why I think the analysis of the work of the CMW would have very little to contribute to the present inquiry.

A) The Human Rights Committee

The Human Rights Committee (HRC) is perhaps the most important of the UN Treaty Bodies, for being the one with the largest number of States submitted to its quasi-judicatory functions, and with the most extensive jurisprudence. It was created by the International Covenant on Civil and Political Rights (ICCPR),²³⁷ but it was only its optional protocol, opened for signature on the same day as the ICCPR, that gave the HRC the competence to analyze individual petitions.²³⁸

The Human Rights Committee's General Comments are particularly valuable in analyzing the extent to which private triggering is accepted within the Committee's practice, as they systematize and expound the meaning and scope of the rights protected by the ICCPR

²³⁷ *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force: 23 March 1976. Number of States parties as of March 2007: 160.

²³⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force: 23 March 1976. Number of States parties as of March 2007: 109.

The relevant provision is the following: “**Article 1.** A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.”

in light of the HRC's jurisprudence, State practice (drawn primarily from State reports) and other international developments. Although in two General Comments the HRC only refers to "positive obligations" in the sense originally developed by the European Court of Human Rights,²³⁹ that is, of inserting social and economic requirements into civil and political rights,²⁴⁰ as a rule the General Comments have openly dealt with private triggering, which, to the extent that these comments are seen as embodying the "state of the art" of international human rights law under the ICCPR, rather than progressively develop it, is a testament to the recognition of private triggering in the field.

General Comment No. 31 is the current high watermark in terms of private triggering in the HRC. While analyzing the general legal obligation imposed by the Covenant, the Committee said that, although the obligations of the Covenant are imposed on States and therefore cannot have direct horizontal effect, the State has the duty to protect States from violations of Covenant rights perpetrated by private individuals, and in certain circumstances the failure of the State to protect or to take appropriate measures in *due diligence* to investigate and punish, especially for failure to provide for remedies, can give rise to violations of substantive rights of the Covenant.²⁴¹ The HRC goes on to point out²⁴² two examples of Covenant rights in which the language of the Covenant allows for private

²³⁹ See *supra* notes 105-112 and accompanying text.

²⁴⁰ See General Comment No. 6, *The right to life (art. 6)*, 30 April 1982, para. 5; and General Comment No. 21, *Replaces general comment 9 concerning humane treatment of persons deprived of liberty (art. 10)*, 10 April 1992, para. 3.

²⁴¹ General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 8. This view had already been expressed almost ten years before this General Comment, when analyzing State reports. See Human Rights Committee, *Consideration of Reports Submitted by States Parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee – United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, UN Doc. CCPR/C/79/Add.57, 9 November 1995, para. 10. For a different discussion of this Comment, as well as some other HRC General Comments, see ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 328-32.

²⁴² *Id.*

triggering, indicating the right to privacy,²⁴³ and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.²⁴⁴

Regarding the right not to be subjected to torture, this same idea regarding the possibility that private individuals can violate this right had already been expressed previously in two general comments,²⁴⁵ and goes generally against the understanding of the Committee Against Torture, which proposes a much narrower interpretation, due to the language constraints of the Convention Against Torture.²⁴⁶ The fact that the Human Rights Committee adopts a more expansive notion adds to the possibility of protection of victims of torture, being a positive development.

The General Comment on equality between men and women also indicates several rights which can be violated by private individuals, and therefore be subject to private triggering. These rights include the right not be discriminated against,²⁴⁷ the right to freedom of movement,²⁴⁸ right to life, right not to be subjected to torture and right to privacy,²⁴⁹ freedom of thought, conscience and religion,²⁵⁰ equality before the law,²⁵¹ and the rights of minorities,²⁵² generally consolidating previous general comments, and giving them a gender

²⁴³ This idea had already been expressed in General Comment No. 16, *The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (art. 17), 8 April 1988, para. 1. and 10.

The relevant provision of the ICCPR is the following: “**Article 17**

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.”

²⁴⁴ The relevant provision of the ICCPR is the following: “**Article 7**. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

²⁴⁵ See General Comment No. 7, *Torture or cruel, inhuman or degrading treatment or punishment* (art. 7), 30 May 1982, para. 2; and General Comment No. 20, *Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* (art. 7), 10 March 1992, para. 2.

²⁴⁶ See *infra* notes 289-293 and 302-308 and accompanying text.

²⁴⁷ General Comment No. 28, *Equality of rights between men and women* (article 3), 29 March 2000, para. 4. This idea had already been expressed in General Comment No. 18, *Non-discrimination*, 10 November 1989, para. 5 and 9.

²⁴⁸ General Comment No. 28, *supra* note 247, at para. 16. This idea had already been stated in General Comment No. 27, *Freedom of movement* (art. 12), 2 November 1999, para. 6.

²⁴⁹ General Comment No. 28, *supra* note 247, at para. 20.

²⁵⁰ *Id.*, at para. 21.

²⁵¹ *Id.*, at para. 31.

²⁵² *Id.*, at para. 32. This understanding had already been stated in General Comment No. 23, *The rights of minorities* (art. 27), 8 April 1994, para. 6.1.

perspective. In furtherance, the General Comment on the rights of the child recognizes that States have a duty to intervene when private parties, more specifically parents and the family, violate the child's rights.²⁵³

While the general comments of the HRC are generally open to private triggering, the jurisprudence seems to suggest a slightly different picture. Out of the 986 cases decided by the HRC between August 1977 and January 2007, only 29, or a little less than 3%, involved private triggering. Out of these, 18, or 62%, were declared inadmissible, none were declared not to violate the Covenant, and 11, or 38%, were declared to violate the Covenant.

As to the inadmissibility of cases, this alternative seems at first sight to be used too often in cases of private triggering. On the other hand, comparing this figure with the overall activity of the HRC, the Committee seems rather reluctant in deciding that there has been no violation of the Covenant, as it has done so only in roughly 10% of its cases, compared to a much more extensive use of inadmissibility.²⁵⁴

Of the cases related to private triggering that were declared inadmissible, one was declared inadmissible on lack of jurisdiction *ratione temporis*,²⁵⁵ and six (or 33.3%) because of lack of exhaustion of local remedies.²⁵⁶ One case was declared inadmissible because of a specific reservation put by Spain, according to which if a case had already been

²⁵³ General Comment No. 17, *Rights of the Child* (art. 24), 07 April 1989, para. 6.

²⁵⁴ Out of the 986 cases researched, 103 (10%) cases were declared not to violate the Covenant, against 430 inadmissible cases (43%), and 353 cases in which a violation of the Covenant was declared (36%). There seems, thus, to be a tendency of the Committee to avoid declaring "no violations" of the ICCPR.

²⁵⁵ Human Rights Committee, Communication No. 499/1992, *K.L.B.-W. v. Australia*, UN Doc. CCPR/C/47/D/499/1992, 30 March 1993.

²⁵⁶ Human Rights Committee, Communication No. 79/1980, *S.S. v. Norway*, UN Doc. CCPR/C/15/D/79/1980, 2 April 1982; Human Rights Committee, Communication No. 287/1988, *O.H.C. v. Colombia*, UN Doc. CCPR/C/43/D/287/1988, 4 November 1991; Human Rights Committee, Communication No. 741/1997, *Michael Cziklin v. Canada*, UN Doc. CCPR/C/66/D/741/1997, 5 August 1999; Human Rights Committee, Communication No. 822/1998, *Mathieu Vakoumé and others v. France*, UN Doc. CCPR/C/70/D/822/1998, 23 October 2000; Human Rights Committee, Communication No. 1103/2002, *Jaime Castro Ortiz v. Colombia*, UN Doc. CCPR/C/85/D/1103/2002, 21 November 2005; and Human Rights Committee, Communication No. 1283/2004, *Adela Calle Savigny v. France*, UN Doc. CCPR/C/85/D/1283/2004.

decided in another international body it could not be analyzed again by the HRC.²⁵⁷ Another case was declared inadmissible because the complaint was based only on articles 2 and 5 of the Covenant,²⁵⁸ which, while having important consequences in terms of private triggering, and can give rise to violations of substantive rights protected by the ICCPR, are not, in the view of the HRC, justiciable by individuals, at least not without being connected to a substantive right.²⁵⁹

The remainder of the cases, nine, or 50% of the cases involving private triggering declared inadmissible, were declared inadmissible on grounds of lack of substantiation of the claim. While this seems to be very clear in four of these cases,²⁶⁰ as the communications described by the HRC very often do not seem to provide any substantial ground for the applications, the same is not true in respect to the remaining five cases. In all

²⁵⁷ Human Rights Committee, Communication No. 1074/2002, *Arturo Navarra Ferragut v. Spain*, UN Doc. CCPR/C/80/D/1074/2002, 28 April 2004.

²⁵⁸ These provisions read: “**Article 2**

1. Each State Party to the present Covenant undertakes 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.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

[...]

Article 5

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

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.”

²⁵⁹ Human Rights Committee, Communication No. 398/1990, *A.M. v. Finland*, UN Doc. CCPR/C/45/D/398/1990, 14 August 1992.

²⁶⁰ Human Rights Committee, Communication No. 638/1995, *Edward Lacika v. Canada*, UN Doc. CCPR/C/55/D/638/1995, 7 November 1995; Human Rights Committee, Communication No. 659/1995, *B.L. v. Australia*, UN Doc. CCPR/C/58/D/659/1995/Rev.1, 3 December 1997; Human Rights Committee, Communication No. 850/1999, *E.V. Hankala v. Finland*, UN Doc. CCPR/C/65/D/850/1999, 6 May 1999; and Human Rights Committee, Communication No. 834/1998, *Waldemar Kehler v. Germany*, UN Doc. CCPR/C/71/D/834/1998, 2 April 2001.

of these latter five cases the HRC seems to make considerations into the merits of the claim, analyzing whether the allegations of violations of certain articles are well founded, making thus a “soft” analysis of the merits, which could be read as another way of saying that the Covenant was not violated in the case.²⁶¹ In four of these cases, in furtherance, the HRC mentions that it is for domestic courts to make determinations of fact and of law, and that it is not for the Committee to review the findings of domestic courts, unless it flagrantly violates the Covenant.²⁶² In a way, therefore, the HRC has created its own version of the doctrine of margin of appreciation as a defense for States. One final note is that in one of these cases there was an individual dissenting opinion by four members of the Committee rejecting the view that the admissibility should take into consideration the complaint before domestic courts.²⁶³

Regarding the cases in which there was a violation of the Covenant, the cases have generally followed the orientation crystallized in General Comment No. 31,²⁶⁴ in the sense of not finding autonomous violations of the right to a remedy, but rather violations of substantive rights provisions, at times coupled with the right to a remedy. This latter hypothesis has happened in two cases. In the first one,²⁶⁵ the HRC analyzed a complaint in which a public authority, motivated by personal reasons, prevented the victim from

²⁶¹ Human Rights Committee, Communication No. 450/1991, *I.P. v. Finland*, UN Doc. CCPR/C/48/D/450/1991, 26 July 1993; Human Rights Committee, Communication No. 761/1997, *Ranjit Singh v. Canada*, UN Doc. CCPR/C/60/D/761/1997, 14 August 1997 [hereinafter “*Ranjit Singh v. Canada*”]; Human Rights Committee, Communication No. 947/2000, *Barry Hart v. Australia*, UN Doc. CCPR/C/70/D/947/2000, 27 October 2000 [hereinafter “*Barry Hart v. Australia*”]; Human Rights Committee, Communication No. 958/2000, *Nuri Jazairi v. Canada*, UN Doc. CCPR/C/82/D/958/2000, 11 November 2004 [hereinafter “*Nuri Jazairi v. Canada*”]; and Human Rights Committee, Communication No. 1417/2005, *J.O., Z.S. and S.O. v. Belgium*, UN Doc. CCPR/C/85/D/1417/2005, 23 November 2005 [hereinafter “*J.O., Z.S. and S.O. v. Belgium*”].

²⁶² *Ranjit Singh v. Canada*, *supra* note 261, at para. 4.2; *Barry Hart v. Australia*, *supra* note 261, at para. 4.3; *Nuri Jazairi v. Canada*, *supra* note 261, at para. 7.4; and *J.O., Z.S. and S.O. v. Belgium*, *supra* note 261, at para. 4.3 (declared inadmissible also on other grounds for other claims, such as incompatibility *ratione materiae* for one of the claims. *Id.*, at para 4.4).

²⁶³ *Nuri Jazairi v. Canada*, *supra* note 261, Individual dissenting opinion of Committee members Mrs. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah, para. 4.

²⁶⁴ *Supra* note 241.

²⁶⁵ Human Rights Committee, Communication No. 641/1995, *Nyekuma Kopita Toro Gedumbe v. Democratic Republic of the Congo*, UN Doc. CCPR/C/75/D/641/1995, 26 July 2002 [hereinafter “*Nyekuma Kopita Toro Gedumbe v. DRC*”].

reassuming its post in a diplomatic school.²⁶⁶ Although the complaint was based on the right to be free from torture²⁶⁷ and the right to privacy,²⁶⁸ the Committee declared a violation of the right to access to public service²⁶⁹ in conjunction with the right to a remedy.²⁷⁰ The HRC, in furtherance, found a violation of the right to family life in conjunction with the right to a remedy in a case of a father who was denied right to visit his son by the mother.²⁷¹

A variation of declaring a violation of the right to a remedy in cases of private triggering is to declare a violation of fair trial rights. This has happened in one case in conjunction with substantive rights (equality between spouses and family life, in a context of a mother who was denied contact with her children following divorce),²⁷² and in two cases only a violation of fair trial rights was found in the context of private triggering.²⁷³ In the other cases, the HRC found violations of rights such as life and freedom from torture,²⁷⁴ personal liberty and security,²⁷⁵ freedom of expression,²⁷⁶ private life and family protection,²⁷⁷ and humane treatment of people deprived of liberty.²⁷⁸

²⁶⁶ *Nyekuma Kopita Toro Gedumbe v. DRC*, *supra* note 265, at para. 2.1.

²⁶⁷ *Supra* note 244.

²⁶⁸ *Supra* note 243.

²⁶⁹ “**Article 25.** Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [...] (c) To have access, on general terms of equality, to public service in his country.”

²⁷⁰ *Nyekuma Kopita Toro Gedumbe v. DRC*, *supra* note 265, at para. 6.1.

²⁷¹ Human Rights Committee, Communication No. 946/2000, *L.P. v. Czech Republic*, UN Doc. CCPR/C/75/D/946/2000.

²⁷² Human Rights Committee, Communication No. 514/1992, *Sandra Fei v. Colombia*, UN Doc. CCPR/C/53/D/514/1992, 26 April 1995.

²⁷³ Human Rights Committee, Communication No. 202/1986, *Graciela Ato del Avellanal v. Peru*, UN Doc. CCPR/C/34/D/202/1986, 31 October 1988; and Human Rights Committee, Communication No. 846/1999, *Gertruda Hubertina Jansen-Gielen v. The Netherlands*, UN Doc. CCPR/C/71/D/846/1999, 14 May 2001.

²⁷⁴ Human Rights Committee, Communication No. 563/1993, *Federico Abreu v. Colombia*, UN Doc. CCPR/C/55/D/563/1993, 13 November 1995.

²⁷⁵ Human Rights Committee, Communication No. 711/1996, *Carlos Dias v. Angola*, UN Doc. CCPR/C/68/D/711/1996, 18 April 2000 (in the context of the government ignoring threats made to the victim, which amounted to a violation of his personal security. *Id.*, at para. 8.3).

²⁷⁶ Human Rights Committee, Communication No. 633/1995, *Robert W. Gauthier v. Canada*, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999; and Human Rights Committee, Communication No. 1180/2003, *Zeljko Bodrožić v. Serbia*, UN Doc. CCPR/C/85/D/1180/2003, 23 January 2006.

²⁷⁷ Human Rights Committee, Communication No. 549/1993, *Francis Hopu and Tepoaitu Bessert v. France*, UN Doc. CCPR/C/60/D/549/1993/Rev/1, 29 December 1997 [hereinafter “Francis Hopu and Tepoaitu Bessert v. France”].

²⁷⁸ Human Rights Committee, Communication No. 1020/2001, *Carlos Cabal and Marco Pasini Bertran v. Australia*, UN Doc. CCPR/C/78/D/1020/2001, 19 September 2003 [hereinafter “Carlos Cabal and Marco Pasini Bertran v. Australia”].

The case involving private life and family protection, *Francis Hopu and Tepoaitu Bessert v. France*, involved the threat posed by a hotel-construction project to the traditional lands, including the traditional burial ground, of a Polynesian tribe.²⁷⁹ The HRC accepted the petitioners' contention that the Committee should interpret the term "family" in accordance with their traditions, by which "family" would mean the entire population of the tribe, and determined that the construction of the hotel complex as planned would interfere with the privacy and family life of the petitioners.²⁸⁰

The case had been previously declared inadmissible under article 27 (minority protection) of the Covenant because of a reservation made by France excluding the application of this provision.²⁸¹ This explains why the HRC decided to broaden its understanding of family for this case, but this position was criticized by some of its members, on the grounds that even a broadened understanding of family could not possibly encompass all the members of a certain ethnic group.²⁸² In any event, for the purposes of private triggering, this case can also be read as an implied recognition in the case law that Article 27 is subject to private triggering.

The case concerning humane treatment of people deprived of liberty, *Carlos Cabal and Marco Pasini Bertran v. Australia*, concerns the conditions of incarceration of two individuals awaiting extradition in a privately operated prison.²⁸³ On a certain occasion, the authors were placed simultaneously for about an hour in a triangular cell the size of a phone booth that was supposed to accommodate only one prisoner at a time,²⁸⁴ which was what

²⁷⁹ *Francis Hopu and Tepoaitu Bessert v. France*, *supra* note 277, at para. 2.2 and 2.5.

²⁸⁰ *Id.*, at para. 10.3.

²⁸¹ Several other cases before this one alleging violations by France of article 27 had been declared inadmissible on the grounds of France's reservation. *See* Human Rights Committee, Communication No. 222/1987, *H.K. v. France*, UN Doc. CCPR/C/37/D/222/1987, 8 December 1989; and Human Rights Committee, Communication No. 220/1987, *T.K. v. France*, UN Doc. CCPR/C/37/D/220/1987, 8 December 1989.

²⁸² *Francis Hopu and Tepoaitu Bessert v. France*, *supra* note 277, Individual dissenting opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville, para. 4.

²⁸³ *Carlos Cabal and Marco Pasini Bertran v. Australia*, *supra* note 278, at para. 2.5.

²⁸⁴ *Id.*, at para. 2.10.

violated their right to humane treatment, in the opinion of the Committee.²⁸⁵ This case is another example of responsibility of the State for the acts of private individuals under classic mechanisms of public international law, as the private prison exercised State functions by delegation from the State, falling under the rules of attribution of the ILC Articles on State Responsibility.²⁸⁶

B) The Committee Against Torture

The Committee Against Torture (CAT) was created by the Convention Against Torture²⁸⁷ to supervise its application. The CAT is entitled to examine individual petitions against States who have recognized such competence through the deposit of a declaration pursuant to a specific provision of the Convention.²⁸⁸

Because the topic of torture is by nature so closely connected to State functions,²⁸⁹ in only few occasions private triggering has become an issue before the CAT. In

²⁸⁵ *Id.*, at para. 8.3.

²⁸⁶ See discussion *supra* Chapter I.

²⁸⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. Entry into force: 26 June 1987. Number of parties as of March 2007: 144.

²⁸⁸ As of March 2007, 64 States have deposited such declaration. The relevant provision of the Convention, which also sets forth the basic procedure for an individual communication, is the following: “**Article 22**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

[...]

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.”

²⁸⁹ The very concept of torture, in article 1 of the Convention, only considers torture acts perpetrated by State agents, even though it opens the possibility for other international instruments or national legislation widening the concept: “**Article 1**

the Committee's General Comments setting the guidelines for individual communications, for example, the CAT is clear in narrowing the interpretation of article 3 of the Convention²⁹⁰ so as to include acts only of public officials or persons acting in an official capacity.²⁹¹

One possibility, however, for imputing responsibility to the State for the acts of private individuals is the case of privatization of security forces and deportation agents, mentioned in a State report to the CAT. Although the Committee did not say that this privatization could still lead to State responsibility, as it showed only concern for events of this sort in the State party,²⁹² that the State is still responsible under international law is clear from the application of general rules of public international law on State responsibility.²⁹³

As to the jurisprudence of the CAT, of the 180 cases decided between November 1993 and January 2007, only four, or 2.2%, made some reference to private triggering. In one of these cases,²⁹⁴ the CAT found there to be a violation of article 16(1) of the Convention,²⁹⁵ relative to acts falling short of torture but that still constitute cruel,

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, **when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." (emphasis added)

²⁹⁰ "Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

²⁹¹ General Comment No. 1, *Implementation of article 3 of the Convention in the context of article 22*, UN Doc. A/53/44, annex IX, 21 November 1997, para. 3.

²⁹² Committee Against Torture, Fifteenth session, *Summary Record of the First Part (Public) of the 234th Meeting – United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/SR.234, 22 November 1995, para. 65 (private companies carrying out deportations) and 70 (privatization of public security forces).

²⁹³ See *supra* Chapter I, notes 69-73 and accompanying text.

²⁹⁴ Committee Against Torture, Communication No. 161/2000, *Hajrizi Dzemajl et al. v. Yugoslavia*, UN Doc. CAT/C/29/D/161/2000, 2 December 2002 [hereinafter "Hajrizi Dzemajl et al. v. Yugoslavia"].

²⁹⁵ "Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply

inhuman and degrading treatment or punishment. After some Roma minors had become suspect of the rape of an ethnic Montenegrin girl,²⁹⁶ an angry mob set fire to cars, houses, machines, stables and other property belonging to Roma in the neighborhood.²⁹⁷ The police was aware of the imminent events,²⁹⁸ and was present monitoring them as the population set fire to the property of the Roma.²⁹⁹ The CAT understood that, because of these circumstances, the State agents had “acquiesced” to the actions, in the sense of article 16(1) of the Convention, and declared its violation.³⁰⁰ In furtherance, because there had been no investigation and no one had been prosecuted by the acts, despite the hundreds of non-Roma citizens participating in the acts and the presence of police officers as witnesses, there had been a violation of the provisions of the Convention regarding remedies.³⁰¹

The other three cases refer to the principle of *non-refoulement* enshrined in the Convention,³⁰² according to which a State cannot return a person to a State where he / she faces the risk of torture. In all these three cases,³⁰³ the person risked being tortured by a non-State actor, either a terrorist group,³⁰⁴ or a belligerent group.³⁰⁵ The argument used by the

with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. [...]”

²⁹⁶ *Hajrizi Dzermalj et al. v. Yugoslavia*, *supra* note 294, at para. 2.1.

²⁹⁷ *Id.*, at para. 2.7.

²⁹⁸ *Id.*, at para. 2.6.

²⁹⁹ *Id.*, at para. 2.8.

³⁰⁰ *Id.*, at para. 9.2.

³⁰¹ *Id.*, at para. 9.4 and 9.5. The relevant provisions of the Convention are the following: “**Article 12.** Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

³⁰² The relevant provision is the following: “**Article 3**

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

³⁰³ For another commentary on these cases in the context of non-State actors, *see* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 342-46.

³⁰⁴ Committee Against Torture, Communication No. 83/1997, *G.R.B. v. Sweden*, UN Doc. CAT/C/20/D/83/1997, 15 May 1998 (concerning the return of a Peruvian national who was threatened by the terrorist group *Sendero Luminoso*).

CAT in the two earlier cases was that there was no effective State, and it had been replaced by the non-State group, applying thus a mechanism of classic public international law of State responsibility.³⁰⁶ In the third case, the CAT reassessed the context of the country in which the belligerent group operated, and concluded that the situation in this State had improved to a point to which torture could no longer be considered to be perpetrated by a non-State actor, as there was a rather functional State.³⁰⁷

The CAT, therefore, adopts a generally conservative approach to private triggering, restricted by the narrow language of the instrument it interprets, and only allows for very narrow exceptions in favor of private triggering, and all of them closely related to mechanisms of public international law that would in any event place responsibility upon the State for the acts of private individuals.³⁰⁸

C) The Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) was created by the International Convention on the Elimination of All Forms of Racial Discrimination.³⁰⁹ Under the Convention, and similarly to the Committee Against Torture,³¹⁰ the CERD can receive individual complaints, as long as States deposit, along with their ratification instruments or at any time after that, declarations to this effect.³¹¹

³⁰⁵ Committee Against Torture, Communication No. 120/1998, *Sadiq Shek Elmi v. Australia*, UN Doc. CAT/C/22/D/120/1998, 25 May 1999; and Committee Against Torture, Communication No. 177/2001, *H.M.H.I. v. Australia*, UN Doc. CAT/C/28/D/177/2001, 1 May 2002 [hereinafter “H.M.H.I. v. Australia”] (concerning the return of Somali nationals threatened by belligerent groups in the Somali civil war).

³⁰⁶ See *supra* Chapter I.B, notes 69-73 and accompanying text.

³⁰⁷ *H.M.H.I. v. Australia*, *supra* note 305, at para. 6.4.

³⁰⁸ See category 4, *supra* Introduction.

³⁰⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965. Entry into force: 4 January 1969. Number of States parties as of March 2007: 173.

³¹⁰ See *supra* note 288 and accompanying text.

³¹¹ As of March 2007, 49 States had deposited such declaration. The relevant provision of the Convention, which also sets forth the basic procedure for an individual communication, is the following: “**Article 14**

The individual communications procedure has been very important for clarifying the reach of the scope of rights protection in the Convention in terms of private triggering. Although the language of the Convention can be at times confusing or ambiguous, by only referring to the obligation of States to eliminate discrimination in the public sphere,³¹² the jurisprudence construed the conventional rights so as to extend their application to private relations, a view that has been endorsed expressly by some member States,³¹³

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6.

(a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7.

(a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article."

³¹² For a discussion on the problems with the language adopted in the Convention, see ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 319-22.

³¹³ See for example Committee on the Elimination of Racial Discrimination, *Summary Record of the 1380th Meeting*, UN Doc. CERD/C/SR.1380, 10 March 2000, para. 17 (in which the representative from Malta, in the context of analyzing the compatibility of Maltese law with the Convention, expresses that Maltese law recognizes *Drittwirkung* and therefore violations of fundamental rights by private individuals have remedies in Maltese courts); and Committee on the Elimination of Racial Discrimination, *Consideration of Reports*

without prejudice of having been recognized by other States that made no statement on the topic.

Regarding these communications, out of the 34 cases decided by the CERD between September 1988 and March 2006, 21, or 61.7%, involved some sort of private triggering. Out of these 21, eight, or 38.1%, have been declared inadmissible. Seven cases, or 33.4%, have been declared to violate the Convention, and the remainder, six cases or 28.5% have been declared not to violate the Convention.

Of the cases declared inadmissible, one was for the expiration of the six-month period between exhaustion of domestic remedies and the presentation of the complaint,³¹⁴ four because of lack of exhaustion of domestic remedies,³¹⁵ and the other three for lack of substantiation of the claim,³¹⁶ referred to in the first one of these cases as the presentation of a *prima facie* case.³¹⁷ In all these cases the reasoning behind the inadmissibility of the complaint was clear, even in the cases where there was no substantiation of the claim. In none of them, though, there seemed to be elements sufficient for a continuation of the case, and reaching the merits would most likely be unfruitful in any event. Unlike the HR, thus, that seems to be rather fond of using the inadmissibility result as a means of finding a “no-

Submitted by States Parties under Article 9 of the Convention, Addendum – Switzerland, UN Doc. CERD/C/270/Add.1, 14 March 1997, para. 57-59 (stating, in the context of analyzing the compatibility of the Convention with Swiss law, that the prohibition of discrimination extends to private relations through indirect horizontal effect). For a discussion of the meaning of *Drittwirkung* and indirect horizontal effect or *mittelbare Drittwirkung*, see *supra* Introduction, notes 8-9 and accompanying text.

³¹⁴ Committee on the Elimination of Racial Discrimination, Communication No. 18/2000, *F.A. v. Norway*, UN Doc. CERD/C/58/D/18/2000, 17 April 2001. The rule is in Art. 14(5) of the Convention, *supra* note 311.

³¹⁵ Committee on the Elimination of Racial Discrimination, Communication No. 19/2000, *Sarwar Seliman Mostafa v. Denmark*, UN Doc. CERD/C/59/D/19/2000, 10 August 2001; Committee on the Elimination of Racial Discrimination, Communication No. 21/2001, *D.S. v. Sweden*, UN Doc. CERD/C/59/D/21/2001, 10 August 2001; Committee on the Elimination of Racial Discrimination, Communication No. 22/2002, *POEM and FASM v. Denmark*, UN Doc. CERD/C/62/D/22/2002, 15 April 2003; and Committee on the Elimination of Racial Discrimination, Communication No. 25/2002, *Ahmad Najaati Sadic v. Denmark*, UN Doc. CERD/C/62/D/25/2002, 16 April 2003.

³¹⁶ Committee on the Elimination of Racial Discrimination, Communication No. 23/2002, *K.R.C. v. Denmark*, UN Doc. CERD/C/61/D/23/2002, 14 August 2002; and Committee on the Elimination of Racial Discrimination, Communication No. 28/2003, *The Documentation and Advisory Centre on Racial Discrimination v. Denmark*, UN Doc. CERD/C/63/D/28/2003, 4-22 August 2003.

³¹⁷ Committee on the Elimination of Racial Discrimination, Communication No. 5/1994, *C.P. and M.P. v. Denmark*, UN Doc. CERD/C/46/D/5/1994, 15 March 1995.

violation” of the ICCPR, the CERD is comfortable with saying that a violation has not occurred in a given case.

The cases in which no violation of the Convention was found were usually because the private individual who committed the discriminatory act was convicted, or at least indicted, with a case pending before court at the time of the Committee’s decision.³¹⁸ In one case the CERD declared there not to be a violation of the Convention for failure of the complainant in substantiating his claim.³¹⁹ Two of the cases in which no violation was found, however, provide interesting insights concerning the operation of private triggering in the CERD.

In the first case, *B.J. v. Denmark*,³²⁰ the CERD analyzed whether not compensating financially a victim of discrimination amounted to a violation of the Convention. The applicant, a Danish citizen of Iranian origin, was denied entry with a group of foreign friends in a discotheque.³²¹ Proceedings were initiated against the restaurant, and its owner was convicted by a court to pay a fine for a violation of a Danish act on racial discrimination.³²² However, in a separate claim in the same proceeding regarding a breach of the Danish Act on Civil Liability, the court understood that no compensation was owed to the author because the harm he had suffered was not so severe.³²³ The State argued in its favor

³¹⁸ Committee on the Elimination of Racial Discrimination, Communication No. 11/1998, *Miroslav Lacko v. Slovakia*, UN Doc. CERD/C/59/D/11/1998, 9 August 2001; Committee on the Elimination of Racial Discrimination, Communication No. 27/2002, *Kamal Quereshi v. Denmark*, UN Doc. CERD/C/63/D/27/2002, 26 August 2003; and Committee on the Elimination of Racial Discrimination, Communication No. 33/2003, *Kamal Quereshi v. Denmark*, UN Doc. CERD/C/66/D/33/2003, 10 March 2005. Please note that the two latter cases refer to the same set of facts and have the same parties.

³¹⁹ Committee on the Elimination of Racial Discrimination, Communication No. 20/2000, *M.B. v. Denmark*, UN Doc. CERD/C/60/D/20/2000, 15 March 2002.

³²⁰ Committee on the Elimination of Racial Discrimination, Communication No. 17/1999, *B.J. v. Denmark*, UN Doc. CERD/C/56/D/17/1999, 10 May 2000.

³²¹ *Id.*, at para. 2.1.

³²² *Id.*, at para. 2.3.

³²³ *Id.*, at para. 2.4.

that the determination of suitable sanctions in specific cases falls within the State's margin of appreciation.³²⁴

The CERD did not endorse this view, and said that the assessment of harm had to be done in each case, as a humiliating experience caused by someone's ethnic background might merit economic compensation.³²⁵ Still, it declared there had been no violation of the Convention.³²⁶ However, it is unclear whether the CERD really rejected the application of margin of appreciation as a possible defense against private triggering, and it seems that it did not discard this defense.

The second case, *Emir Sefic v. Denmark*,³²⁷ refers to the denial of car insurance by a private insurer to a Bosnian citizen. The denial was based on the fact that Mr. Sefic did not speak Danish, which was a requirement of the company.³²⁸ The issue before the CERD was whether the fact that no investigation was formally made into the allegations of Mr. Sefic amounted to a violation of the Convention.³²⁹ The CERD concluded that, in the specific circumstances of the case, considering that the reasons the company provided to the investigators gave sufficient support for the decision not to formally initiate an investigation were "reasonable and objective",³³⁰ and therefore found no violation of the Convention.³³¹ In these two decisions, therefore, the Committee roughly signaled margin of appreciation and proportionality to be two possible defenses, as they are in the European system.³³²

It is important to note that, in these cases in which no violation was found, whether the Convention was applicable to private relations was never an issue, and was taken for granted. In furtherance, perhaps the fact that these two latter cases, which seem to indicate

³²⁴ *Id.*, at para. 4.6.

³²⁵ *Id.*, at para. 6.3.

³²⁶ *Id.*, at para. 7.

³²⁷ Committee on the Elimination of Racial Discrimination, Communication No. 32/2003, *Emir Sefic v. Denmark*, UN Doc. CERD/C/66/D/32/2003, 10 March 2005.

³²⁸ *Id.*, at para. 2.1.

³²⁹ *Id.*, at para. 3.2.

³³⁰ *Id.*, at para. 7.2.

³³¹ *Id.*, at para. 8.

³³² See *supra* note 114 and accompanying text.

possible defenses against private triggering, were against Denmark, a Party to the European Convention, may have influenced the indication of these defenses. Denmark in at least the first of these cases invoked the doctrines of the ECtHR in its defense, thus enabling their transplant, at least partially and in a rudimentary way, into the jurisprudence of the CERD.

As to the cases in which a violation of the Convention has been declared, the jurisprudence is not unanimous. There is only one case, and the oldest of them, in which the violation of only a substantive right has been declared.³³³ While in two instances the CERD declared there to be only a violation of the right to a remedy against racial discrimination, in both cases the facts determined that no investigation whatsoever into whether there had been a racial discrimination had occurred at the domestic level,³³⁴ and as affirmed in *Dragan Durmic v. Montenegro, Serbia*, a violation of the right to a remedy against racial discrimination can be so big so as to prevent an analysis by the CERD of the substantive provisions of the Convention.³³⁵ What is implied is that, when domestic jurisdictions do not even examine the claim regarding racial discrimination, the CERD will not either.

³³³ Committee on the Elimination of Racial Discrimination, Communication No. 1/1984, *A. Uilmaz Dogan v. The Netherlands*, UN Doc. CERD/C/36/D/1/1984, 29 September 1988. The provision violated was the following: “Article 5.

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; [...]

³³⁴ Committee on the Elimination of Racial Discrimination, Communication No. 16/1999, *Kashif Ahmad v. Denmark*, UN Doc. CERD/C/56/D/16/1999, 8 May 2000, para. 6.1 and 6.2; and Committee on the Elimination of Racial Discrimination, Communication No. 29/2003, *Dragan Durmic v. Montenegro, Serbia*, UN Doc. CERD/C/68/D/29/2003, 8 March 2006, para. 9.6 [hereinafter “*Dragan Durmic v. Montenegro, Serbia*”]. The right to a remedy under the Convention is the following: “Article 6. States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

³³⁵ See *Dragan Durmic v. Montenegro, Serbia*, *supra* note 334, at para. 9.6.

In the other four cases violations of substantive provisions and the right to a remedy against racial discrimination seem to walk hand-in-hand.³³⁶ In *Jewish community of Oslo and others v. Norway*, the CERD seems also to have confirmed the possibility of the use of margin of appreciation as a defense against private triggering. The CERD analyzed, in the session on the merits of the case, an argument posed by the State (again a State Party to the European Convention) referring explicitly to the margin of appreciation doctrine, and said that it took into account the domestic decision on the case, but it had the ultimate responsibility “to ensure the coherence of the interpretation of the provisions [...] of the Convention”.³³⁷

In furtherance, the CERD has adopted several general recommendations reflecting and consolidating its jurisprudence in terms of private triggering. General Recommendation No. 19, for example, while affirming that racial segregation can also arise without the direct involvement of public authorities,³³⁸ by the actions of private persons,³³⁹ affirms that States have an obligation to eradicate apartheid even when it is “imposed by forces outside the State”.³⁴⁰ The issue of the responsibility of the State to eliminate private segregation was also discussed in the Recommendation concerning discrimination based on

³³⁶ Committee on the Elimination of Racial Discrimination, Communication No. 4/1991, *L.K. v. The Netherlands*, UN Doc. CERD/C/42/D/4/1991, 16 March 1993; Committee on the Elimination of Racial Discrimination, Communication No. 10/1997, *Ziad Ben Ahmed Habassi v. Denmark*, UN Doc. CERD/C/54/D/10/1997, 6 April 1999; Committee on the Elimination of Racial Discrimination, Communication No. 30/2003, *Jewish community of Oslo and others v. Norway*, UN Doc. CERD/C/67/D/30/2003, 22 August 2005 [hereinafter “*Jewish community of Oslo and others v. Norway*”]; and Committee on the Elimination of Racial Discrimination, Communication No. 34/2004, *Mohammad Hassan Gelle v. Denmark*, UN Doc. CERD/C/68/D/34/2004, 15 March 2006.

³³⁷ *Jewish community of Oslo case*, *supra* note 336, at para. 10.3.

³³⁸ General Recommendation No. 19, *Racial segregation and apartheid* (art. 3), 18 August 1995, para. 4.

³³⁹ *Id.*, at para. 3.

³⁴⁰ *Id.*, at para. 2. It is important to take into account that apartheid in South Africa had the participation of non-State actors. See TRC REPORT, *supra* note 96, Volume 1, Chapter 4, at para. 77-81.

descent,³⁴¹ a remarkable example of which is the question of the “untouchables” in India, discussed by the Committee in its 2007 Concluding Observations on India.³⁴²

The ultimate responsibility of the State with regard to racial discrimination occurring in the private sphere is also stated in the General Recommendation on the implementation of rights and freedoms.³⁴³ The CERD affirmed, in the Recommendation regarding Roma rights, that there is a duty on States to investigate and punish acts of violence perpetrated against Roma, regardless of whether these acts were perpetrated by public officials or others,³⁴⁴ to act against discriminatory practices in living arrangements,³⁴⁵ and to prevent, punish and eliminate practices regarding the access of Roma individuals to public places, such as restaurants, theaters, discotheques and hotels.³⁴⁶

The CERD also recognizes that acts of private actors violating other fundamental rights can induce or aggravate a situation of marginalization and discrimination, as in the case of indigenous peoples³⁴⁷ and women.³⁴⁸ In furtherance, the actions of private individuals can be particularly relevant in the context of hate speech, often fostered by private media, the Internet and society at large. This is particularly true in the context of non-citizens, in which hate speech creates an environment of xenophobia that affects several rights of non-citizens.³⁴⁹

³⁴¹ General Recommendation No. 29, *Article 1, paragraph 1 of the Convention (Descent)*, 1 November 2002, para. 1.

³⁴² Committee on the Elimination of Racial Discrimination, *Consideration of Reports submitted by States under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination – India*, UN Doc. CERD/C/IND/CO/9, of March 2007. One of the instances of the effects of the discrimination against the Dalits is the rape of Dalit women by men of “superior” castes (para. 15). For an NGO perspective, see Human Rights Watch, *India: UN Finds Pervasive Abuse Against Dalits*, available at <http://hrw.org/english/docs/2007/03/12/india15469.htm> (last accessed March 14, 2007).

³⁴³ General Recommendation No. 20, *Non-discriminatory implementation of rights and freedoms (art. 5)*, 15 March 1996, para. 5.

³⁴⁴ General Recommendation No. 27, *Discrimination against Roma*, 16 August 2000, para. 12.

³⁴⁵ *Id.*, at para. 31.

³⁴⁶ *Id.*, at para. 35.

³⁴⁷ General Recommendation No. 23, *Indigenous peoples*, 18 August 1997, para. 3.

³⁴⁸ General Recommendation No. 25, *Gender related dimensions of racial discrimination*, 20 March 2000, para. 2.

³⁴⁹ See General Recommendation No. 30, *Discrimination Against Non Citizens*, 1 October 2004, para. 12.

D) The Committee on the Elimination of Discrimination Against Women

The Committee on the Elimination of Discrimination Against Women (CEDAW) administers the Convention on the Elimination of All Forms of Discrimination Against Women.³⁵⁰ The CEDAW, for the very object of its activity, has been one of the first and most important forums in advocating the idea that human rights can be violated by private individuals, and not only the State.³⁵¹

Various General Recommendations have tackled the issue of private triggering, but this has not always been the case. For instance, General Recommendation No. 14,³⁵² dealing with the issue of female circumcision,³⁵³ refers exclusively to the duty of the State to adopt strategies to eradicate the practice in *public* health care.³⁵⁴

General Recommendation No. 19,³⁵⁵ however, dealing with violence against women, expresses a full-fledged embracement of private triggering. The Recommendation recognizes that the full implementation of the Convention imposes on States a duty to adopt positive measures,³⁵⁶ and, although affirming that the Convention applies to violence perpetrated by State agents,³⁵⁷ the CEDAW affirms that discrimination can also be done by private individuals, and can trigger State responsibility unless the State acts with due diligence in the prevention of violations, or investigates and punishes acts of violence.³⁵⁸

³⁵⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981. Number of parties as of March 2007: 185. This Convention is also known by the acronym CEDAW. In this paper, however, “CEDAW” will be used to refer to the Committee.

³⁵¹ See ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 333. For an analysis of violations of women’s rights perpetrated by private parties, see *supra* Chapter I.C.

³⁵² General Recommendation No. 14, *Female circumcision*, Adopted during the Committee’s ninth session, in 1990.

³⁵³ For a discussion of female circumcision, see *supra* note 89 and accompanying text.

³⁵⁴ Recommendation b.

³⁵⁵ General Recommendation No. 19, *Violence against women*, Adopted during the Committee’s eleventh session, in 1992.

³⁵⁶ *Id.*, at para. 4.

³⁵⁷ *Id.*, at para. 8.

³⁵⁸ *Id.*, at para. 9.

Although it is not specified what “due diligence” means, nor what the satisfactory requirements of “investigation and punishment” are, this is the standard for private triggering set under this Convention. “Due diligence”, in furtherance, is pointed out as having been used for developing positive obligations regarding violence perpetrated by non-State actors.³⁵⁹ A series of other practices more often perpetrated by private individuals that amount to violation of women’s rights has been recognized under this General Recommendation, including forced marriage and family violence and abuse.³⁶⁰

The most comprehensive use of private triggering under the CEDAW’s General Recommendations, however, happened in General Recommendation No. 24, relating to women and health.³⁶¹ In this Recommendation, not only it was recognized that the obligations of the State extended also to private health care providers³⁶² (therefore superseding the restriction of General Recommendation No. 14), but also that private triggering affects the three different sets of duties that are imposed on States by the Convention: the duties to respect, to protect and to fulfill rights.³⁶³

The duty to respect imposes on States the responsibility for ensuring that both public and private health care providers respect the right of equal access to health care.³⁶⁴ The duty to protect requires that action is taken “to prevent and impose sanctions for violations of rights by private persons and organizations”.³⁶⁵ And the duty to fulfill rights determines that, even though States can delegate health care functions to private entities, this does not absolve

³⁵⁹ See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS..., *supra* note 25, at 334 (citing two Amnesty International reports: AMNESTY INTERNATIONAL, MAKING RIGHTS A REALITY: THE DUTY OF STATES TO ADDRESS VIOLENCE AGAINST WOMEN, AI Index ACT 77/049/2004; and AMNESTY INTERNATIONAL, RESPECT, PROTECT, FULFILL – WOMEN’S HUMAN RIGHTS: STATE RESPONSIBILITY FOR ABUSES BY “NON-STATE ACTORS”, AI Index IOR 50/01/00).

³⁶⁰ General Recommendation No. 19, *supra* note 355, at para. 11.

³⁶¹ General Recommendation No. 24, *Article 12: Women and health*, Adopted during the Committee’s twentieth session, in 1999.

³⁶² *Id.*, at para. 14.

³⁶³ *Id.*, at para. 7.

³⁶⁴ *Id.*, at para. 14.

³⁶⁵ *Id.*, at para. 15.

them from responsibility.³⁶⁶ This is a step beyond from more traditional conceptions of positive obligations, which tend to find positive obligations only within the duty to protect. The approach adopted by the CEDA is much more comprehensive, and also progressive.

Finally, the Recommendation also affirms that several practices, including non-consensual sterilization and mandatory testing for pregnancy or sexually transmitted diseases should not be allowed as a condition for employment,³⁶⁷ presumably including private employment. The work of the CEDAW has been very important for framing private triggering in the context in which the idea of private perpetrations first evolved, that is, violence against women. The interpretation given is comprehensive, and imposes on States a great burden in implementing the Convention generally and enforcing the rights protected by it with due diligence.

The Optional Protocol to the Convention for the Elimination of Discrimination Against Women³⁶⁸ empowered the CEDAW to receive individual complaints against States parties to it. At the time of writing, five communications have been decided by the CEDAW, and one of them referred to private triggering. The case of *A.T. v. Hungary*³⁶⁹ involved domestic violence perpetrated against Ms. A.T. during and after the end of her cohabitation with her companion, L.F. A domestic court order gave L.F. the right to re-enter the apartment after he had been dislodged from there, and he resumed physically assaulting A.T.³⁷⁰

³⁶⁶ *Id.*, at para. 17. See also the discussion on international responsibility under general public international law *supra*, in Chapter I.B.

³⁶⁷ *Id.*, at para. 22.

³⁶⁸ *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day. Entry into force 22 December 2000. Number of States parties as of February 2007: 85.

³⁶⁹ Communication No. 2/2003, *A.T. v. Hungary*, 26 January 2005, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> (last accessed March 13, 2007) [hereinafter “*A.T. v. Hungary*”].

³⁷⁰ *Id.*, at para. 2.1-2.4.

Recalling its General Recommendation on Violence against Women,³⁷¹ and in conformity with it, the CEDAW adopted the view that violence against perpetrated by a private party could trigger State responsibility under the Convention,³⁷² and said that, because the Hungarian judiciary appeared to give precedence to the right of L.F. to regain possession of his property over the right of A.T. to be free from violence, it had violated the Convention.³⁷³

E) The Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) was created by the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁷⁴ Although the body is not empowered to accept individual applications,³⁷⁵ it has issued a series of General Comments reflecting concerns of the CESCR in relation to State reports. The most recent General Comments generally follow a common structure: regarding private triggering, they point out the three different levels of obligations regarding any given right under analysis (respect, protection and fulfillment) and talk about private triggering under the obligation to protect. This has not always been the case, though.

The General Comment on the nature of States parties' obligations of 1990,³⁷⁶ for example, does not mention private triggering explicitly, although it does not explicitly restrict States' obligations to acts of agents of the State either, (un)intentionally leaving an open door

³⁷¹ See *supra* note 355.

³⁷² *A.T. v. Hungary*, *supra* note 369, at para. 9.3.

³⁷³ *Id.*, at para. 9.6.

³⁷⁴ *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force: 3 January 1976. Number of States parties as of March 2007: 155.

³⁷⁵ There is an ongoing negotiation for an optional protocol that would enable the CESCR to accept individual complaints. This proposal is summarized by Catarina de Albuquerque, *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, UN Doc. E/CN.4/2004/44, 15 March 2004.

³⁷⁶ General Comment No. 3, *The nature of States parties obligations (art. 2, para. 1 of the Covenant)*, 14 December 1990.

for construing private triggering in the future. The same happens in the General Comment on the rights of older persons, which does not talk about private triggering, but uses an open-textured language when talking about discrimination,³⁷⁷ which leaves open the possibility for future construction of private triggering in terms of discrimination. The General Comment on the right to housing does not talk about the three different levels of obligations either, although it already mentions that the State is supposed to provide for a legal remedy against illegal actions carried out by landlords, either public or private.³⁷⁸ The General Comment on persons with disabilities mentions private triggering in the sense that the State still bears primary responsibility with fulfilling the obligations under the ICESCR, even if it delegates some of these functions to private groups.³⁷⁹

The General Comment on forced evictions also only mentions that States are the primary bearers of responsibility, and cannot be exempted from responsibility in case of delegation of its functions to private entities;³⁸⁰ however, it presents an innovation by affirming that States have the duty to provide for remedies against evictions perpetrated by private individuals.³⁸¹

The General Comment on the right to food³⁸² represents a new leap in terms of recognition of private triggering in the work of the CESCR. In this Comment, the CESCR for the first time mentions the three different duties emanating from each right (duty to protect, to promote, and to fulfill),³⁸³ which later became a formula repeated with only slight variations in all subsequent Comments. In this Comment, the CESCR said that violations can occur either “through the direct action of States or other entities insufficiently regulated by States”,

³⁷⁷ General Comment No. 6, *The economic, social and cultural rights of older persons*, 8 December 1995, para. 18.

³⁷⁸ General Comment No. 4, *The right to adequate housing (art. 11(1) of the Covenant)*, 13 December 1991, para. 17.

³⁷⁹ General Comment No. 5, *Persons with disabilities*, 9 December 1994, para. 12.

³⁸⁰ General Comment No. 7, *The right to adequate housing (art. 11.1 of the Covenant): forced evictions*, 20 May 1997, para. 9.

³⁸¹ *Id.*, at para. 11.

³⁸² General Comment No. 12, *The right to adequate food (art. 11)*, 12 May 1999.

³⁸³ *Id.*, at para. 15.

and pointed out as an example of such violation the States' "failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others".³⁸⁴ This idea pervades all levels of obligations under the ICESCR, being comparable to the achievements of CEDAW's General Recommendation No. 24,³⁸⁵ which was adopted in the same year as the CESCR's General Comment.

The General Comments on the right to education,³⁸⁶ to health,³⁸⁷ to water,³⁸⁸ equality between men and women,³⁸⁹ enjoyment of scientific or literary production by the author³⁹⁰ and the right to work³⁹¹ present the same structure. The Comment on the right to education, after mentioning the three levels of obligations,³⁹² and specifying the duties of the States towards violation perpetrated by third parties,³⁹³ mentions some instances in which violations perpetrated by private parties can give rise to State responsibility, such as when parents and employers stop girls from going to school.³⁹⁴

The Comment on the right to health mentions the three levels of obligations,³⁹⁵ specifies the obligation to protect,³⁹⁶ and mentions examples of violations by private parties triggering State responsibility.³⁹⁷ Interestingly enough, this General Comment also mentions that States have responsibilities extending beyond their national borders for the acts of private actors that violate the right to health in other countries, as long as the States are able to

³⁸⁴ *Id.*, at para. 19.

³⁸⁵ See *supra* note 361.

³⁸⁶ General Comment No. 13, *The right to education (article 13 of the Covenant)*, 8 December 1999.

³⁸⁷ General Comment No. 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000.

³⁸⁸ General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 20 January 2003.

³⁸⁹ General Comment No. 16, *The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2005.

³⁹⁰ General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1(c), of the Covenant)*, 12 January 2006.

³⁹¹ General Comment No. 18, *The right to work*, 6 February 2006.

³⁹² General Comment No. 13, *supra* note 386, at para. 46.

³⁹³ *Id.*, at para. 47.

³⁹⁴ *Id.*, at para. 50.

³⁹⁵ General Comment No. 14, *supra* note 387, at para. 33.

³⁹⁶ *Id.*, at para. 35.

³⁹⁷ *Id.*, at para. 51.

influence these actors by their own internal legal and political means, “in accordance with the Charter of the United Nations and applicable international law”.³⁹⁸ Although this seems to refer to multinational corporations,³⁹⁹ the open language of the Comment leaves open the door for future developments. The same concept is adopted in the General Comment on the right to water, under a more sophisticated construction.⁴⁰⁰

The General Comment on the right to water also presents another new feature also present in the General Comment on the equality between men and women:⁴⁰¹ when talking about the content of the duty to protect, the CESCR includes privatized services,⁴⁰² which until then were a separate category. The General Comment on the benefits owed to authors also adds to the formulation of private triggering by the CESCR, by affirming, in the part relative to obligations other than States Parties’, that States, even though being the only ones ultimately held accountable for violations of the ICESCR, should consider regulating the responsibility of the private sector.⁴⁰³ The same reasoning is repeated in the General Comment on the right to work,⁴⁰⁴ and suggests a positive move towards internal accountability of private triggering, even though it still falls short of a recommendation for the adoption of national measures to address human rights violations perpetrated by private actors.

The evolution of the treatment of private triggering by the CESCR is noticeable, and is inclined towards expanding private triggering to all the rights protected by the Covenant. May the optional protocol ever come into existence, and the CESCR start accepting individual complaints, States will be faced with a very high standard relative to

³⁹⁸ *Id.*, at para. 39.

³⁹⁹ For a discussion on the role of multinational corporations in the violation of human rights, *see supra* Chapter I.A.

⁴⁰⁰ General Comment No. 15, *supra* note 388, at para. 33.

⁴⁰¹ General Comment No. 16, *supra* note 389, at para. 20.

⁴⁰² General Comment No. 15, *supra* note 388, at para. 23.

⁴⁰³ General Comment No. 17, *supra* note 390, at para. 55.

⁴⁰⁴ General Comment No. 18, *supra* note 391, at para. 52.

Economic, Social and Cultural Rights generally, not only with respect to their obligation to provide for remedies for violations perpetrated by private parties, but even with the possibility of being held responsible internationally for failing to prevent such violations in the first place.

F) The Committee on the Rights of the Child

The Committee on the Rights of the Child (CRC) was created by the Convention on the Rights of the Child, the most widely ratified UN human rights treaty to date.⁴⁰⁵ Much of the language of the Convention on the Rights of the Child refers to responsibilities of the State and also responsibilities of private actors, including society as a whole. This does not, however, imply that the State is relieved from its duty as the primary responsible for the implementation of the Convention, either by negative or positive measures.

Positive obligations are mentioned in General Comment No. 6, but not in the sense of private triggering.⁴⁰⁶ However, in General Comment No. 5, relative to general measures of implementation,⁴⁰⁷ the CRC is very clear in pointing out that privatization of childcare services does not exempt the State from its obligation to protect the rights of all children within its territory.⁴⁰⁸ This refers to the fourth category of private triggering I outline, since the privatization of State functions is dealt with by the rules of public international law of State responsibility.⁴⁰⁹ The same reasoning concerning the delegation of

⁴⁰⁵ *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990. Number of parties as of March 2007: 193. This Convention is also known by the acronym CRC. In this paper, however, “CRC” will be used to refer to the Committee.

⁴⁰⁶ See General Comment No. 6, *Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2005, para. 13.

⁴⁰⁷ General Comment No. 5, *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), 27 November 2003. Also discussed in ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS...*, *supra* note 25, at 322-4.

⁴⁰⁸ General Comment No. 5, *supra* note 407, at para. 44.

⁴⁰⁹ See *supra* Introduction.

State functions to private entities is referred to in General Comment No. 7, regarding services for early childhood development,⁴¹⁰ and abuse and neglect of children.⁴¹¹

The situation of neglect is explored in further detail in General Comment No. 8, dealing with corporal punishment of children, in which the CRC identifies several contexts in which corporal punishment is perpetrated in private contexts, such as the school, home and family, and situations of child labor,⁴¹² and determines that the adoption of measures to prevent perpetration of these violations is “an immediate and unqualified obligation of States parties.”⁴¹³ In this Comment the CRC moves from contexts of attribution of responsibility under general rules of public international law into the more specific area of private triggering.

General Comment No. 9, on the rights of children with disabilities,⁴¹⁴ however, takes on a different tone when analyzing private triggering. Even though the CRC recognizes instances of perpetration of human rights violations by private actors,⁴¹⁵ and says that States should generally provide for remedies for violations of the rights of children with disabilities,⁴¹⁶ the General Comment seems to fall short of making a clear statement on private triggering. The CRC only implies private triggering when referring to privatization of services, and only mentions the responsibility of the State to oversee that funds are allocated for children with disabilities;⁴¹⁷ it only “urges” States to take measures against infanticide in certain traditional communities;⁴¹⁸ and it also only “urges” States to take measures to prevent

⁴¹⁰ General Comment No. 7, *Implementing child rights in early childhood*, 20 September 2006, para. 32.

⁴¹¹ *Id.*, at para. 36(a).

⁴¹² General Comment No. 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (arts. 19; 28, para. 2; and 37, inter alia), 21 August 2006, para. 12.

⁴¹³ *Id.*, at para. 22.

⁴¹⁴ General Comment No. 9, *The rights of children with disabilities*, 29 September 2006.

⁴¹⁵ *Id.*, at para. 8.

⁴¹⁶ *Id.*, at para. 9(b).

⁴¹⁷ *Id.*, at para. 20.

⁴¹⁸ *Id.*, at para. 31.

abuse and violence against children with disabilities in schools and other care-giving contexts.⁴¹⁹

Even though the Convention on the Rights of the Child is the most widely ratified universal human rights instrument under the UN, and it has in other General Comments adopted a firm position with regard to private triggering, this particular General Comment uses a recommendatory language only, falling short of indicating that private triggering can happen in some contexts, rather just identifying situations in which private individuals violate children's rights and "urging" States to take measures, but never really saying they are responsible under the Convention for the harm suffered by children. This seems to be a step back in the recognition of private triggering in the context of this specific treaty body, what is particularly regrettable in light of its wide participation.

⁴¹⁹ *Id.*, at para. 43.

IV – THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE GENOCIDE CASE AND PRIVATE TRIGGERING

In the Genocide Case,⁴²⁰ the International Court of Justice was asked to determine whether Serbia was responsible for a violation of the Convention for the Prevention and Punishment of the Crime of Genocide against Bosnian Muslims. The claims from each of the parties, as well as the factual background are extremely complex, and it is not my intention here to do a thorough analysis of the case. The crucial part for the topic I am analyzing is chapter IX of the Judgment, in which the Court analyzes the alleged responsibility of Serbia for breaching its obligations to prevent and punish genocide.

In other words, what the Court is inquiring, after determining that the actions perpetrated against Bosnian Muslims amounted to genocide,⁴²¹ but that they were not perpetrated by the Serbian State or any entity under its control (using the test developed in the Nicaragua case),⁴²² is whether Serbia can still be held in breach of the Genocide Convention for failing to prevent or punish genocide, which, according to many of the individual opinions in the case, is the only real obligation created by the Genocide Convention.⁴²³

⁴²⁰ *Supra* note 17.

⁴²¹ *Id.*, at para. 297.

⁴²² *Id.*, at para. 395. This position was criticized in the *Dissenting Opinion of Vice-President Al-Khasawneh*, under the argument that the threshold of control in *Nicaragua* was higher because the objective of commission of international crimes was not the common objective of the United States and the Contras. The common objective was the overthrowing of the Nicaraguan government, which was achievable without the commission of international crimes. On the other hand, when the commission of international crimes is a part of the common objectives, the threshold should be lower (para. 39). He said that, when the State and the non-State actors share a common ideology and there is a unity of goals and ethnicity, the test of effective control is not necessary (para. 36). Alternatively, he says that the test of control is variable, or context-sensitive, referring to ICTY precedents such as *Celebici* and *Tadić* (para. 37).

⁴²³ See *Joint Declaration of Judges Shi and Koroma* (concerned with the fact that to find a State responsible for the commission of acts of Genocide would be inconsistent with the purpose of the Genocide Convention, which is to punish individuals, and also because the criminal responsibility of States is not a well-settled rule of international law); *Separate Opinion Judge Owada* (arguing that direct responsibility cannot be found for the crime of Genocide, rather only indirect responsibility, what I refer to as private triggering); and *Separate Opinion Judge Tomka* (raising serious doubts as to whether Article IX of the Genocide Convention, a jurisdictional provision and the only one mentioning the possibility of State responsibility for genocide, can be

The Court starts its analysis by expressing that although connected, these are two distinct obligations, to be considered separately.⁴²⁴ As to the obligation to prevent genocide, the Court makes four general introductory remarks. First of all, the Court says there are several international instruments other than the Genocide Convention which determine the duty to prevent, and the content of such duty varies from instrument to instrument, depending on the nature of the acts prohibited by the instrument. However, the Court's intention is not to establish a general jurisprudence applicable to all instruments which contain a duty to prevent; rather, the decision of the Court is only valid for the Genocide Convention.⁴²⁵

Secondly, the Court affirms that the duty to protect is an obligation of conduct, and not of result, which can be fulfilled if the State employs "all means reasonably available" to prevent genocide. This is translated into the notion of "due diligence", which, for its assessment in each case, requires the consideration of some parameters, the most important of which (and the only one the Court really mentions or analyzes) is the capacity of the State to actually influence the actions of persons committing or likely to commit genocide, a capacity depending on the political strength of the State towards these people and the geographical distance between the State and the place where genocide is being perpetrated.⁴²⁶

In third place, the State can only be held responsible for failure to prevent genocide if genocide has really happened. This means, for the case, that the Court will only

used as a mechanism to find State responsibility for the commission of acts of genocide. He, however, construes the possible different meanings of "responsibility" in the context of Article IX, and finds that it can mean that the State is to bear the consequences of a genocide committed by a private party, under rules of attribution found in the international law of State responsibility). This position of Judge Tomka, in the sense that criminal responsibility of legal entities is not recognized under international law, is supported and further explained in the *Separate Opinion of Judge Kreća*.

⁴²⁴ *Genocide case*, *supra* note 17, at para. 425.

⁴²⁵ *Id.*, at para. 429.

⁴²⁶ *Id.*, at para. 430.

examine Serbia's conduct relative to the Srebrenica events, the only acts the Court considered amounted to genocide.⁴²⁷

Fourthly, the Court differentiates between “failure to prevent genocide” and “complicity in genocide”. There are two main differences: (1) while complicity means a breach of a negative obligation, the obligation not to perpetrate genocide, the duty to prevent is a positive obligation; and (2) an accomplice must support the perpetration of genocide with full knowledge of the facts, while this is not required to engage the duty to prevent.⁴²⁸

In the application of these legal considerations to the facts, the Court found that: (1) the FRY was in a privileged position to influence the actors committing genocide;⁴²⁹ (2) there were two orders of provisional measures issued by the ICJ that imposed very specific obligations of preventing genocide upon the FRY;⁴³⁰ and (3) that it was very unlikely that authorities in Belgrade did not know of the imminence of genocide in Srebrenica.⁴³¹ For all these reasons, because even though the FRY had the privileged position, the specific obligation and the knowledge, and still did not do anything that could at least have mitigated the genocide, Serbia was held responsible for violating its duty to prevent genocide.⁴³²

One of the individual opinions raised doubts as to the existence of the duty to prevent. Judge *ad hoc* Kreća, in his Separate Opinion, generally froze the meaning of the Genocide Convention at the moment of its approval, in 1948.⁴³³ By doing this, Judge *ad hoc* Kreća found a gateway to construe not only the meaning of the language of the Convention, but also of its very purpose and underlying principles, to understandings dating back to the

⁴²⁷ *Id.*, at para. 431.

⁴²⁸ *Id.*, at para. 432.

⁴²⁹ *Id.*, at para. 434.

⁴³⁰ *Id.*, at para. 435.

⁴³¹ *Id.*, at para. 436.

⁴³² *Id.*, at para. 439.

⁴³³ Judge Kreća affirms, for example, that “[t]here is not need to say that the progressive development [of law concerning genocide], achieved particularly in the jurisprudence of two *ad hoc* tribunals, is irrelevant *in casu*, for in disputes such as this the Court’s task is to apply the law of genocide as established by the Convention.” (para. 108). He qualifies the jurisprudence of the ICTY as a progressive development of the Genocide Convention, rather than its application, and therefore discards the ICTY’s precedents (para. 109).

first half of the twentieth century. In this line he affirms that there is no duty to prevent, since this is not a purpose of criminal law, and being the Genocide Convention a norm of criminal law, it cannot prevent a fact, as criminal laws operate *post factum*. The duty to prevent genocide is thus only “a social, moral, even metaphysical duty”, having no legal force.⁴³⁴ Judge *ad hoc* Kreća goes further and says that, even if one admits that there is a duty to prevent genocide as a matter of a peremptory norm, the fact that the majority of the ICJ considered the duty to prevent to be an obligation of means rather than of result is inconsistent with the alleged peremptory character of the norm, thus raising doubts as to the validity of the obligation.⁴³⁵

As to the obligation to punish genocide,⁴³⁶ the Court noted that the genocide in Srebrenica was not committed in Serbian territory, and therefore no obligation derived from the Genocide Convention’s specific duty to punish genocide in the State’s domestic courts, which only permitted, but not required, extraterritorial exercise of jurisdiction.⁴³⁷ However, when analyzing the duty to cooperate with an international tribunal contained in the Genocide Convention, the Court said that the ICTY constituted an international tribunal for the purposes of the Genocide Convention,⁴³⁸ and that Serbia had accepted its jurisdiction by

⁴³⁴ *Separate Opinion of Judge ad hoc Kreća*, para. 113.

⁴³⁵ *Id.*, at para. 118. Judge *ad hoc* Kreća’s strategy in his separate opinion seems to be that, by making it a separate opinion, rather than a dissenting, he would be attempting to give more credence to his reasoning, as it is parallel to the majority’s, rather than opposed to it. However, what he in fact does is deconstruct the argumentation of the majority opinion, without reaching any significant conclusion, since the obvious conclusions that would emanate from his reasoning would amount to him becoming a dissenter. By deconstructing the majority’s opinion in an opinion that is at first glance only in consonance with the majority’s conclusion undermines the overall credibility of the opinion not only to the case at hand, but also as a precedent and statement of current international law. However, because to me Judge *ad hoc* Kreća’s opinion is a dissent in disguise, I would rather give his opinion this weight, instead of the greater weight usually attributed to separate opinions.

⁴³⁶ Judge Kreća’s opinion notes that the Court overlooked the difference between a duty to prosecute, and a duty to punish. According to him, to interpret the “duty to punish” within the Genocide Convention amounts to a violation of the presumption of innocence (para. 130). This critique resonates in the context of a literal interpretation of the wording of the Genocide Convention, but is inconsistent with the meaning given to this expression in the context of further developments in the law regarding genocide, which he rejects.

⁴³⁷ *Genocide case*, *supra* note 17, at para. 442.

⁴³⁸ *Id.*, at para. 445.

virtue of the Dayton Agreement⁴³⁹ and the mere fact of membership to the United Nations.⁴⁴⁰ Serbia had therefore also failed with its duty to punish genocide.⁴⁴¹

This judgment implies recognition by the highest judicial body of the United Nations, and consequently one of the greatest international legal institutions in the world, that actions of non-State actors can engage the responsibility of the State under certain conditions. In the case the ICJ relied on a literal interpretation of the Genocide Convention, as it relied on its express language to find an obligation of States parties to prevent and punish genocide.

Such has not been the case in many of the treaties examined in previous chapters, as the great majority simply imposes upon States a general obligation to protect the human rights of people within their territories. In this sense, the judgment represents a conservative approach to private triggering adopted by the ICJ. In furtherance, the ICJ uses a high threshold in its control test, developed in the *Nicaragua case* and embodied in the ILC Articles on State Responsibility, it did not find Serbia responsible for the perpetration of Genocide or other acts the Convention considers crimes, which would be the “substantive” provisions of the Genocide Convention, but rather of the failure to prevent and punish genocide.

This can be read as meaning that, because the Genocide Convention specifically imposes an obligation to prevent, this is the only that could be violated in the first place via private triggering in the first and second categories laid out in the introduction. This is the case also with the Convention Against Torture, mentioned by the ICJ when citing other instruments that foresee a duty to prevent, and it explains why, in *Hajrizi Dzemajl et al. v. Yugoslavia*,⁴⁴² the Committee Against Torture found there to be a violation of the duty to prevent torture. However, in that case, the CAT also found a violation of a substantive

⁴³⁹ *Id.*, at para. 447.

⁴⁴⁰ *Id.*, at para. 449.

⁴⁴¹ *Id.*, at para. 450.

⁴⁴² *Supra* note 294.

provision of the Convention Against Torture, making in this sense a more progressive interpretation of an instrument expressly foreseeing a duty to prevent (as a violation of this duty could bring along a violation of a substantive provision of the instrument) than the ICJ did with the Genocide Convention (by considering that a violation of the duty to prevent did not impute responsibility for the genocide in itself). Therefore, it can be said that the ICJ Judgment in the Genocide case represents a step forward in terms of private triggering in general international law, but a step back in terms of private triggering in international human rights law.

Especially if one considers the effect that ICJ decisions have in molding international law,⁴⁴³ this rather conservative decision, taken in apparent disregard of the vast jurisprudence of other bodies on the topic, can have a harmful effect in the development of private triggering. Even in the aspect of due diligence the Court seems to have adopted a generally conservative approach, by limiting a consideration of due diligence to a determination of whether the State could influence the private actors perpetrating the violations. Maybe if one reads this judgment's reasoning as being applicable only to circumstances in which the private actor is acting outside the territory of the State who could have exercised influence to prevent the perpetration (a situation mentioned and to some extent explored in some of the UN Treaty Bodies Recommendations and Comments seen above), this decision can have its application in future cases restricted.

⁴⁴³ See in this sense generally JOSÉ E. ALVAREZ, *supra* note 15, at 485-502.

CONCLUDING REMARKS

The notion that human rights are effective only in relations between the State and individuals is no longer accurate. The realities of a globalized world, imposing challenges of ever-increasing complexity upon lawmakers and lawyers has brought us to the realization that private actors violate the human rights of their fellow human beings. Human rights are justified for protecting certain values, and are particularly relevant in situations where there is a discrepancy of power between the parties, independently of who the stronger party is, a State or a private actor.

Until the end of last century, the stronger, oppressive party was the State. Nowadays, though, other individuals can invade one's personal sphere, and these invasions can be framed in terms of human rights. While it is still true that individuals who violate other individual's human rights are subject to municipal criminal law (such as laws criminalizing murder, rape, defamation, and so on), there is a new perception that sometimes internal accountability is not enough. Either because the State cannot provide for this accountability for being a failed State, or because it is simply unwilling to do so, the fact that human rights became such a central topic in today's world agenda made it possible for States to be brought before fora for international accountability for the way they handle internal human rights issues, even when those issues have nothing to do with the State directly.

Companies violate human rights because human rights are not necessarily their concern, what they primarily (and sometimes exclusively) are more often than not concerned with is their profit margins, regardless of what means are necessary for reaching optimum results. Insurgent groups believe that, in the cause of national liberation they are entitled to pillage, murder, rape and using children in wars these infants don't understand. Many men all

around the world think that, for the sake of their own benefit, which in some of their minds is the same as the benefit of their families, they are entitled to use women as a scapegoat for their frustrations, and use violence against them. The press thinks that, for the “greater good” of a scoop, they are entitled to do whatever it takes, even invade a person’s privacy and show it to the world, to get the news on the street.

It is often because private individuals, and not only the State, corroborate with Machiavelli’s assertion that the means justify the ends, that they violate human rights. Maybe because the State sees these ends as legitimate (foreign investment, a more thriving economy, an active and free press – which makes the economy prosper), or because it does not care (things that happen in the privacy of the home do not concern the public sphere), because it is easy to privatize a public service and not have to deal with the problems attached to it ever again, or even because the State is unwilling to negotiate with “rebels” and “dissidents” before the situation reaches the point of no return, it may do nothing to repeal, prevent or punish these violations.

And, because human rights have long stopped being only an internal affair, and are increasingly becoming more central in any international debate, the international community has started wondering whether the State should really be able to pretend not to see anything wrong. And it has started holding States accountable.

Regional human rights systems have started looking at these violations, which for some time were not of their concern, with new eyes. The European Court of Human Rights developed the concept that inherent to each right is something else: a right is not only a sphere of protection *from* the State, it is also a requirement of protection *by* the State. If the State failed with providing such protection, it could be held responsible before the international community, or, in the case of a regional system, before their neighbors.

The Inter-American system soon followed, as well as the African system, in embracing this conception, and regional systems started condemning States for allowing things to happen, or for not providing for a proper recourse after they had happened. They developed a wide jurisprudence according to each most of the human rights protected by their instruments can be violated by private parties and still trigger international State responsibility.

The “weaker” regional systems, that is, the Inter-American and the African systems, are generally more timid in using private triggering as their sole or most important *ratio decidendi*, preferring to use it as a subsidiary argument to complement other arguments indicating the responsibility of the State. This can be related to the need for affirmation of these systems, since they have not attained a membership equivalent to the total membership of the regional organizations in which they are inserted.

This reasoning was also adopted by the UN Treaty Bodies. While each instrument shows a different perspective on the topic, depending on the instruments they interpret and apply, all of them at some point seem to concede that private triggering is a possibility, a reality. These systems seem to complement each other in some aspects, such as in the example of torture, admissible under private triggering only in exceptional circumstances by the Committee Against Torture, but well received in the Human Rights Committee.

The regional and universal systems also seem to communicate amongst themselves in a very curious fashion. Although they do not very often refer to each other’s case law, much of the reasoning regarding private triggering is present in a great number of these bodies, such as the defenses of due diligence and margin of appreciation. Maybe the fact that States appear in many of these fora helps explain these transplants of ideas and concepts.

Being such the case, it is possible to try to formulate a general rule regarding private triggering. Whenever the acts of a private individual violate the human rights of someone, this person is entitled to redress. If such redress cannot be obtained in internal fora for any reason international bodies can entertain the dispute, and the responsibility of the State can be found if it is proven that the State failed to fulfill its positive obligations either in preventing the violation in the first place, or in providing a remedy for it. In furtherance, the actions of a private actor can be imputable to the State because the private entity aims at replacing the State totally, such as the case of insurgent movements, or performs the activities that would otherwise be performed by the State, such as private security companies.

This can give rise to the violation of both substantive and procedural rights protected by international instruments. The fact that this mechanism exists is very positive, as it gives international lawyers the possibility to try to remedy harm caused by individuals in what would otherwise be considered internal affairs, with no international oversight. But then again, this is the ultimate purpose of international human rights law in the first place: to provide international oversight to the way a State acts towards its citizens. If a State fails in protecting individuals against other individuals and non-State entities, then the State must be held accountable for not fulfilling with its duties as a State. Even from a Hobbesian point of view, the State exists to protect individuals against other individuals. Whether one agrees with Hobbes or not, the predicament that the State must protect its citizens is a core foundation of human rights law, and must be observed.

Not always, however, is this possible, as the State is not capable of providing full oversight and control over its citizens. This is not even desirable, at least from an Orwellian point of view. What is necessary is that the State acts with due diligence in all circumstances, and, if before an international forum it is determined that to require the State the protection the lack of which allowed the violation to happen in the first place would not

be proportional, so be it. The requirement of proportionality cuts both ways: on the one hand it may seem to protect the State from being held responsible for the acts of individuals, but on the other it is an important tool to prevent individuals from making claims of positive protection that, if accepted, would lead into a slippery slope that could result in a lack of autonomy, which is one of the most important values that human rights purports to defend in the first place.

In other instances, international bodies are just not well equipped to fully comprehend the particular instances of a given case. If such a situation presents itself, then it is permissible to invoke the margin of appreciation doctrine, under whichever name best suits the system analyzing the instant case. This prevents excessive international oversight that could in extreme situations lead States to denounce their international commitments. While it is important to have States to comply with their international obligations, this cannot be taken to extreme situations in which an international body would presume to understand the State better than itself. If this happens, the State may be compelled to withdraw from international human rights institutions, and, once the State is out, no more oversight can be done, which is ultimately a loss for the people the international institution meant to protect in the first place.

Even though private triggering is a good rule, it must be used with caution and moderation, as must other progressive doctrines in human rights law. But by no means should private triggering, already a reality in international human rights law, be disregarded.

The four categories I contended in the Introduction to form the corpus of private triggering jurisprudence seem to be very fluid and permeable, rather than file drawers into which each case can be put. This is not only the work of some of these bodies' lack of precision regarding the issue, but, most importantly, it is due to the complexity of the cases, that ultimately prevents such precision to a large extent. Human rights violations are usually

complex cases, affecting several rights which, by themselves even in a theoretical framework, are hardly seen as isolated from each other.

Recently, the International Court of Justice laid down a rather conservative decision on a case involving a massive and gross violation of human rights, the one the international community was first concerned about, as it adopted the Genocide Convention even before the Universal Declaration on Human Rights. By setting up a rigid test, the ICJ found that Serbia was responsible for not preventing genocide, although this did not entail responsibility for the genocide. This position, that a failure to prevent a violation, while it can be *per se* a violation of a “procedural” obligation (such as the obligation to provide the right to a remedy) has been in more recent human rights jurisprudence seldom used, and human rights bodies tend to see private triggering as a tool to engage State responsibility for the violation of substantive rights. While it is possible to construe the decision of the ICJ narrowly, and even the ICJ suggests that this should be the case to some extent, the repercussions could be damaging to this emerging corpus of international human rights jurisprudence. However, as these bodies more often than not tend to rely on their own jurisprudence for issues they have already been faced with, there is a good chance that the ICJ precedent will not stop or slow this evolution of international human rights law.

BIBLIOGRAPHY

ALAISTAR R. MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* (Oxford, Hart Publishing 2004).

AMNESTY INTERNATIONAL, *MAKING RIGHTS A REALITY: THE DUTY OF STATES TO ADDRESS VIOLENCE AGAINST WOMEN*, AI Index ACT 77/049/2004.

AMNESTY INTERNATIONAL, *RESPECT, PROTECT, FULFILL – WOMEN’S HUMAN RIGHTS: STATE RESPONSIBILITY FOR ABUSES BY “NON-STATE ACTORS”*, AI Index IOR 50/01/00.

ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (Oxford, Clarendon Press 1993).

ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* (Oxford, Oxford University Press 2006).

Antônio Augusto Cançado Trindade, *The Emancipation of the Individual from his Own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*, in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO: 1979-2004* [“THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A QUARTER OF CENTURY: 1979-2004”] 159 (San José, C. R., Corte Interamericana de Derechos Humanos 2005).

ANTONIO CASSESE, *INTERNATIONAL LAW* (Oxford University Press 2005).

Brice Dickson, *The Horizontal Application of Human Rights Law*, in *HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 59 (Angela Hegarty and Siobhan Leonard eds.).

Carlos Manuel Vázquez, *Sosa v. Alvarez-Machain and Human Rights Claims against Corporations under the Alien Tort Statute*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 137 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005).

Cecilia Medina Quiroga, *Las Obligaciones de los Estados bajo la Convención Americana sobre Derechos Humanos* [“The Obligations of States under the American Convention on Human Rights”], in *LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: UN CUARTO DE SIGLO: 1979-2004* [“THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A QUARTER OF CENTURY: 1979-2004”] 207 (San José, C. R., Corte Interamericana de Derechos Humanos 2005).

CESARE P. R. ROMANO, *THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS – SYNOPSIS CHART*, available at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (last accessed March 13, 2007).

Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in *HUMAN RIGHTS AND INTERNATIONAL*

TRADE 95 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005).

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Y. Sandoz, C. Swinarski and B. Zimmermann eds.) (ICRC / Nijhoff 1987).

ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti and Francesco Francioni eds.) (The Hague, Martinus Nijhoff Publishers 1997).

Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne – Cours General de droit international privé*, [Cultural identity and integration: the postmodern private international law] 251 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 11 (1995).

Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 29 (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi eds.) (Oxford, Oxford University Press 2005).

Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously, Rejoinder to Alston*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 845 (2002).

Ernst-Ulrich Petersmann, *Time for a United Nations “Global Compact” for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 621 (2002).

Francisco Rivera, *Inter-American Justice: Now Available in a U.S. Federal Court Near You*, 45 SANTA CLARA L. REV. 889 (2005).

Frank Haldemann, *Gustav Radbruch v. Hans Kelsen: A Debate on Nazi Law*, 18 RATIO JURIS 162 (June 2005).

Frédéric Sudre, *Les “obligations positives” dans la jurisprudence européenne des droits de l’homme* [“The ‘positive obligations’ in the European human rights jurisprudence”], in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE – STUDIES IN MEMORY OF ROLF RYSSDAL 1359 (Paul Mahoney, Franz Matscher, Herbert Petzold and Luzius Wildhaber eds.) (Berlin, Carl Heymanns Verlag KG 2000).

HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (Oxford University Press 2000).

HILARY CHARLESWORTH AND CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (Manchester, Juris Publishing 2000).

HOWARD CHARLES YUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (The Hague, Kluwer Law International 1996).

HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann and Daphne Barak-Erez eds.) (Oxford, Hart Publishing 2001).

HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed.) (The Hague, Kluwer Law International 1999).

HUMAN RIGHTS WATCH, "YOU'LL LEARN NOT TO CRY": CHILD COMBATANTS IN COLOMBIA (Human Rights Watch 2003).

HUMAN RIGHTS WATCH, A QUESTION OF SECURITY: VIOLENCE AGAINST PALESTINIAN WOMEN AND GIRLS (2006), *available at* <http://hrw.org/reports/2006/opt1106/opt1106web.pdf> (last accessed Nov. 27, 2006).

HUMAN RIGHTS WATCH, FACTS ABOUT CHILD SOLDIERS, *available at* <http://www.hrw.org/campaigns/crp/facts.htm> (last visited Nov. 26, 2006).

HUMAN RIGHTS WATCH, RECONCILED TO VIOLENCE: STATE FAILURE TO STOP DOMESTIC ABUSE AND ABDUCTION OF WOMEN IN KYRGYZSTAN (2006), *available at* <http://hrw.org/reports/2006/kyrgyzstan0906/kyrgyzstan0906web.pdf> (last accessed Nov. 27, 2006).

HUMAN RIGHTS WATCH, WHERE CHILD SOLDIERS ARE BEING USED, *available at* <http://www.hrw.org/campaigns/crp/where.htm> (last visited Nov. 26, 2006).

Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L. J. 309 (2004).

JESÚS GARCÍA TORRES AND ANTONIO JIMÉNEZ-BLANCO, DERECHOS FUNDAMENTALES Y RELACIONES ENTRE PARTICULARES: LA *DRITTWIRKUNG* EN LA JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL ["*Fundamental Rights and Relations among Private Parties: Drittwirkung in the Jurisprudence of the Constitutional Court*"] (Madrid, Civitas 1986).

JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (Oxford, Oxford University Press 2005).

Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* 143 (Dorinda Dallmeyer ed.) (1993).

Karen Engle, *Female Subjects of International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992).

Karen Engle, *Views from the margins: a response do David Kennedy*, 1994 UTAH LAW REVIEW 105.

Karin Lucke, *States' and Private Actors' Obligations under International Human Rights Law and the Draft UN Norms*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 148 (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi eds.) (Oxford University Press 2005).

Lech Garlicki, *Relations between Private Actors and the European Convention on Human Rights*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 129 (András Sajó and Renáta Uitz, eds.) (Eleven International Publishing 2005).

Lucien J. Dhooge, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3 (2003).

Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

MARCO GERARDO MONROY CABRA AND HERMES NAVARRO DEL VALLE, DESAPARICIÓN FORZADA DE PERSONAS [*“Enforced Disappearances of People”*] (Bogotá, Ediciones Libería del Profesional 2001).

Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701 (2004).

Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in THE EU AND HUMAN RIGHTS 553 (Philip Alston ed.) (Oxford University Press 1999).

MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS (Oxford, Hart Publishing 1998).

Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105 (2004).

Philip Alston, *Resisting the Merger and Acquisitions of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 815 (2002).

Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 93 (Dorinda Dallmeyer ed.) (1993).

REPORT OF THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION, available at <<http://www.news24.com/News24v2/ContentDisplay/genericFrame/0,,trc,00.html>> (last accessed May 24, 2007).

Rhoda Howard, *Group Versus Individual Identity in the African Debate on Human Rights*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES (Abdullah An-na-im and Francis Deng eds.) (1990).

Sir Basil S. Markesinis, *The Applicability of Human Rights as between individuals under German Constitutional Law*, in ALWAYS ON THE SAME PATH 175, 182 (Basil S. Markesinis ed.) (Oxford, Hart Publishing 2001).

Stanley L. Paulson, *On the Background and Significance of Gustav Radbruch's Post War Papers*, 26 OXFORD JOURNAL OF LEGAL STUDIES 17 (2006).

Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443 (2001).

Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT'L L. 1 (2003).

T. Christian Miller, *Ecuador: Texaco Leaves Trail of Destruction: As ChevronTexaco Faces a Major Lawsuit, Evidence Portrays a Company and a Nation that for Years Showed Little Concern for the Environment*, L. A. TIMES, Nov. 30, 2003, available at <http://www.corpwatch.org/article.php?id=9249> (last visited November 25, 2006).

Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009 (2003).

THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM (András Sajó and Renáta Uitz eds.) (Eleven International Publishing 2005).

Theo van Boven, *Non-State Actors: Introductory Comments [1997]*, in HUMAN RIGHTS FROM EXCLUSION TO INCLUSION: PRINCIPLES AND PRACTICE: AN ANTHOLOGY FROM THE WORK OF THEO VAN BOVEN (F. Coomans, C. Flinterman, F. Grünfeld, I. Westendorp and J. Willems eds.) (Kluwer 2000).

Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi, *Introduction*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 1 (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi eds.) (Oxford, Oxford University Press 2005).

VINCENT ORLU NMEHIELLE, THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS (2001).