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United Nations

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HUMAN RIGHTS VIOLATIONS ARISING FROM CONDUCT OF NON-STATE ACTORS

Jan Arno Hessbruegge*

INTRODUCTION

From their humble beginnings in the Magna Carta of 1215 to their official birth in the Déclaration des droits de l’homme et du citoyen of 1789 and thereafter, human rights movements concerned themselves with curbing abuses by powerful states and their rulers. Today, states increasingly share their power with international organizations and, perhaps even more importantly, with non-state actors. It has been argued that the end of the Cold War not only shifted the balance of power between states, but had wider repercussions on the order created by the 1648 Peace of Westphalia – an order which designated the state to be the primary source of power in international politics and law.¹ This wider power shift can be characterized as a “medievalization” of international relations. The Westphalian order, consisting of one layer of states, is increasingly replaced by a multi-layered system similar to the feudalist medieval European empires, in which power was distributed among various layers of noblemen with the emperor having only partial control over his lands.² Multinational corporations, strengthened by free trade and privatization, achieve annual turnovers that dwarf the gross domestic product of transitional and smaller developed countries³ and are capable of abusing their economic power. Transnational networks of

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² Id. at 61.
³ According to a 2000 study comparing corporate sales and country gross domestic products, 51 of the 100 largest economies in the world are corporations and only 49 are countries. “General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan.” Sarah Anderson & John Cavanagh, Institute for Policy Studies, Top 200: The Rise of Corporate Global Power 3 (2000), available at http://www.ips-dc.org/downloads/Top_200.pdf.
non-governmental organizations (NGOs) force countries to adopt new rules of international law such as those embodied in the Ottawa Treaty against Landmines.\(^4\) Armed non-state groups control territory that failed states left for the taking. Transnational mercenary firms combine the power flowing from the barrel of a gun with their business muscle.\(^5\)

The most startling and horrifying assertion of power by a non-state actor in recent times, the attacks of September 11, 2001, have caused states to attempt to reassert their power against international organizations and non-state actors. Yet, it is uncertain whether this attempt will be successful. After all, in reaction to the attacks of September 11, 2001, the United States once again enlisted non-state actors - the various factions known as the Northern Alliance - to conduct the ground operations against the Taliban government and Al-Qaeda in Afghanistan. This "outsourcing" of war into the non-state realm has continued in Iraq, where some tasks that have traditionally been the prerogative of the military are now being fulfilled by private entities contracted by the Pentagon.

This paper addresses the issue of whether, and to what extent, the conduct of non-state actors (i.e. their actions or omissions) may give rise to violations of international human rights law as it presently stands.\(^6\) As it is used in this paper, the term "non-state actor" refers to all actors operating at a sub-state or transnational level: individuals, corporations, armed groups (e.g. insurrectional movements) and other organized entities, with the exception of intergovernmental organizations.\(^7\) The issue addressed by this paper is not a new one, but harkens back to the historical origins of human rights. After all, one of the first popular human rights movements was the anti-slavery movement, which strived against the holding and trading of human beings by private persons. Another powerful transnational humanitarian movement of the early 19th century was directed against the societal practice of Suttee (or Sati), according to which Indian widows were ex-


\(^6\) For models outlining how human rights ought to address non-state actors de lege ferenda, see, e.g., David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. INT’L L. 931 (2004).

\(^7\) The question of whether international intergovernmental organizations have human rights responsibilities (e.g. when conducting peacekeeping missions) is of great practical relevance but beyond the scope of this paper.
pected to commit suicide by throwing themselves on their husbands' burning funeral pyres. Today, the continuing shift of power into the non-state sphere makes the issue of how the actions of those within that sphere will be treated, one of the most critical human rights matters of our time.

An example may illustrate the various facets of the issue. A United Nations (UN) report of 2002 found that the Northern Alliance used child soldiers to conduct their armed operations against the Taliban regime in Afghanistan.\(^8\) Article 24 of the International Covenant on Civil and Political Rights (ICCPR) grants every child the "right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."\(^9\) Such measures include an obligation "to ensure that children do not take a direct part in armed conflicts."\(^10\) Has international human rights law therefore been breached? If it has been breached, by whom? Has it been breached by the United States, a party to the ICCPR, because the United States supported and collaborated with the Northern Alliance in the military campaign against the Taliban regime? Perhaps the state of Afghanistan, also a party to the ICCPR, breached it because Northern Alliance leaders now occupy positions in the new government of Afghanistan? Did the Northern Alliance factions themselves (or their individual members) breach human rights law because they form part of Afghanistan's society, which is also addressed by ICCPR Article 24?

Would anything change if any of the said states had been a party to the 2000 Optional Protocol to the Convention on The Rights of the Child on the Involvement of Children in Armed Conflict? The Protocol not only outlaws the use of child soldiers by states, but also sets forth in Article 4:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal


Part I of this paper discusses whether non-state actors themselves are bound by human rights law. While the texts of existing major human rights treaties generally do not create direct obligations for non-state actors, such obligations are emerging in international customary law for armed groups serving as the \textit{de facto} governing body in a territory and for non-state actors that become complicit in states' human rights violations. In addition, the conduct of supposed "private" actors can be attributed to a state, and thus give rise to human rights violations, more often than one would expect (Part II.1). Furthermore, states have an obligation to protect individuals and groups from other non-state actors with due diligence, by preventing or at least reacting to certain non-state conduct (Part II.2). These diagonal obligations on states must be distinguished from true horizontal obligations between non-state actors, but they can produce equivalent results, provided that states remain capable of fulfilling them.

While the existence of these diagonal obligations is now generally accepted, international jurisprudence has not yet developed a formula that clarifies which human rights give rise to diagonal obligations. This paper seeks to fill this jurisprudential gap by introducing a distinction between existential and social goods rights. The state may not consciously abstain from protecting existential human rights against private harm unless there are countervailing rights that must be respected. Conversely, human rights guaranteeing access to social goods, and fair distribution thereof, only have to be protected against some forms of non-state conduct, because a free society accepts and is based on competition for social goods.

It should be noted that this paper deals with human rights law and, to a lesser extent, with international criminal law, but not with international humanitarian law (or the law of armed conflict, as it is also known), which has long accepted that non-state actors have obligations towards individuals. International humanitarian law must not be mistaken for a human rights law of armed conflict. Whereas human rights law derives its philosophical justification from the rights holder's qualities as a human being, humanitarian law results from expectations of chivalry and humane compassion leveled against the duty holder. Even though human rights values
increasingly permeate international humanitarian law, crucial differences continue to exist. Whereas human rights law is universal, for instance, the protection offered by international humanitarian law is generally limited to the opponent’s soldiers and civilians.

I. NON-STATE ACTORS AS DUTY-HOLDERS IN INTERNATIONAL HUMAN RIGHTS LAW

In the public discourse, a variety of actors are routinely branded as human rights violators: dictators, exploitative transnational corporations, terrorist groups and abusive husbands, to name a few. Yet, are any or all of these non-state actors actually capable of violating human rights law? Who is bound by international human rights law?

A. The Jurisprudential Debate

In the human rights context, three dimensions of rights-duty relationships can be imagined:

- **Vertical Obligations**: The state (S) has an obligation to do or not to do X in its dealings with a non-state actor (N), because N can invoke a human right against S.
- **Diagonal Obligations**: The state has an obligation to protect one non-state actor (N₁), ensuring that another non-state actor (N₂) does or does not do X to N₁, because N₁ can invoke a human right against the state.
- **Horizontal Obligations**: N₁ must do or not do X to N₂, because N₂ has a human right corresponding to an obligation of N₁.

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Human rights have primarily been associated with the first dimension of vertical obligations, probably because they were first publicly promulgated

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against the backdrop of struggles against oppressive states. The French *Déclaration des droits de l'homme et du citoyen* was a reaction to the absolutism of the *ancien régime*. The mentioning of "unalienable Rights" in the American Declaration of Independence was an expression of the desire to build a country that distinguished itself from the oppressive, colonial rule of the British monarchy.

Raday notes that states are singled out as the addressee of human rights obligations because of the absolute socio-economic and legal power they wield over the individual in the absence of legal restraints. This power stems from the state's authority to make binding law. Ostensibly, some non-state actors (e.g. certain trade associations or international sports federations) also engage in practices of norm-setting. However, state law distinguishes itself from these practices in that it is ultimately backed up by the legitimate use of factual power. The individual is subjected to the state's power by way of legal sanction regardless of his consent. The state courts are the first and only jurisdiction which have legal authority to check the use of state power. On the other hand, private socio-economic power is subject to additional mechanisms of legal control, even where it is factually overwhelming. As a result, the balance of power between the state and the individual is, by definition, predetermined, whereas the balance of power between non-state actors is subject to change. Today's bully might become tomorrow's victim.

The state's authority to make binding law also puts it in a unique position, because it can generate revenue by levying taxes and other fees. This allows the state to obtain the resources needed to fulfill cost-intensive human rights obligations, such as guaranteeing socio-economic rights or the right to a fair trial. The state can also use its taxing power to influence areas of life that are generally intractable to legal commands (social attitudes, for instance), by redistributing resources from disfavored to favored causes or groups without a cost to the state itself.

Critics of the human rights orthodoxy would like to see that human rights are also applied horizontally between non-state actors, turning them into human rights duty holders (in addition to the state). They point out the enormous power that certain non-state actors have accumulated. They argue that the individual deserves to be protected from such power as much as from the power of the state. Feminist critiques sharpen this point by argu-

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14 *The Declaration of Independence* para. 2 (U.S. 1776).
16 *Id.* at 109.
17 *See, e.g.*, Kinley & Tadaki, *supra* note 6, at 933.
ing that the state/non-state divide is based on gender bias.\textsuperscript{18} It is argued that the "men's sphere" is the public world, while the "women's sphere" tends to be the private world of family and domestic life. In the men's sphere human rights apply; in the women's sphere they do not. A solely vertical application of human rights protects men that suffer state-sponsored torture, while it does not protect women that endure equally horrendous suffering in the form of domestic violence.

In addition, it is argued that state functions are becoming increasingly dispersed and shifted to the non-state sector, which makes it hard to draw the line between state and non-state actions.\textsuperscript{19} However, recognizing the applicability of human rights to non-state actors does not solve the distinction problem. A denial of a human right by the state is always an act of oppression, because the state's absolute power is abused. Conversely, the frustration of human rights-relevant behavior by a non-state act does not necessarily constitute an abuse. It will depend on the distribution of power between the actors. If the goal of horizontal application is to check the accumulated socio-economic power of private actors, rather than to simply create rules of mutual self-restraint between private individuals, then one has to analyze the power relationship and determine whether one side's autonomy is threatened. The legal analysis is completely different than in the state-individual relationship, in which the power relationship is pre-determined.\textsuperscript{20} Hence, one still has to determine what belongs to the non-state sphere and what belongs to the state sphere.

A compromise between both viewpoints is the concept of diagonal obligations. Rather than creating direct obligations between non-state actors, diagonal obligations require states to protect one non-state actor from another in certain situations. It has been argued that this approach would be ineffective because its indirect nature makes the legal process too time consuming.\textsuperscript{21} Others argue that states retain too great a margin of appreciation under the diagonal approach.\textsuperscript{22} The latter, however, is actually an argument in favor of opting for the diagonal approach in the international context.


\textsuperscript{19} Dickson, supra note 13, at 67-70; see also Andrew Clapham, Human Rights in the Private Sphere 126-29 (1993).

\textsuperscript{20} Raday, supra note 15, at 109-10.


\textsuperscript{22} Id. at 66.
The purpose of international human rights treaties is not to limit a state’s policy choices, but to ensure that the policy eventually chosen still allows the individual to enjoy his basic freedoms and rights. Both horizontal and diagonal obligations are ultimately aimed at regulating relations in the non-state sphere. However, diagonal obligations leave it up to each state to choose how to fulfill its obligation. Different states may make different choices. International human rights norms may be directly applicable to individuals under one state’s domestic law, while another state may decide that the values embodied in international human rights should guide courts when interpreting norms of private law.\textsuperscript{23} Finally, a state can take the view that human rights norms do not affect obligations between non-state actors at all and instead fulfill its international obligations by adopting domestic statutes of a protective nature. International law ought to respect these different choices to the extent that states prove capable of fulfilling their diagonal obligations.

B. The Positive Law

International law permits the creation of binding human rights obligations for non-state actors. It is sometimes contended that individuals or corporations are not subjects of international law and therefore unable to bear rights or obligations in international law. Yet, this argument is putting the cart before the horse. Subject status results from rights and duties under international law, not vice versa. International intergovernmental organizations are limited subjects of international law. They have limited subject status because their competence extends only as far as their express or implied powers.\textsuperscript{24} By the same token, individuals and corporations attain partial subject status to the extent that international law endows them with rights or duties. An abstract study of whether a certain non-state actor is a


\textsuperscript{24} Cf. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 ICJ 93, ¶ 25 (July 8).
subject of international law, before moving on to explore the non-state actors specific obligations, is therefore redundant.\textsuperscript{25}

The Nuremberg Judgment authoritatively affirmed that the individual can and does have duties under international law:

\begin{quote}
[T]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized . . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.\textsuperscript{26}
\end{quote}

States are capable of creating such duties by way of an inter-state treaty that does not require the consent of the non-state actor.\textsuperscript{27} These obligations can not only be created for individuals, but also for group entities. Conventions on international maritime law, for instance, create such obligations for owners of ships.\textsuperscript{28} International humanitarian law places duties on certain

\begin{footnotes}


\end{footnotes}
armed groups, namely through Common Article 3 of the Geneva Conventions of 1949.\textsuperscript{29}

That there are no legal obstacles to the formation of horizontal human rights obligations does not mean, however, that such obligations do, in fact, exist. Apart from a few exceptions, human rights treaty law does not recognize horizontal human rights obligations for non-state actors. More significant exceptions emerge in customary human rights law. In addition, a framework of quasi human rights obligations is forming on the basis of international criminal law.

1. Horizontal Obligations Contained in Human Rights Conventions

Human rights conventions contain few horizontal obligations between non-state actors. Article 28 of the African Charter on Human and Peoples' Rights requires that "[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."\textsuperscript{30} Article 20 of the African Charter on the Rights and Welfare of the Child imposes duties on parents towards their children.\textsuperscript{31} ICCPR


\textsuperscript{31} African Charter on the Rights and Welfare of the Child art. 20 ¶ 1, OAU Doc. CAB/LEG/24.9/49 (July 1, 1990).

Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development [of] the child and shall have the duty:

(a) to ensure that the best interests of the child are their basic concern at all times;

(b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and

(c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.
Article 24 is arguably another example.\textsuperscript{32} Article 4(1) of the Optional Protocol on Children in Armed Conflict, which constitutes somewhat of a hybrid between a humanitarian and human rights law norm, has already been mentioned.\textsuperscript{33} The wording — stating that armed groups "should not . . . recruit or use" children in armed conflict\textsuperscript{34} — leads one to wonder whether the provision creates a binding prohibition. The\textit{ travaux préparatoires} reveal that the ambiguity was intended. Some speakers argued that an inter-state treaty could not bind non-state parties.\textsuperscript{35} However, a proposal to relegate the issue to the preamble was rejected.\textsuperscript{36} It would suit the humanitarian object and purpose of the treaty if the prohibition was interpreted to be binding on non-state actors, especially since the Protocol’s preamble “recognizes the responsibilities” of armed non-state groups and condemns “with the gravest concern the recruitment, training and use” of children by such groups.\textsuperscript{37}

Beyond such isolated examples, treaty-based human rights law, as embodied in the six main international conventions and the three major regional treaties, does not create horizontal obligations between non-state actors. The wording of the treaties is unequivocal. State parties “respect,” “ensure,” “take steps toward achieving,” and “undertake” human rights obligations.\textsuperscript{38} That is not to say that human rights treaties do not affect rela-

\textit{Id.} \textsuperscript{32} ICCPR,\textit{ supra} note 9.

\textit{Id.} \textsuperscript{33} See Convention on the Rights of the Child in the Involvement of Children in Armed Conflict,\textit{ supra} note 11 and accompanying text.


\textit{Id.} \textsuperscript{35} Id. \$ 38.

\textit{Id.} Annex, at pmbl. para. 11.

tions in the non-state sphere. They clearly do, since they create diagonal obligations. But the treaty obligations themselves are only owed by states. A General Comment by the Committee on Economic, Social and Cultural Rights underscores the difference between a state’s legal obligations under international human rights law and consequential indirect responsibilities of non-state actors: “While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society – individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector – have responsibilities in the realization of the right to adequate food.” Some authors overlook this subtle but important distinction when they wrongly conclude from jurisprudence recognizing diagonal obligations of states, that non-state actors themselves have horizontal human rights obligations. Clapham, for instance, has suggested that the European Convention for Human Rights (ECHR) establishes direct obligations between individuals. The fact, he argues, that the Convention only provides for an


39 See infra notes 194-282 and accompanying text.


41 CLAPHAM, supra note 19, at 89-133. Professor Clapham has reaffirmed this position for human rights law in general in his course entitled Human Rights Obli-
action of individuals against states and not against other individuals (see ECHR Article 25) does not preclude the existence of obligations between individuals under the Convention.\textsuperscript{42} This is certainly right. International law routinely recognizes the existence of rights and obligations without offering a judicial forum in which to enforce them. However, his argument is still not convincing because there are no cases in which the European Court of Human Rights has recognized horizontal obligations between non-state actors contrary to the wording of ECHR Article 1, which only addresses "the High Contracting Parties."\textsuperscript{43} Clapham refers to a number of cases in which the Court has held that states have to adopt measures designed to protect non-state actors from one another.\textsuperscript{44} However, there is a difference between the contention that the ECHR creates direct legal duties between non-state actors and the Court’s position that states must at times step in and regulate relations between non-state actors. Whereas Clapham takes the view that the ECHR is horizontally applicable between non-state actors, the European Court of Human Rights only recognizes that states have diagonal obligations under the ECHR.\textsuperscript{45}

The Court’s interpretation is not undermined by ECHR Article 17, which states that “[n]othing in this Convention 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 set forth herein . . . .”\textsuperscript{46} It has been argued that ECHR Article 17 rests on the premise that private persons can breach human rights norms and thereby forfeit their own right. Moreover, some individual rights may be limited with regard to the rights of others.\textsuperscript{47} From these provisions, it is inferred that private persons must owe such rights to other private persons.\textsuperscript{48} However, these limitations on human rights do not exist because non-state actors owe each other obligations under the Convention. Rather, the limitations


\textsuperscript{42} \textit{Id.} at 91-92.

\textsuperscript{43} ECHR, \textit{supra} note 38, at art. 1.

\textsuperscript{44} CLAPHAM, \textit{supra} note 19, at 89 nn.3-4.

\textsuperscript{45} For references to the relevant case law, \textit{see infra} notes 219, 229-31 and accompanying text.

\textsuperscript{46} ECHR, \textit{supra} note 38, at art. 17.

\textsuperscript{47} \textit{See, e.g., id.} at arts. 8-11.

represent recognition of the fact that the state may find itself in a position of conflicting obligations, where it cannot protect one person’s right without limiting the rights of another. In the case of ECHR Article 17, the private person provokes this conflict of obligations and is therefore denied recognition of his right. In the other cases, the state is permitted to balance between protecting the right of one person, while maintaining respect for the rights of others, by giving one right precedence over another.49

Finally, one might also point to ECHR Article 13 in order to support the contention that the ECHR applies horizontally between non-state actors. The provision states: “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.”50 The passage can be interpreted as logically implying that not only persons acting in an official capacity, but also non-state actors can violate human rights. However, it might also be no more than a clarification that acts in an official capacity are subject to administrative and subsequent judicial review, which has not traditionally been the case in some common law jurisdictions.51

2. Emerging Horizontal Obligations under Customary Human Rights Law

The Universal Declaration of Human Rights (Universal Declaration) has at least partially attained the status of customary international law.52 If the Universal Declaration considers non-state actors to be human rights duty holders, then binding customary obligations arising from it could be regarded as binding on non-state actors as well. Two passages are often cited as proof that the Universal Declaration also creates human rights obligations for non-state actors.53 The Universal Declaration’s opening par-

49 See also WIESBROCK, supra note 38, at 38-40.
50 ECHR, supra note 38, at art. 13 (emphasis added). Cf. ACHR, supra note 38, at art. 25; ICCPR, supra note 9, at art. 2.3.
51 WIESBROCK, supra note 38, at 41-42.
53 See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, supra note 27, at 58-62. See also CLAPHAM, supra note 19, at 96 (noting also that the Declaration has to be interpreted in light of the Genocide Convention, which was adopted one day before the Declaration and explicitly prohibits individuals from partaking in genocide). Cf. Paust, supra note 48, at 811-15 (with references to regional human rights instruments as well).
agraph states that "every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedom and . . . to secure their universal and effective recognition and observance . . . ." Article 29(1) of the Universal Declaration gives everyone "duties to the community in which alone the free and full development of his personality is possible."

Neither of the two passages contain a compelling argument for the existence of horizontal human rights obligations. Article 29 makes reference to individual duties, but is silent on what exactly these duties are. It is also worth noting that the duties are owed "to the community," and not to specific rights holders. A study of the travaux préparatoires reveals that different drafters were thinking of different duties relating to diverse purposes, such as "loyalty to the State and to the United Nations," "share of common sacrifices," "obedience to law," "exercise of a useful activity," "willing acceptance of obligations and sacrifices demanded for the common good," and finally "respect [for] the rights of their fellow men." Given the lack of subsequent clarifying state practice, this ambiguous provision therefore does not offer sufficient proof that the Universal Declaration, and the customary law emanating from it, create horizontal human rights obligations.

The opening paragraph does not necessarily have to be understood to extend the obligations under the Universal Declaration to non-state actors either. It is equally conceivable that it tasks "‘every individual and every organ of society’" to strive to ensure that states continue to adhere to their international human rights obligations. After all, the Universal Declaration states quite clearly that "Member States have pledged themselves to achieve . . . the promotion of universal respect for and observance of human rights and fundamental freedoms . . . ."

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55 Id. at art. 29(1).
57 UDHR, supra note 54, at art. 29(1).
59 Rodley, supra note 56, at 305 (quoting UDHR, supra note 54).
60 UDHR, supra note 54, at pmbl. para. 6 (emphasis added).
a) The Emerging Duty Not to Become Complicit in Human Rights Obligations

The opening paragraph of the Universal Declaration can be drawn upon to support the view that non-state actors have derivative horizontal human rights obligations. Every individual and every organ of society has an obligation to promote the adherence of states to their human rights obligations. At a minimum, this entails that individuals and organs do nothing to detract from a state’s human rights adherence. Therefore, non-state actors can be said to have a duty not to cooperate with states in a way that furthers the latter’s human rights violations. For instance, a company may have a duty not to collaborate in an oil exploration project with a state, if their joint venture would motivate that state’s security forces to commit grave human rights abuses.

Some international practices lend support to the proposition that the duty not to become complicit in human rights abuses has become customary international law. In three separate resolutions passed between 1982 and 1984, the UN Economic and Social Council requested companies to divest from South Africa in order not to support the Apartheid regime. Following a Commission of Inquiry’s report that Myanmar extensively used slave labor, the International Labour Organization (ILO) passed a resolution in 2000, which invoked Article 33 of the ILO Constitution for the first time in the organization’s 80-year history. Article 33 authorizes the ILO Governing Body to “recommend to the Conference such action as it may deem wise and expedient to secure compliance” with recommendations of an ILO Commission of Inquiry. In the Myanmar case, the Governing Body, earning approval from the International Labor Conference, recommended that “governments, employers and workers . . . review . . . the relations that they may have with [Myanmar] and take appropriate measures to ensure that [Myanmar] cannot take advantage of such relations to perpetuate or extend

63 I.L.O. CONST. art. 33
64 Id.
the system of forced or compulsory labor referred to by the Commission of Inquiry ... ."\(^{65}\)

In 1999, the UN General Assembly passed a Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.\(^{66}\) Unfortunately, the General Assembly missed the opportunity to specifically include a duty for non-state actors not to become complicit in human rights abuses. The Declaration only stipulates, rather lamely, that, "[e]veryone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms ... ."\(^{67}\) and

\[\text{individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.}\(^{68}\)

However, in the same year the UN started a major initiative aimed specifically at inducing corporations not to become complicit in human rights violations. In an address to the 1999 World Economic Forum, UN Secretary-General Kofi Annan challenged business leaders to join an international initiative, called the Global Compact, that would bring companies together with UN agencies, labor and civil society to support nine principles in the areas of human rights, labor and the environment. Hundreds of corpora-


\(^{67}\) Id. Annex, at art. 11.

\(^{68}\) Id. at art. 18.3.
tions have since accepted the nine principles. The second principle explicitly requires companies not to become complicit in human rights abuses by states.69

These corporate undertakings raise the interesting question of whether acceptance of obligations by non-state actors (e.g. those contained in the numerous existing codes of corporate conduct), can be taken into account in determining whether an obligation under customary international law exists. Underlying this is an even more fundamental issue. If non-state actors can create international obligations for themselves through their own conduct, they can lift themselves up by their own bootstraps to the status of subjects of international law. States will no longer be the gatekeepers that govern access to the international legal order. Nevertheless, conduct of non-state actors is one factor – though not the only one – that can be taken into account when ascertaining the existence of a rule of customary law.

According to Article 38 of the International Court of Justice (ICJ) Statute, customary law results from “general practice accepted as law.”70 The provision does not explicitly refer to state practice. In the Tadic Interlocutory Appeal, the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered the conduct of insurgents “instrumental in bringing about the formation of the customary rules at issue.”71 This precedent underscores the principle that self-imposed corporate commitments like the

69 See The Global Compact, The Ten Principles of the Global Compact, at http://www.unglobalcompact.org/content/AboutTheGC/TheNinePrinciples/10pr.pdf. This does not mark the first time that a group of corporations has made a formal undertaking not to cooperate with human rights abusers. In 1977, Leon Sullivan, a director of the General Motors Corporation, drew up a Statement of Principles for US Corporation Operating in South Africa. These Sullivan Principles stipulated, inter alia, that all workers should receive equal pay, there should be no segregation of workers’ facilities, corporations are required to secure black workers’ rights to freedom of association, and assure protection against victimization while pursuing and after attaining these rights. Cf. Economic Imperatives and Ethical Values in Global Business: The South African Experience and International Codes Today (S. Prakash Sethi & Oliver F. Williams eds., 2000); Christopher McCrudden, Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?, 19 Oxford J. Legal Studies 167 (1999).

70 Statute of the ICJ art. 38(1)(b).

71 Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 108 (Oct. 2, 1995). The ICTY considered the practice of the FMLN rebel movement in El Salvador and also agreements concluded by armed opposition groups as evidence of customary law. Id. ¶ 107.
Principles of the Global Compact can be taken into account if they are undertaken with a sense of binding obligation.

Finally, one can look at the United States jurisprudence under the Alien Tort Claims Act. The term "Alien Tort Claims Act" refers to a provision in the United States Judiciary Act of 1789, which establishes the district courts' original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations."\(^{72}\) This provision has been interpreted by United States courts as providing a cause of action under United States tort law, if a norm of international law has been breached. In 2002, the 9th U.S. Circuit held that non-state actors can be accountable for human rights violations, where they have acted in concert with state officials or with significant state aid.\(^{73}\)

b) **Emerging Human Rights Obligations of Armed Groups Governing Territory**

It has been noted above that states distinguish themselves from non-state actors by their power to create and enforce law.\(^{74}\) However, this distinction cannot be made with regard to one specific type of non-state actor: armed groups that have established durable control over a territory and the population living therein. A contemporary example is the Liberation Tigers of Tamil Eelam in Sri Lanka. These "non-state groups look and behave like would-be states . . . . In many cases, the only difference between states and non-state groups is international recognition."\(^{75}\) Their power flows not only from the barrels of their guns but also from the administrations that they have established to govern the population under their

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\(^{73}\) Doe v. Unocal Corp., 395 F.3d 932, 962-64 (9th Cir. 2002). UNOCAL has since announced that it intends to settle the case. Recently, the United States Supreme Court has curtailed the scope of the Alien Tort Claims Act to breaches of international law norms that are as definite and generally accepted as the 18th-century paradigms motivating the enactment of the statute (e.g. piracy). See Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). It is therefore doubtful what authority judgments of lower courts, which were handed down prior to that decision, still have.

\(^{74}\) See Raday, *supra* note 15 and accompanying text.

control. Within their realm of territorial control, they can issue binding orders that can, for all practical purposes, be equated to law. They can (and do) generate revenue by levying taxes and other fees. In other words, there is every reason to make customary human rights law fully applicable to these state-like groups, which would otherwise only be bound by the limited prescriptions of the law of internal armed conflict.76

Moreover, some international practices suggest that this position may have even attained the status of positive international law. When discussing atrocities committed in the Bosnian war, one member of the Human Rights Committee took the position that the Bosnian Serb authority that had control of a territory was bound by human rights law.77 This finding is supported by general Human Rights Committee jurisprudence. According to the Committee, human rights treaties are so-called "localized treaties." Their protection evolvs with the territory of the state party and continues to protect the people living therein, "notwithstanding change in Government of the State party, including dismemberment in more than one State or State succession."78 That is to say, human rights obligations bind the territory. As an insurrectionary movement takes control over territory and establishes an administration, it therefore automatically assumes the human rights obligations resting on the territory. A similar assumption underlies a 1989 report of the Special Rapporteur in Afghanistan that submitted: "The territorial sovereignty of the Afghan Government is not fully effective since some provinces of Afghanistan are totally or partly in the hands of traditional forces. The responsibility for the respect of human rights is therefore


77 Decision on State Succession to the Obligations of the Former Yugoslavia under the International Covenant on Civil and Political Rights (separate opinion Mullerson), Human Rights Comm., reprinted in 15 European Human Rights Reports 233, 236 (1992) ("Thus [the Bosnian Serbs] might be asked to explain how they complied with the Covenant, not as a successor State, but as an authority in control of a territory.").

This seemed to have been confirmed by a 1998 Security Council Resolution calling on "the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights . . . and to adhere to the internationally accepted norms and standards in this sphere." During the Somali Civil War "all parties in Somalia" were urged by the Human Rights Commission "to respect human rights and international humanitarian law pertaining to internal armed conflict." In a 2004 report, the UN Secretary-General drew attention to "human rights violations" by the Forces nationales de libération (FNL) in Burundi, even though this rebel group did not form part of the transitional government of Burundi when the report was published.

3. Quasi-Human Rights Obligations Emerging from International Criminal Law

Beyond human rights law proper, a regime of non-state obligations similar to human rights norms is emerging on the basis of international criminal law. It has been stated that "[t]he Nuremberg Charter applied a customary international law of human rights in charging the Nazi war criminals, inter alia, with 'crimes against humanity' . . . ." Whereas Article 6(c) of the Nuremberg Charter still required state involvement in a crime against humanity, this is no longer a prerequisite for a crime against humanity, so long as the crime is systematically organized. Specific

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crimes against the human person, such as slavery, have never required state involvement. Therefore, non-state actors can commit these crimes. Yet, international criminal law still must not be equated with a human rights law that also applies to non-state conduct. First of all, its substantive scope is much narrower than human rights law in doing so. No dictator would have to fear prosecution under international law for shutting down every independent media outlet in his country, even though his state clearly violates human rights law in doing so.

Secondly, the legal consequences differ. Responsibility for a human rights violation entitles the victim to restitution, compensation or satisfaction. Both the European Court of Human Rights and the Inter-American Court of Human Rights can award reparations. Even though neither the ICCPR nor its Optional Protocol explicitly stipulate it, the UN Human Rights Committee has also recognized an obligation to make reparations. Conversely, violations of international criminal law have so far only resulted in accountability in the form of criminal punishment.

However, the legal consequences of an international crime more and more resemble the consequences of a breach of human rights law by a state. According to Article 75(2) of the Rome Statute, the International Criminal Court (ICC) may order a convicted person to give "reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Thus, one could imagine a situation where the Human Rights Committee charges a state involved in systematic slave raids to pay compensation to the victims, while the ICC orders the individual leaders of the slave raiding parties to do likewise. Article 75 of the Rome Statute reveals that a norm of international criminal law contains a primary and


88 Rome Statute, *supra* note 85, at art. 75(2).
secondary obligation. The primary obligation is the obligation not to engage in certain criminal conduct. The secondary obligation has traditionally been the duty to endure the criminal penalty. Now an additional secondary obligation is emerging under international customary law – the individual perpetrator’s duty to give reparations.

While the problem of differing legal consequences is therefore gradually fading away, international criminal law has a third limitation. Although, it has yet to be firmly established that it applies not only to individuals but also to other non-state actors.\(^9\) It has been asserted that multinational corporations have the same rights and duties under customary international law as natural persons, because they are legal persons.\(^9\) This assertion is logical, but so far only supported by limited international practice. The Nuremberg Charter provided that organizations could be declared criminal.\(^9\) The International Military Tribunal at Nuremberg eventually declared the leadership corps of the Nazi party, SS, SD, and Gestapo to be criminal organizations because they participated in war crimes and crimes against humanity.\(^9\) However, these declarations only had an auxiliary function. Their purpose was to facilitate the conviction of individuals for their membership in criminal organizations. The International Convention Against the Crime of Apartheid pronounces that parties to the convention must “declare criminal those organizations, institutions and individuals committing the crime of apartheid.”\(^9\) The 1998 Rome Conference considered a proposal to give the ICC jurisdiction over legal persons as well.\(^9\)

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\(^{89}\) See, e.g., RATNER & ABRAMS, supra note 27, at 16 (finding that it remains unclear whether international criminal law creates obligations for groups and organizations).


\(^{91}\) Charter of the International Military Tribunal (The Nuremberg Charter) art. 9, Aug. 8, 1945, 82 U.N.T.S. 279.

\(^{92}\) See International Military Tribunal (Nuremberg), Judgment and Sentences, supra note 26, at 262, 266-67.


This has been cited as proof that the conference delegates accepted that international criminal law applies to legal persons. However, the proposal was eventually withdrawn.

4. Non-Binding Soft Law

Horizontal human rights obligations for non-state actors are also contained in a number of international instruments that are not legally binding (so-called "soft law"). There are, for instance, UN General Assembly declarations, which demand that no group or individual may discriminate on the ground of race or religious belief. Such declarations, even though they are not binding themselves, have normative value, because they can provide evidence to establish the existence of a rule of customary international law. Nevertheless, said anti-discrimination declarations do not represent binding customary law since there is no international consensus accepting their content as binding law (opinio juris). Instead, the international community refrained from including obligations for individuals in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) or the ICCPR even though the declarations had been passed several years before both treaties were adopted.

(The Court shall also have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.).


97 Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, ¶ 70 (July 8).

98 For the same reason the provision in the U.N. General Assembly’s Declaration Against Torture, according to which the Declaration is directed also at “other entities exercising effective power,” cannot also not be considered as binding custom-
For transnational corporations, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy sets out a number of non-binding horizontal human rights obligations. In addition, there are the Revised OECD Guidelines for Multinational Enterprises, which demand that multinational enterprises respect the human rights of those affected by their activities. Both instruments have remained ineffective, due at least in part to their toothless supervision mechanisms.

In order to create more effective, binding horizontal obligations, the UN presented the UN Code of Conduct on Transnational Corporations (UNCTC) in 1990. However, the Code was never adopted. Corporations harshly criticized it, feeling that their human rights obligations under the Code would have superseded those of governments. At the same time, developing countries' desire for foreign investment in the early 1990s superseded their interest in international regulation. The 1999 UN Development Program Human Development Report sought to revive the issue. In 2003, the UN Subcommission for the Protection of Human Rights picked up the ball by approving the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.


Id. Cf. Peter T. Muchlinski, Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD, in Liability of Multinational Corporations Under International Law, supra note 95, at 97.

It remains to be seen whether these Norms will form the basis for a fresh attempt to create binding corporate obligations or whether economic interests will once again prevail. The Human Rights Council has not endorsed the draft Norms though the former Commission on Human Rights requested the UN Secretary General to appoint a Special Representative on the issue of human rights and transnational corporations and other business enterprises.

II. RESPONSIBILITY OF STATES FOR CONDUCT OF NON-STATE ACTORS

In the Westphalian international order, states are the primary subjects of international law, holding rights and obligations. Created through instruments of international law, human rights obligations are based on this framework. These obligations rest first and foremost on states, which owe them *erga omnes* to all other states. Therefore, the law of human rights responsibility is doctrinally a mere sub-set of the law of state responsibility. Nevertheless, some international human rights lawyers still tend to regard their discipline as *sui generis*. This might be due to the fact that human rights norms seek to influence the relationship between the individual and the state, and not relations between states. However, this *sui generis* hampers the progress of human rights, as Meron has pointed out:

> [u]nfortunately, the principles of state responsibility have often remained terra incognita for human rights lawyers. This is a situation that must not be allowed to continue. By coupling human rights with the corpus of law governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness.

By viewing international human rights law in the context of general international law, a jurisprudence that has evolved over centuries becomes availa-
ble to a field of international law that is little more than half a century old. The question of when a state is responsible for acts that one non-state actor commits against another, has occupied international law since its inception, albeit not as one of human rights law. Instead, the question has been addressed by the law of responsibility for injuries to foreign nationals – a branch of law which has been characterized as one of the important predecessors to contemporary human rights law.109

Under what circumstances does conduct of a non-state actors cause a state to violate its human rights obligations? Two broad principles can be distinguished:

1. A state is responsible for the conduct of individuals exercising the state’s power and authority, since these acts and omissions are attributed to that state even if the actors exceed the authority they were granted.

2. Acts or omissions of real non-state actors are generally not attributable. However, human rights law may hold a state responsible when an injury results because the state failed to fulfill its diagonal obligation to protect human rights holders with due diligence from harmful non-state conduct.110

These two principles have been referred to as direct and indirect responsibility.111 The term “indirect responsibility” is unfortunate because it wrongly suggests that this type of human rights violation is less grave. The term also implies that there is always a bearer of direct responsibility, even though it is rare that non-state actors are directly bound by international human rights law. It is equally misleading to distinguish between responsibility arising from action and responsibility arising from omission. A state can breach its duties of due diligence by taking action, for example if state organs actively obstruct investigations into murders committed by non-state death squads.112 Conversely, even an omission by a private actor may be attributed to the state and give rise to a human rights violation. An


110 Hessbruegge, supra note 109, at 268.


112 See infra notes 273-74 and accompanying text.
example would be a guard in a privately operated prison, who fails to pro-
tect an inmate from assault by other inmates. To avoid these terminologi-
cal pitfalls, this paper will refer to the two principles respectively as
responsibility due to attribution and responsibility based on a failure to pro-
tect with due diligence.

A. Attribution of Conduct to the State

Attribution, or "imputability," as some prefer to call it, occurs when
the individual or his conduct is so closely linked to the state in a specific
situation that the conduct can be considered that of the state itself. The
doctrines of attribution have been extensively researched by the Interna-
tional Law Commission of the UN (ILC) and set out in the Draft Articles on
Responsibility of States for Internationally Wrongful Acts (Draft Articles),
which are accompanied by a detailed commentary. Articles 4 through 11
of the Draft Articles outline when individual acts or omissions are attributa-
able to the state. Drawn up by an international group of "highly qualified
publicists,"115 the Draft Articles and, to a lesser extent, the Commentary to
the Draft Articles, codify pre-existing customary international law.

1. Responsibility for de jure Agents

A state is responsible for the conduct of all persons that it has des-
ignated to be its agents by way of an act of domestic law. These persons
can be referred to as de jure agents. Acts of the legislative, judicial or
executive organs are attributable to the state. The rank of the official is
irrelevant. Conduct is attributable to the state regardless of whether the
acting organ is part of the central government or a territorial unit. Even

113 See infra note 171 and accompanying text.
UNDOC/GEN/N01/557/81/img/N0155781.pdf?OpenElement [hereinafter Draft
Articles].
115 Statute of the ICJ art. 38(1)(d).
116 Draft Articles, supra note 114, at 44. See also Difference Relating to Immunity
from Legal Process of a Special Rapporteur of the Commission on Human Rights,
1999 ICJ 62, at 87 (Apr. 29).
117 Draft Articles, supra note 114, at 44 ("... whatever position it holds in the
organization of the State . . . ").
118 Id. See also LaGrand (F.R.G. v. U.S.), 1999 ICJ Order ¶¶ 28-29 (Req. for the
5310/71, 2 Eur. H.R. Rep. 25, 77-78, (1978) (Court). This raises the interesting
legal question whether the central state can still be held responsible where there
acts by which the organ breaches municipal law or exceeds the authority vested in it (so-called *ultra vires* acts), are attributable to the state, so long as the organ acts within its capacity. The rule has attained the status of customary international law because it provides for "clarity and security in international relations." It saves third-party states from the arduous task of ascertaining which acts were *intra vires* and which were not. International law also steers clear of interference with a state's internal structures by avoiding prescribing how a state must organize itself and control its agents.

The principle also applies to human rights obligations and is of particular importance in this context because "the most egregious violations of human rights, such as torture, murder, or causing the disappearance of individuals, would also breach the internal law of the state or, at least formally, the policy or the instructions issued by senior governmental officials." Yet, the clarity and security provided by the decision to attribute *ultra vires* acts to the state is limited by the fact that it only applies where the organ "acts in that capacity." The Commentary to the Draft Articles clarifies that "[c]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State." Even if a state official abuses the means placed at his disposal exists a strong devolution of power to territorial units, e.g. whether the Republic of Bosnia-Herzegovina can be held responsible for all human rights violations incurred by organs of the Republic of Srpska (or whether the territorial unit itself can be held responsible). An answer to this question would go beyond the scope of this paper, but the question shows another dimension of the issues raised by the above-mentioned power shift in the international system. Cf. Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 *Mich. J. Int’l L.* 312, 357-60 (1991).

119 Draft Articles, *supra* note 114, at 44.
120 Id. at 99. *See also supra* note 109 and cases referred to therein.
122 Id.
124 Meron, *supra* note 108, at 375.
125 Draft Articles, *supra* note 114, at 44.
126 Id. at 102.
for his official duties, his conduct will not be attributed to the state as long as he does not make use of his official authority.\(^\text{127}\) Therefore, a state violates its human rights obligations if a policeman murders a suspect in the course of an arrest, regardless of whether that state’s domestic law outlaws the conduct or not. But if the policeman joins an extremist political group and shoots a political adversary off-duty, this conduct is not attributed to the state even if he used his police revolver. In the latter case, responsibility can only ensue if the state displayed a lack of due diligence in failing to prevent the misuse of state-owned weaponry or sensitive information to which only the state authorities are privy.

2. "Adopted" Conduct

The case of "adopted conduct" is actually a sub-category of *de jure* agency. The state is responsible because it retrospectively authorizes certain conduct and thereby makes it its own. The Draft Articles stipulate that conduct is attributed, "if and to the extent that the State acknowledges and adopts the conduct in question as its own."\(^\text{128}\) The principle, which was mentioned as early as 1749 by the German writer Christian Wolff,\(^\text{129}\) was endorsed by the ICJ in the *Tehran Hostages* case.\(^\text{130}\)

On November 4, 1979, several hundred militant young Iranians seized the United States embassy and took diplomats and members of staff hostage to protest the fact that the United States had allowed the deposed Shah into the United States for medical treatment. The ICJ considered Iran legally responsible for the events, even though the acts had been committed by militant private individuals, because "[t]he approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the embassy and detention of the hostages into acts of that State."\(^\text{131}\) To come to this finding, the Court took into account public expressions of approval by Iranian officials, namely a decree by the Ayatollah Khomeini stating that Iran would not permit the release of the hostages until the United States


\(^{128}\) Draft Articles, *supra* note 114, at 45.


\(^{131}\) *Id.* at paras. 73-74.
extradited the Shah to be tried in Iran and also returned his property to Iran.\textsuperscript{132}

The adoption principle was also implicitly endorsed when the Security Council censured Israel for the capture of Nazi criminal Adolf Eichmann in Argentina and his clandestine transfer to Israel.\textsuperscript{133} Israel was held responsible, even though it never admitted that Eichmann’s captors were government agents. Instead the Israeli Foreign Minister at the time referred to them as a “volunteer group.”\textsuperscript{134}

In a third case, Greece was held liable for the breach of a concession agreement by Crete, which occurred when the latter was an autonomous territory of the Ottoman Empire. Greece incurred responsibility because it had made the breach its own by endorsing and continuing it even after it acquired territorial sovereignty over the island.\textsuperscript{135}

For adoption of a certain conduct to occur, two requirements must be fulfilled: acknowledgement of the conduct and adoption thereof. With regard to the first requirement, the key question is whose knowledge is relevant. Must the highest state authorities have knowledge (as they had in the precedents just mentioned)? If that is the case, the principle would be virtually unusable in the human rights context because such knowledge can hardly ever be proven. This view would also be inconsistent with the general principle that all conduct of state organs acting in that capacity is attributable regardless of their rank or authority. Consequentially, it cannot make a difference which state organ has knowledge.

However, the approving state must know about the specific behavior that would amount to a breach of human rights, if it were undertaken by the state authorities themselves. Knowledge of the general conduct is not enough. It must be remembered that only the conduct itself is attributable. The individual does not become an agent by virtue of the act of adoption. Excesses on his part, which are unknown to the state, are therefore not attributable. Because the conduct, and not the agent, is adopted, any analogy to the \textit{ultra vires} principle, according to which unauthorized conduct of state officials is still attributed, is inappropriate. For instance, if police authorities approve of the arrest of a suspect by a private citizen but are unaware of the fact that the citizen seriously mistreated the suspect in the course of the arrest, an adoption of the mistreatment does not take place.

\textsuperscript{132} \textit{Id.} at para. 71.


\textsuperscript{134} See Draft Articles, \textit{supra} note 114, at 102.

The European Court of Human Rights had to consider a similar scenario in the case of Stocké v. F.R.G.\textsuperscript{136} In this case German authorities agreed that an informer would set out to locate a fugitive from justice in France.\textsuperscript{137} The informer went beyond the agreement and brought Stocké back to Germany against his will.\textsuperscript{138} The Court held that Germany had not violated Stocké’s rights, since the German authorities had not known about the informer’s plan to bring him back to Germany.\textsuperscript{139}

With regard to the requirement of adoption, there are several issues that are of particular importance in the human rights context. Given that states will rarely admit that they approve of private atrocities, the question arises whether adoption must be expressed by public statement or can be made tacitly. The Appeals Chamber of the ICTY found that the statement of approval has to be given publicly.\textsuperscript{140} Conversely, the Iran-U.S. Claims Tribunal has taken the view that tacit adoption is sufficient.\textsuperscript{141} The latter view deserves support. There is no reason to exclude cases of tacit approval as long as the approval can be proven by circumstantial evidence. If a state makes use of the conduct in question just as if it were its own, it cannot be relevant whether it has the political savvy not to say so in public. Especially in the case of human rights violations, a state would hardly publicly adopt them as its own.

Adoption has to be distinguished, however, from mere endorsement of a given non-state conduct. The adoption principle must be applied restrictively because it establishes state responsibility even though the state had no control of the conduct when it occurred. For this reason, mere endorsement of a certain conduct does not suffice for the said conduct to be attributed.\textsuperscript{142} Otherwise, the state would be held responsible for all private acts that serve its interests and thus receive its tacit endorsement. An example illustrates the point: It has been argued that Yugoslavia was responsible for acts of ethnic cleansing committed by Bosnian Serb forces, since it ratified these actions.\textsuperscript{143} This clearly overextends the principle. Yugoslavia might have breached its human rights obligations because it had effective

\textsuperscript{137} Id. at 18.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 118 (July 15, 1999).
\textsuperscript{142} Draft Articles, supra note 114, at 121.
control of Bosnian Serb Forces and the Bosnian Serb Forces were therefore Yugoslavia’s *de facto* agent. But merely agreeing with non-state conduct that occurs outside of a state’s sphere of control can surely not give rise to state responsibility.

The line between mere endorsement of private action and adoption of such action as the state’s own, is a fine one. Three instances of adoption can be distilled from the case law. First, the adoption principle applies where the state formally legalizes a certain conduct retrospectively or where it factually treats such conduct for all purposes as if it were legal. Obviously, in the case of *de facto* legalization, the rank and authority of the adopting state organ has to be taken into account. Second, the principle applies if the state takes further action through which it takes advantage of the individual’s conduct. This happened in the Eichmann case, because Israel made use of the capture by putting Eichmann on trial. It also occurred in the *Tehran Hostages* case, since the Iranian state used the hostage situation in an attempt to extort certain concessions from the United States. Third, adoption with retrospective state responsibility can be assumed when a state approves of past non-state conduct and continues it after the state assumes control over it.

3. **De Facto Agents and Agent Groups**

Attribution is not limited to cases where a state legally assumes responsibility for its agents or for adopted conduct. The conduct of an individual is also attributable to a state if the individual is a *de facto* agent acting on behalf of the state. The Draft Articles stipulate that acts of non-state persons are attributable if they are “in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” While either of these two instances suffices on its own to establish state responsibility, control and instruction usually go together and reinforce each other mutually. Because they are under state control, *de facto* agents accept instructions. By way of instructions, the state exercises and maintains its control. In the *Blake* case, for instance, the Inter-American Court of Human Rights found that a paramilitary group (a so-called “Civilian Self-Defense Patrol”), which had abducted and killed Mr. Blake, was a *de facto* agent of Guatemala. In coming to this conclusion, the Court noted that the group had “an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover,

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144 See *infra* notes 155-66 and accompanying text.
145 Draft Articles, *supra* note 114, at 45.
Two questions arise if one seeks to determine who may be regarded as a de facto agent. Firstly, one has to ask how closely the state must control or instruct the agent. This issue will be referred to as intensity of control. The second issue deals with the object of control: Who does the state have to instruct or control: the acting individual himself or just the group to which he belongs?

The ICJ addressed both issues in the Nicaragua case. Among other things, the case dealt with the question of whether the United States breached international humanitarian law by supporting the Contra rebels, who had committed gross atrocities in the course of its insurgency campaign against the Sandinista government. The Court took the position that a very high intensity of control and instruction, referred to by the Court as "effective control," was necessary in order to assume a de facto agency. The Court held that

United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.

While the United States was therefore not responsible for the conduct of the Contras, the Court found that the conduct of so-called Unilaterally Controlled Latino Assets (UCLAs) during the Nicaraguan civil war was attributable to the United States. These UCLAs were persons of various

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147 Id. at ¶ 76.
150 Id. at 51.
nationalities, which were paid by, and acting on the direct instructions of, United States military or intelligence personnel.\textsuperscript{151}

With regard to the object of control, the ICJ took the view that the state must have effective control of the individual agent or specifically command him to undertake the conduct that violates humanitarian law. Effective control of the Contras as a group would not have been sufficient. The Court held that the United States was only responsible for breaches of humanitarian law by the Contras if it either had "effective control of the military or paramilitary operations in the course of which the alleged violations were committed,"\textsuperscript{152} or if the "United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."\textsuperscript{153} In his separate opinion, Judge Ago clarified that state organs would have to specifically instruct the Contras to commit a particular act or to carry out a particular task of some kind on behalf of the United States.\textsuperscript{154}

\textsuperscript{151} Id. at 45.
\textsuperscript{152} Id. at 55.
\textsuperscript{154} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 188-89 (June 27) (separate opinion of Judge Ago). This position corresponds with the holdings of other international tribunals. The Lehigh Valley Railroad cases concerned various acts of sabotage committed by German private individuals in the U.S. during World War I. In the initial case, it was proven that German diplomats had been ordered to instruct individuals to sabotage "all kinds of factories for war deliveries; [whereas] railroads, dams, bridges must not be touched there." However, it was not proven that the saboteurs had received specific instructions on which targets to attack. Therefore, the U.S.-German Mixed Claims Commission held that the conduct of the individuals was not attributable to the state. Lehigh Valley Railroad I (U.S. v. Ger.), 8 R.I.A.A. 100, 101 (U.S.-Ger. Mixed Cl. Comm., 1931). Shortly after the decision was handed down, evidence emerged proving that the individual saboteurs had indeed been instructed to attack specific sites. The case was reopened and Germany was held responsible for the acts of sabotage. Lehigh Valley Railroad (Rehearing Grant) (U.S. v. Ger.), 8 R.I.A.A. 104, 114-15 (U.S.-Ger. Mixed Cl. Comm, 1932). Lehigh Valley Railroad II (U.S. v. Ger.), 8 R.I.A.A. 225, 339-45 (U.S.-Ger. Mixed Cl. Comm, 1939). Cf. L.H. Woolsey, The Arbitration of the Sabotage Claims Against Germany, 33 AM. J. INT'L L. 737, 738 (1939). The U.S.-Iran Claims Tribunal based its decision on the same legal consideration in the case of Short. The applicant was an American, who was forced by unidentified individuals to leave Iran. The applicant argued that the Ayatollah Khomeini's general statements against Americans residing in Iran rendered those individuals who attacked Americans to be \textit{de facto} agents of the Iranian state. The
Since the *Nicaragua* decision, the standard of the *de facto* agency has shifted. The *Nicaragua* standard is still valid concerning the intensity of control, but has changed with regard to the object of control. In the *Tadic* case, the ICTY concerned itself with the issue of *de facto* agency. In order to determine whether the accused had committed war crimes against civilians in violation of the Geneva Convention IV of 1949, the Tribunal had to address the question of whether there had been an international conflict in Bosnia after the Yugoslav national army formally withdrew from the armed conflict in May 1992. This was the case only if the Army of the Republic of Srpska could be regarded as a *de facto* agent of the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY). Thus, the issue of responsibility for *de facto* agents specifically arose as a matter of state responsibility rather than as one of individual criminal responsibility, which may have different standards.

The ICTY's Trial Chamber upheld the ICJ's test of effective control.\(^{155}\) It found that the Republic of Srpska and its army received material and financial support from the FRY and that a number of former soldiers and commanders of the Yugoslav army had continued to serve in the Srpska army.\(^{156}\) For these reasons, the Court held that Yugoslavia “had the capability to exercise great influence and perhaps even control over” the Republic of Srpska and its army.\(^{157}\) However, there was not sufficient evidence to prove that the FRY had made use of this capability and actually exercised effective control.\(^{158}\) Instead, the Republic of Srpska and its army were nothing more than “allies, albeit highly dependent allies, of the [FRY].”\(^{159}\) Judge McDonald, the presiding judge in the *Tadic* Trial Chamber, dissented and argued that dependency of the presumed agent and the state’s capability to use this dependency to exercise effective control was sufficient for a *de facto* agency.\(^{160}\) The ICTY Appeals Chamber rejected Judge McDonald’s position and confirmed the opinion of the Trial Chamber’s majority, finding

\(^{155}\) Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 585-88, 600 (May 7, 1997).

\(^{156}\) *Id.* at ¶¶ 588-604.

\(^{157}\) *Id.* at ¶¶ 605-06.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at ¶ 606.

\(^{160}\) *Id.* (Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute).
that the capacity to exercise effective control was not sufficient if the principal did not in fact assume effective control.\textsuperscript{161}

Therefore, atrocious conduct of a non-state actor is not attributed to a state according to the principle of \textit{de facto} agency just because a state gives assistance and advice to the non-state actor – even if that state knows about the atrocities.\textsuperscript{162} Applying the principle to our introductory example about the Afghan child soldiers, one has to conclude that the Northern Alliance forces were dependent allies, but not \textit{de facto} agents of the U.S. in the Afghanistan campaign. Given that both actors shared the common military goal of overthrowing the Taliban regime, there was no need for the U.S. to assume effective control of the group during the fighting phase. Therefore, the Northern Alliance’s use of child soldiers cannot be attributed to the U.S., because the U.S. did not adopt the conduct as its own either.

While the ICTY Appeals Chamber confirmed the \textit{Nicaragua} decision with regard to the necessary intensity of control, it expanded the scope of \textit{de facto} agency by changing the object of control. In the \textit{Nicaragua} case, the ICJ held that actions of the Contras were only attributable to the United States if the individual members of the Contra group were assigned specific instructions by the United States. Conversely, the ICTY Appeals chamber held that specific instructions were not necessary. If a state has “overall control” over an organized and hierarchically structured group (such as a military unit), all acts of its members are attributable to the state even if there is no specific control of the individual or if the individual acts contrary to specific instructions.\textsuperscript{163} The Chamber pointed out that “a structure, a chain of command and a set of rules as well as the outward symbols of authority” characterize such groups.\textsuperscript{164} For this reason, “[n]ormally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group.”\textsuperscript{165} This allows a state to affect individual actions by only controlling the agent group. Even where the individual disobeys group orders, it is still justified to hold the state responsible given that the state is responsible for \textit{ultra vires} acts of its officials. By the same token, the state must be held

\textsuperscript{161} Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 80-162 (July 15, 1999).
\textsuperscript{163} Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 120 (July 15, 1999).
\textsuperscript{164} \textit{Id}.
\textsuperscript{165} \textit{Id}.
responsible for disobedient members of a group if it has chosen to exercise
effective control over that group.\textsuperscript{166}

The decision of the ICTY to depart from the ICJ's jurisprudence
has been criticized. Yet, the international acceptance of the U.S. military
action against the Taliban regime in Afghanistan lends support to the \textit{Tadic}
jurisprudence. The Taliban had control over Al-Qaeda as a group.\textsuperscript{167} The
Taliban regime could therefore be held responsible for knowingly allowing
Afghan territory to be used to injure other states.\textsuperscript{168} However, an Al-
Quaeda cell, whose members were operating outside of Afghan territory,
carried out the attacks of September 11, 2001. The Taliban were therefore
unable to stop the individuals that eventually carried out the attacks. That
they were nevertheless held responsible, affirms the holding in the \textit{Tadic}
case: Overall control over an organized and hierarchically structured group
suffices to attribute conduct of individual group members to a state even
where that state does not have control over these specific individuals.

In the human rights context, this view seems to have long been
adopted. In the \textit{Blake Case}, the Inter-American Court only required a
showing that the Guatemalan state effectively controlled the organized and
hierarchically structured Civilian Self-Defense Patrols, to whom Blake's
murderer pertained. The Court did not require proof that the Guatemalan
state had given the specific instruction to murder Mr. Blake or had effect-
ively controlled the individual murderer. Instead, it held that "those pa-
trols should be deemed to be agents of the State and that the actions they
perpetrated should therefore be imputable to the State."\textsuperscript{169}

To summarize, a \textit{de facto} agency exists where a state exercises its
effective control over an individual or where the individual receives spe-

\textsuperscript{166} \textit{Id.} ¶ 121.
1378 (2001). \textit{See also Department of State, Patterns of Global Terrorism 2000, at

(Islamic extremists from around the world . . . continued to use
Afghanistan as a training ground and base of operations for their
worldwide terrorist activities in 2000. The Taliban, which con-
trolled most Afghan territory, permitted the operation of training
and indoctrination facilities for non-Afghans and provided logis-
tics support to members of various terrorist organizations . . . the
United States repeatedly made clear to the Taliban that it would
be held responsible for any terrorist attacks undertaken by Bin
Ladin while he is in its territory.).

\textsuperscript{168} \textit{Cf. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).}
\textsuperscript{169} \textit{Blake Case, Inter-Am. C.H.R. (ser. C) No. 36, ¶ 78 (1998) (emphasis added).}
cific instructions from that state. A state’s mere capability to control or
direct is not sufficient. If the individual is a member of an organized and
hierarchically structured group, it suffices that the agent group is effectively
controlled by a state in order to attribute human rights violations of individ-
ual group members to that state.

4. Para-Statal Entities and State-Owned Companies

In recent times, many countries have begun to outsource services
traditionally provided by public authorities, for example the provision of
electricity or water. New public corporations, semi-public entities or pri-
ivate companies are created, or an existing private firm is contracted to pro-
vide such services. Sometimes these parastatal entities are assigned even
the most traditional of state functions. In a number of countries, for in-
stance, private contractor firms operate prisons on behalf of the state.

The Draft Articles stipulate that the conduct of a non-state entity
“empowered by the law of that State to exercise elements of the govern-
mental authority shall be considered an act of the State under interna-
tional law, provided the person or entity is acting in that capacity in the particular
instance.” 170 Parastatal entities are therefore de jure agents of the state, to
the extent that they are empowered to assume public functions. A state
violates its human rights obligations, for instance, if employees of a pri-
vately operated prison physically abuse the inmates. 171

The decisive factor required for attribution to occur is the entity’s
performance of a public function. How the entity was created is irrelevant.
The nature of the entity can neither prevent nor trigger state responsibility.
The European Commission on Human Rights has held that the fact that an
industrial board is created by statute does not make its actions attributable
to the state. 172 Conversely, the UN Human Rights Committee found in
B.d.B. v. The Netherlands that “a State Party is not relieved of its obliga-
tions under the Covenant when some of its functions are delegated to other
autonomous organs.” 173 The specific “autonomous organ” in question was

170 Draft Articles, supra note 114, at 44.
171 See Chirwa, supra note 162, at 6.
that the fact that certain workers' government councils were created by government
decree does not make them agents of the Iranian state as long as they do not fulfil
state functions and are not subject to government interference).
an industrial board made up of representatives of employer and employee organizations, which had no formal connection to the Dutch Government. If a state has allowed religious bodies – for example, a religious police force – to make rules and enforce them with quasi-public power, the religious body’s conduct is also attributable. In X v. Germany, the European Commission on Human Rights found a complaint to be admissible which concerned a church regulation that stated that property rights in tombs lapsed after a certain period of time because the church had assumed public functions in maintaining the graveyard.174

When does a private institution exercise elements of public authority? The jurisprudence of international bodies provides some guidance. The European Court of Human Rights took the material ambit of Convention rights into account. The case of Costello-Roberts v. United Kingdom concerned corporal punishment in a private school.175 The Court noted that Protocol 1 of the ECHR protects the right to education, which entails the student’s right to study in an environment of school discipline.176 The Court found that a state could not “absolve itself from responsibility [to secure a Convention right (i.e. to ensure school discipline)] by delegating its obligations to private bodies or individuals.”177 Therefore, the state could be held responsible for a breach of the freedom from inhumane or degrading treatment and punishment, although private persons in a private institution had ordered and carried out the corporal punishment. The same reasoning underlies the decision in Van der Mussele v. Belgium.178 In this case, the European Court of Human Rights found that the defendant state could be held responsible for the conduct of a private professional body, the Ordre des avocats, because it had relied on that private body to fulfill its obligation to provide legal aid pursuant to Article 6(3)(c) of the ECHR.179

To establish whether a private entity carries out a public function, one can also look at its sources of financing. In my view, there is a rebuttable presumption that a private business, which runs at a loss on a sustained basis and has to be kept afloat by state subsidies, is fulfilling a public func-

the state responsible for the actions of a professional Veterinary Surgeon’s Council because the Council had been awarded independent rule-making power by the legislator).

176 Id. at ¶ 27.
177 Id.
179 Id. ¶¶ 28-29.
tion – otherwise one would presume that the state is squandering its resources without fulfilling a public purpose.

It has been noted that parastatal entities are de jure agents, to the extent that they have been assigned public functions. Therefore, the principle that ultra vires acts are attributable applies mutatis mutandis. The state cannot deny responsibility for human rights violations by claiming that the parastatal entity acted contrary to domestic law or otherwise exceeded its authority as long as the entity acted within its general area of authorized conduct. Abuses in a privately operated prison are therefore attributable to the state even if the contract between the state and the prison operator stipulated that such abuses must not occur.

Apart from parastatal entities exercising public functions, there are state-owned or state-controlled companies of a purely commercial nature (e.g. a state-owned airline). One might be inclined to treat these companies as if they were state organs. For state organs, the state can incur responsibility no matter whether the organs exercise their public function (acta iure imperii) or act commercially (acta iure gestionis). For instance, a state would breach its human rights obligations if one of its administrative agencies awarded a procurement contract on a racially discriminatory basis. The question arises whether that also holds true with regard to conduct of a private company, which just happens to be owned by the state. May the editor of a state owned newspaper assert a stronger right to freedom of expression against the publisher than a colleague working for a privately owned paper? May government officials not instruct the editor to refrain from publishing a certain opinion piece, even if their action is purely commercially motivated (e.g. because they do not want to endanger sales by offending the newspaper’s particularly conservative readership)? Should the state be subject to more restrictive rules of investment management than a private shareholder even though it is just acting how any reasonable businessperson would? In favor of that position, one could argue that the state is only in the position to give instructions to the company because it has used public funds to form or purchase it. In addition, the state seems to exercise effective control much as it does over de facto agents because its instructions are followed.

Cf. in the context of armed non-state entities, Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 119 (July 15, 1999) (“In this case, by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.”).

Draft Articles, supra note 114, at 87.
However, this view leads to arbitrary results. If the state had declined to exercise control over said newspaper and instead appointed an independent board of directors that had taken the same commercially motivated decision, the conduct would not be attributable. International law accepts the separation between different corporate entities, unless the "corporate veil" is used as a vehicle for fraud or evasion. By the same token, the conduct of a state-owned company that does not fulfill a public purpose must only be attributed to the state if the Government interferes with the company out of political motivations inconsistent with the commercial interest of the company. Thus, a state owning a cosmetics company violates its human rights obligations if it instructs the management to award suppliers' contracts only to members of a certain race. However, it would not breach its human rights obligations if it instructed the management to concentrate solely on cosmetic products for a certain racial group only because that market segment seemed lucrative.

This view is also in harmony with the principles of de facto agency outlined above. A state that owns a company or the majority of its shares has the capability to exercise effective control over it. However, the mere capability to exercise effective control does not give rise to de facto agency. Effective control has to actually be exercised. If the Government gives an instruction to the management that is motivated by political reasons, it is exercising effective control. However, if the Government acts no different than any reasonable private businessperson would, the state conduct can be regarded as neutral and not controlling, which is why an agency may not be assumed.

5. Groups Usurping State Functions

According to the Draft Articles, private conduct is also attributed to the state "if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority." The Commentary to the Draft Articles clarifies that "cir-

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182 See Barcelona Traction, Light, and Power Co. (Belg. v. Spain), 1970 ICJ LEXIS 2 (Feb. 5).
183 See Kevin A. Bove, Attribution Issues in State Responsibility, 84 AM. SOC’Y INT’L L. PROC. 51, 63-64 (1990) (quoting Remarks by Jane Chalmers). Chalmers also makes the sensible suggestion to place the onus on the government to prove that a decision is not politically motivated. Cf. Draft Articles, supra note 114, at 107-08.
184 See supra notes 145-69 and accompanying text.
185 Draft Articles, supra note 114, at 45.
circumstances such as to call for the exercise of those elements of authority" occur in times of "revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative."\textsuperscript{186} This attribution doctrine was applied by the Iran-United States Claims Tribunal to the conduct of Revolutionary Guards or "Komitehs," which fulfilled police functions during the Iranian Revolution in the absence of regular state authorities.\textsuperscript{187}

Two rationales underlie this form of agency. In some cases one might see it as a special case of due diligence. The state is held responsible for allowing private individuals to usurp its powers.\textsuperscript{188} In other cases it might be a mere principle of necessity, deriving from the restrictions implicit in the Westphalian paradigm of state responsibility. Since international law cannot hold the usurping non-state actors accountable, the chaotic state, in which they operate, is held responsible. In practice, this established principle of positive international law proves very helpful to human rights lawyers that often find it hard to prove that a certain private group was effectively controlled by a state. The principle is also important in cases concerning a person's right not to be refouled to another state, where there are substantial grounds for believing that he would be in danger of being subjected to torture (see Article 3 of the Convention Against Torture [CAT]). In \textit{Sadiq Shek Elmi v. Australia}, a case before the Committee Against Torture, the author pleaded not to be returned to Somalia, since he feared that one of the clans ruling parts of Somalia would subject him to atrocities. Australia responded that there was no involvement of state officials, as required by Article 1(1) of the CAT. The Committee found that the clan had set up quasi-governmental structures and exercised prerogatives that are normally exercised by the legitimate government. Accordingly, the clan members were to be regarded as "acting in an official

\textsuperscript{186} \textit{Id.} at 109.


\textsuperscript{188} \textit{But see} Draft Articles, \textit{supra} note 114, at 109-10 (justifying this attribution principle as an "agency of necessity"). "Just as citizens have the right to collective self-defence in the absence of regular forces (levée en masse), they may assume governmental functions where government is absent." Hessbruegge, \textit{supra} note 109, at 274. It seems strange that a right of citizens against the state could justify obligations of that state towards other states. It also seems odd to hold a state that has just re-established itself responsible for human rights violations that occurred while chaos persisted.
capacity" (see Article 1 of the CAT) and Elmi's claim that he had to fear torture was upheld.  

6. Successful Insurrectional Movements

Like the principles on other groups usurping state power, the legal principles dealing with successful revolutionary movements are also a consequence of the fact that the movements themselves could not bear responsibility according to traditional international law (unless they had been recognized as belligerents). In principle, acts of revolutionary movements, mobs, etc. are not directly attributable to the state. However, the conduct of an insurrectional or secessionist movement, which becomes the new government of a state, is considered an act of that state under international law. The reason for this is the continuity between the insurrectional movement and the new organization of the state.

It is important to note that the factual conduct and not the legal breach is attributed. The example of the Northern Alliance's child soldiers demonstrates the importance of this point. The Northern Alliance is now part of the government of Afghanistan. Accordingly, its conduct as an insurrectional movement—the use of child soldiers—is attributed to the state of Afghanistan, which is therefore responsible for a breach of Article 24 of the ICCPR. Whether the Northern Alliance itself breached its own obligations (under the law of internal armed conflict or customary human rights law applicable to armed groups governing territory) is irrelevant. Instead, the state of Afghanistan is legally treated as if it itself had used child soldiers at the time when the Northern Alliance used them.

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190 Draft Articles, supra note 114, at 112. See also Alfred L.W. Short v. Iran, 16 Iran-U.S. Cl. Trib. Rep. 76, 85 (1987).
192 Draft Articles, supra note 114, at 113. For a critique of this justification, see Brownlie, supra note 191, at 178; Hessbruegge, supra note 109, at 273.
193 Draft Articles, supra note 114, at 111-18 (consistently referring to the attribution of "conduct" and not of "breaches").
Holding a state governed by successful insurrectionists or secessionists responsible for the latter’s previous conduct produces a remarkable result. The insurrectional or secessionist movement is legally not bound by human rights law. Yet, the Damocles sword of being held retrospectively responsible in case it succeeds in its stated goal of becoming a state government is looming over the movement. Using this argument, human rights activists can condemn atrocities by such groups, without having to forego the language of human rights and venture off into the realm of international humanitarian law.

B. Responsibility for Failure to Exercise Due Diligence

Whereas the principles of attribution are rules of general international law that are merely applied to human rights law, responsibility for failure to exercise due diligence in protecting individuals arises from specific rules of human rights law. The rationale for holding the state responsible is not its complicity in the non-state conduct, but the failure to protect against it. The principle has been drawn from the law governing the protection of foreign nationals. The key question raised by the due diligence principle is the same in both bodies of law: To what extent may and must a state interfere in the relations that non-state actors have with one another?

Writing in the late 19th century, Sir William Edward Hall considered to what extent a state must provide itself with the means of preventing injury to foreigners. He argued that a state cannot be asked to use the most efficient means to protect foreigners, because it would otherwise be required to resort to “a completely despotic government” which “can make its will felt immediately for any purpose.” In order to justify why the most efficient (i.e. “despot” to Hall) measures of protection did not have to be employed, Hall argued that a community had the “right to regulate its life in its own way . . . . All that can be asked is that the best provision for the fulfillment of international duties shall be made which is consistent with the character of the national institutions . . . .”

The issues are the same in the context of human rights law. The very purpose of human rights law is to prevent a “completely despotic government.” For this reason, there have to be limits on the state’s obligations

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196 *William Edward Hall, A Treatise on International Law* 221 (5th ed. 1904).
197 *Id.*
to protect one individual from another, because any state interference for the benefit of the former curbs the latter’s freedom to act. Furthermore, human rights law does not prescribe a particular social or economic system. In that sense, the community of citizens that unites in the state retains the \"right to regulate its life in its own way.\" By requiring the state to protect non-state actors from certain conduct of other non-state actors, human rights are introduced into the non-state realm through the backdoor. Theoretically, almost any interaction between non-state actors could be framed as a human rights issue and subjected to the scrutiny of international human rights bodies. An all-embracing human rights law could become the blueprint for the perfect society (as perceived by the respective interpreter) or, more likely, meaningless. The boundaries of the state’s responsibility to protect human rights from non-state conduct with due diligence must therefore be carefully delineated.

Three issues merit discussion. It needs to be considered whether diagonal obligations to protect flow from every human right or only from a selected few. To the extent that a state has a diagonal obligation towards a human rights holder, the state’s ambit of responsibility has to be demarcated. Finally, it needs to be ascertained whether the mere failure to protect with due diligence brings about a human rights violation or whether there has to be an injury resulting from the failure to protect.

1. Which Human Rights Contain Diagonal Obligations?

States are doubtlessly under a duty to protect non-state actors from one another where this is expressly required by human rights treaties. For instance, CERD Article 2(d) requires state parties \"to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.\" Certain racist groups or activities are to be penalized (CERD Article 4). CERD Article 6 requires the state parties to assure effective protection from racial discrimination and to assure the individual’s right to seek damages if it nevertheless occurs. In L.K. v. The Netherlands, the Committee on the Elimination of Racial Discrimination held that these norms require the state to take concrete action when confronted with private racial discrimination. L.K. and a friend had wanted to visit a house for which a lease had been offered to him and his family. A group of street residents told him

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that they wanted no more foreigners to move in, threatened to burn his house and damage his car and ultimately filed a petition with the local authorities against granting L.K. the lease. The police only prepared a report one and a half months after the incident and the courts dismissed an action that would have required the state to prosecute the authors of the petition for racial discrimination. The Committee found that the police and the judiciary had not afforded the applicant effective protection and remedies in accordance with CERD Article 6.\footnote{L.K. v. Neth., Communication No. 4/1991, U.N. Comm. on the Elimination of Racial Discrimination, ¶ 6.7, U.N. Doc. CERD/C/42/D/4/1991 (Mar. 16, 1993).}

The types of anti-discriminatory measures the state must take vary, depending on the specific instance of racial discrimination. One should bear in mind that the state only has to end racial discrimination "by all appropriate means." Therefore, the state is not always obliged to directly interfere in individual cases of discrimination. For instance, the state would not have to stop an individual person from taking the race of another person into account when choosing whom to marry or whose donation to accept from a sperm bank, even if the individual acts out of sheer prejudice. That there are areas exempt from direct state interference, follows also from CERD Article 7, which requires state parties "to adopt immediate and effective measures, particularly in the field of education, culture and information, with a view to combating prejudices which lead to racial discrimination."

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) contains provisions about gender discrimination that are comparable to the norms contained in CERD. State parties undertake "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (CEDAW Article 2(e)). Subsequent articles mention specific areas requiring state interference, such as sexual exploitation (CEDAW Article 6) or the participation in "non-governmental organizations and associations concerned with the public and political life of the country" (CEDAW Article 7(c)).\footnote{See also specific recommendations contained in General Recommendation 19, Committee on the Elimination of Discrimination against Women (CEDAW), 11th Sess. (1992), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1\ Rev.1 at 84 (1994).} CEDAW also implicitly recognizes the limits of direct state interference in specific types of conduct in Article 5, which oblige state parties to work towards modifying "the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and practices based on
prejudice or gender stereotypes].” The Convention on the Rights of the Child (CRC) also contains a number of provisions requiring the state to protect against certain private conduct such as physical or mental abuse (Article 19(1)) or the trafficking of children (Article 35).201

In some cases, the duty to protect against certain non-state conduct can even extend beyond the territory of a state. Article 4(2) of the Optional Protocol on Children in Armed Conflict,202 which requires states to prevent, where feasible, the recruitment and use of child soldiers by armed non-state actors, is such a case. The Protocol does not contain a territorial limitation. Instead, the Protocol’s preamble condemns “the recruitment, training and use within and across national borders of children in hostilities [emphasis added].” Indeed, the factual scope of Article 4(2) would be rather narrow if only applied to armed non-state actors operating within a state party’s territory. Strong states will never tolerate that armed non-state actors operate in their territory. On the other hand, weaker states might tolerate the formation of non-state militias within their borders, but, owing to their weakness, it is rarely feasible for them to prevent these militias from using child soldiers. By definition, the conduct of insurrectionary movements cannot be controlled by the territorial state.

The extraterritorial ambit of the Optional Protocol on Children in Armed Conflict does not require a state to become actively engaged in another country’s internal conflict merely because the warring parties use child soldiers. However, where a state party to the Protocol has an operational relationship with a non-state actor – like the United States (which is not a party to the Protocol) had with the Afghan Northern Alliance – it is obliged to use its leverage to curb the recruitment and use of child soldiers. Simply turning a blind eye to the practice is not enough.

General human rights treaties also contain a number of provisions, which expressly require state interference in private conduct. ICESCR Article 10(3) stipulates that children and young persons should be protected from economic and social exploitation.203 ICCPR Article 6(1) obliges states

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201 See also Convention on the Rights of the Child, G.A. Res. 44/25, 44th Sess., arts. 18(1), 21(c) and (d), 32, 33, 34 and 36 (1989). On duties with regard to trafficking, see also the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplemen

202 Convention on the Rights of the Child in the Involvement of Children in Armed Conflict, supra note 11 and accompanying text.

203 ICESCR, supra note 38.
to protect the right to life by law. This obligation entails the duty to prevent and punish crimes against life. In Dermit Barbato v. Uruguay the HRC held the state responsible for a prisoner's death. It was not clear whether Dermit Barbato committed suicide, was driven to suicide or killed by others. Nevertheless, the Committee concluded that the Uruguayan authorities were responsible either by act or by omission for not taking adequate measures to protect Dermit Barbato's life. From ICCPR Article 6, the Committee also deduced a duty to prevent and investigate the disappearance of persons, since the disappearance is in many cases only a preliminary step before the victim is murdered.

An obligation to prevent and punish non-state conduct can also be deduced from the wording of ICCPR Article 8, which stipulates: "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited." Articles 17(2) and 24(1) of the ICCPR also contain language indicating duties to protect.

ICCPR Article 20 requires the state to prohibit "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" as well as "propaganda of war." The mere prohibition of the said acts is insufficient; appropriate sanctions in case of violation have to be provided for. However, ICCPR Article 20 only ad-

\[\text{References:}\]
\[204\] ICCPR, supra note 9. See also ECHR, supra note 38, at art. 2(1); ACHR, supra note 38, at art. 4(1).
\[205\] See also General Comment 6, Article 6, Human Rights Comm., 16th Sess., at 6 (1982), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI
\[207\] Id. at para. 4.
\[209\] ICCPR, supra note 9, at art. 17(2) ("Everyone has the right to the protection of the law against such interference or attacks."); id. at art. 24(1) ("Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.").
\[210\] General Comment 11, Article 20 Human Rights Comm. 19th Sess., at 12 (1983), in Compilation of General Comments and General Recommendations...
addresses propaganda for illegal wars of aggression. Thus the provision opens interesting possibilities for indirect challenges to wars that violate international law. Were the countries, which formed the “coalition of the willing” against Iraq, under a human rights obligation to restrain and sanction those segments of their private media, which cheered the war on so emphatically?

States also have duties to show due diligence in providing protection, even if this is not expressly required by a specific human rights norm. All six general human rights treaties create positive obligations to control certain non-state activities. ICCPR Article 2 provides that states not only undertake to “respect” the rights in the Covenant, but also that they “ensure” those rights to all those within their territory and subject to their jurisdiction. The term “respect” is understood to create duties of forbearance. These negative obligations require the state and its agents to “refrain from restricting the exercise of [Covenant] rights.” Conversely, the word “ensure” refers to duties of performance. One aspect of these duties of performance is the state’s obligation to protect non-state actors from one another in certain cases.

The same two-pronged distinction of duties can be found in the other general human rights treaties. The American Convention on Human Rights contains an undertaking to “respect” and to “ensure” rights (Article 1(1)). The latter phrase gives rise to protective duties, a fact that the Inter-

TIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. DOC. HRI\GEN\1\Rev.1 (1994).

211 Id.
213 ICCPR, supra note 9.
214 Nowak, supra note 208, at 36. It is not entirely clear whether the original drafts actually intended to create this two-pronged set of human rights duties. The original draft had only provided for an obligation to “ensure” rights; presumably this referred to duties of forbearance. The Human Rights Commission only inserted the words “to respect” after a requisite motion by France and Lebanon had passed without dissent in 1950. Id. at 29. This might have been done to change the meaning of “ensure” to now create duties of performance. In the alternative, the insertion of “respect” was only meant to reinforce the aspect of forbearance. Given that the travaux préparatoires are only a subsidiary means to determine the meaning of a treaty (see Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 32, 1155 U.N.T.S. 331), the issue does not have any bearing on the position of current human rights law.
215 Nowak, supra note 208, at 36.
216 Id. at 36-37.
American Commission recognized as early as 1975. The African Charter of Human and Peoples Rights obliges member states to “recognize” the Charter provisions and to “adopt . . . measures to give effect to them.” The African Commission of Human and Peoples Rights concluded that Article 1 of the African Charter creates duties to protect when it held Chad responsible for failing to secure the safety and the liberty of its citizens, and to conduct investigations into murders. The wording of the ECHR is not quite as explicit, since the Convention only requires state parties to “secure” the Convention rights to everyone within their jurisdiction. But this term has been read by the European Court of Human Rights to embrace both negative and positive duties, including diagonal obligations to protect on numerous occasions. Finally, Article 2 of the ICESCR stipulates that each state party “undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” The wording is sufficiently broad to embrace duties to protect.

The fact that protective duties are contained in the major human rights treaties still does not answer the initial question: Which human rights contain obligations to protect and which ones do not? A number of rights clearly cannot contain diagonal obligations, since the harm to the right has to be specifically caused by state action. These are typically rights which aim to curb the state’s unique power to make law in the form of abstract laws, or concrete judicial and administrative decisions. The rights of the accused in the criminal justice process belong to this group. The same is true for the right to recognition as a person before the law (ICCPR Article 16) or the right of equal access to the public service (ICCPR Article 25(c)).


220 Cf. Kinley & Tadaki, supra note 6, at 967 (considering de lege ferenda which human rights ought to attach to transnational corporations).
Leaving these specific exceptions aside, international human rights tribunals and commissions have found obligations to protect in an array of human rights norms, covering virtually the entire spectrum of protected rights. *Delgado Páez v. Colombia* concerned a teacher who was subjected to death threats and physical attacks by non-state actors and ultimately fled the country after unknown killers murdered another teacher. The UN Human Rights Committee found that the author's right to security (ICCPR Article 9(1)) had been violated because Colombia had failed to ensure effective protection.221 On the same legal principle, Algeria was reprimanded for tolerating vigilante groups.222 Other states have been censured for failing to prevent customary practices of female genital mutilation, which the Committee has found to be cruel, inhuman and degrading treatment (see ICCPR Article 7).223

A duty to curb discrimination in the non-state sphere emerges from ICCPR Articles 2(1) and 26. In *Nahlik v. Austria*, the author of the complaint charged that he was discriminated against by a collective bargaining agreement. The agreement was governed by private law and its content was exclusively determined by the contracting parties. The Committee took the view that "the courts of States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment."224

With regard to the right of free expression (ICCPR Article 19), the Committee notes that “because of the development of modern mass media,
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effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression . . . "

ICCPR Article 27 places an obligation on state parties to protect the existence and exercise of the individual’s minority rights against their denial by non-state actors within the state party. In Hopu and Bessert v. France, the Human Rights Committee considered the private construction of a hotel complex on government owned-land to be a violation of the two ethnic Polynesian applicants’ human rights, since the hotel was to be constructed on a traditional burial ground. Confronted with a French reservation to ICCPR Article 27, the Committee held that France had failed to effectively protect the applicants’ family and private life in accordance with ICCPR Articles 17 and 23. The UN Committee on Economic, Social and Cultural Rights has taken the view that the right to food, the right to water, and the right to take part in cultural life contain obligations to protect.

The jurisprudence of European human rights bodies has found obligations to protect in the right to form and join trade unions and the right

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to privacy and family life. The same holds true for the right to free assembly. In Plattform “Ärzte für das Leben” v. Austria, protesters intensely disturbed the demonstration of an anti-abortion group. The European Court noted that while the right to free assembly contained protective duties the state had a margin of appreciation in choosing the measures to fulfill these duties.

The Inter-American Court held in the Velásquez Rodríguez Case, which concerned a case of abduction and murder by a private death-squad, that the individual’s right to physical integrity puts the state under an obligation to protect the individual from private violence. In the Awas Tingi Community case, an indigenous community complained that Nicaragua had not demarcated the communal lands of the Community or adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources. With a view to Article 21 of the American Convention (right to property), the Court held:

[T]he members of the Awas Tingni Community have the right that the State
a) carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and
b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.

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232 Id. at 12.


234 Mayagna (Sumo) Awas Tingni Community v. Nicar., Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001). This case built upon the jurisprudence devel-
Destruction of and displacement from ancestral lands was also at the heart of an important recent decision of the African Commission, which concerned ruthless oil exploration by the Shell Petroleum Development Corporation in collaboration with the Nigerian government in the Niger Delta, the home region of the Ogoni people. The Commission found that Nigeria had violated human rights *inter alia* because it failed to protect the Ogoni’s right to health (Article 16 of the Banjul Charter) and to a clean environment (Article 24 of the Banjul Charter) from being impaired by Shell’s exploration activities. Moreover, the Court found that the Ogoni’s right to self-determination, which entails a right to free disposition of their wealth and natural resources (Article 21 of the Banjul Charter), has been insufficiently protected from encroachments by Shell.

An analysis of the case law does not reveal a pattern indicating which human rights contain duties to protect and which do not. Instead, every human right seems capable of producing duties to protect. This raises the question of whether any potential frustration of behavior otherwise protected by relevant human rights creates an obligation on the state to implement protective counter-measures. Is one really dealing with a human rights issue if someone makes the conscious decision not to invite another person to dinner because the other person does not share his/her religion or gender?

Recently, the UN Human Rights Committee noted that not all human rights entail diagonal obligations:

> . . . the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment

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236 *Id.* paras. 55-57.

Unfortunately, the Committee failed to develop general principles discerning when a human right creates a duty to protect from non-state conduct. Several approaches could be imagined to fill this jurisprudential gap. One approach would be to limit the protective ambit of a human right by balancing it with the countervailing human rights of the non-state actor against whom the states would protect. Some 40 years ago, Louis Henkin outlined such an approach for the right not to be discriminated against on racial grounds under the U.S. Constitution, when he commented on the U.S. Supreme Court Case of \textit{Shelley v. Kramer}\.\footnote{334 U.S. 1 (1948).} In this case, the Court refused to enforce a restrictive private covenant which provided that a certain plot of land was not to be conveyed to black persons. Henkin took the view that the state is responsible for racial discrimination, if it could prevent, should prevent, and fails to prevent the discrimination.\footnote{Louis Henkin, \textit{Shelley v. Kramer: Notes for a Revised Opinion}, 110 U. PENN. L. REV. 473, 483 (1962).} In other words, he argued that a diagonal obligation to protect against discrimination by non-state actors existed under the U.S. Constitution.

When should the state intervene? Henkin found that the discriminator's constitutional rights of liberty and privacy had to be balanced with the victim's right to be protected against non-state discrimination.\footnote{\textit{Id.} at 487-88.} Henkin suggested that the sphere in which the discrimination occurs determines which right prevails. In certain situations, the discriminator retains the right to be "whimsical, sentimental, irrational, [and] capricious."\footnote{\textit{Id.} at 488.} However, where the discrimination is organized, public and prominent or where the private individuals involved are only loosely associated and have no intimate ties, the right to be protected against discrimination is likely to prevail.\footnote{\textit{Id.} at 496.} Such an approach could also be applied in international human rights law. One could find that the state's diagonal obligation to protect is more likely to prevail, the more the discrimination moves into the "organized, public and prominent" sphere. In fact, the UN Human Rights Com-
mittee’s finding in the *Nahlik* case, that the state has to prevent discrimination in the “quasi-public sector,” seems akin to Henkin’s approach. Along the same lines, one could delineate the scope of CERD Article 6 from that of CERD Article 7. The more private or intimate a certain behavior is, the more the obligation changes from a duty to interfere in the concrete case to a general duty to educate against prejudices.

In many cases involving other human rights, similar countervailing rights can be found. In *Plattform “Ärzte für das Leben,”* for instance, one could argue that the Plattform’s right to demonstrate was limited by the protesters’ right to counter-demonstrate. In *Hannover v. Germany,* the Court explicitly balanced the freedom of the press against the applicant’s right not to be photographed in her private life, but upheld the duty to protect the latter in that case.244

However, there are situations where this approach seems rather artificial. An untalented aspiring artist is booed of the stage by a drunken crowd. Did the state fail to protect the artist’s right to take part in cultural life (ICESCR Article 15 (1))? Or is the state only vindicated in refusing to protect him because it chose to respect the crowd’s countervailing right to free expression? What if a shop owner prohibits a group of teenagers to assemble (loiter, in his opinion) in the store? The ICCPR does not protect the right to property. Does one have to endeavor to find a countervailing customary right to property flowing from Article 17 of the Universal Declaration to solve the issue? It seems that the discourse of human rights is misplaced in these situations and should remain separate, lest it be trivialized. It is therefore necessary to construct a theory to determine in which instances there are no duties to protect from the very outset.

Clapham has made an attempt to construct such a theory. Although his theory is based on the assumption that human rights are horizontally applicable, it can be adapted to the question of diagonal application. Clapham finds that dignity and democracy are the values which underlie human rights provisions.245 His definition of democracy is a broad one. It entails not only fair elections, but also participation, accountability, representativeness, pluralism, tolerance, broadmindedness, freedom of expression and protection of minorities.246 Dignity requires that “everyone’s humanity . . . be respected” and protected from indignities such as killing, torture, slavery, discrimination, and so forth. Dignity also entails that “the

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243 *See supra* note 194 and accompanying text.
245 **CLAPHAM,** *supra* note 19, at 145-49.
246 *Id.* at 147.
247 *Id.* at 148.
conditions for everyone’s self-fulfillment . . . [are] created and protected." This aspect is attacked where “the right to associate, to make love, to take part in social life, to express one’s intellectual, artistic, or cultural ideas, to enjoy a decent standard of living and health care” are denied. Based on his theory, Clapham argues, for example, that a group of protesters must not be prevented by other private actors from demonstrating in a private shopping precinct, as that would thwart democracy. Applied to a model of diagonal obligations, this would mean that the state has to protect the protesters’ right to demonstrate against private interference. However, according to Clapham, democracy is not threatened when a group of witches demand to speak at a Christian prayer meeting is rejected. Clapham argues, only where the witches are denied the right to speak at all would one be dealing with a denial of dignity.

Clapham poses the right question – What factors determine whether the state has to intervene in non-state relations? – but, to my mind, he provides a flawed answer. As the foundational stone of human rights, the concept of dignity is all-embracing, which makes it an inappropriate tool of analysis. Every human right has dignity as one of its underlying values, even the most “democratic” of human rights such as the rights to participate in elections or to speak freely. Democracy is ultimately a tool to preserve individual dignity. Clapham’s focus on “dignity” therefore creates a safety net that catches all cases in which the democracy principle does not generate a duty to protect but it seems nevertheless appropriate to assume one. No clarity is gained. In addition, some of the strongest denials of dignity occur in areas where most people would find that the state has no business to interfere. Some of the greatest derisions and humiliations human beings can suffer are intractable to human rights. A person would be deeply humiliated if he were to be rejected as a lover or spouse solely because of his race. Yet, human rights language is incapable of addressing these intimate indignities, which are hurtful precisely because they are so intimate.

Building on both Clapham and Henkin, I propose a different framework of analysis. To my mind, two separate categories of human rights can be distinguished: existential rights and social good rights. The distinction does not imply a ranking of importance. Human rights are indivisible. I deem the categorization only important to explain why certain types of rights produce more extensive duties to protect than others.

248 Id.
249 Id. at 149.
250 Id. at 145-46.
251 Id. at 146.
252 Id.
Existential human rights are those which protect the individual's very physical existence. Comprised of the rights to physical security and rights to subsistence (the rights necessary to ensure the individual's bare survival), this category corresponds roughly with what Henry Shue has called basic rights. Recognizing that civil and political rights on the one hand and socio-economic rights on the other hand are interdependent and intertwined, existential rights are drawn from both sets of rights. To the extent that they ensure the mere subsistence of the individual, the rights to food, health, clothing or housing are existential rights. So are the rights to life and physical integrity or the rights to be free from torture, slavery or arbitrary arrest.

Two factors distinguish these rights from others. Their enjoyment is a necessary precondition for the enjoyment of all other rights. This does not make them more valuable or intrinsically more satisfying than some other human rights, but may explain why these rights tend to supersede other rights if a choice has to be made between conflicting human rights. More importantly, the denial of an existential right always constitutes an act of cruelty.

Whereas existential rights protect the human being's individual existence, social good rights protect the human being as a member of society. For the individual, these rights secure fair access to social goods or at least

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253 HENRY SHUE, BASIC RIGHTS: SUBSTANCE, AFFLUENCE, AND U.S. FOREIGN POLICY 8-30 (2d. ed. 1996). In a later passage, Shue makes the case that a right to minimum participation would also be a basic right. Id. at 65-88. He argues that for someone to have a right to enjoy the basic goods of security and subsistence there needs to be social arrangements to safeguard this right. Therefore, Shue contends, basic rights cannot exist in an absolute dictatorship that lacks any form of popular participation. Because there are no social arrangements to safeguards basic rights, the substantive entitlement provided through these rights cannot be demanded as of right but the entitlement is only granted out of an act of dictatorial benevolence. However, this argument is flawed in the context of international human rights law, because the obligations corresponding to these rights are not only owed to the entitled individual but erga omnes to all states. See Barcelona Traction, Light, and Power Co. (Belg. v. Spain), 1970 ICJ LEXIS 2 (Feb. 5). Due to this erga omnes character, international arrangements to safeguard basic rights exist, even where domestic social arrangements are completely absent. A right to participation is not a condition sine qua non to the existence of other international human rights.


255 SHUE, supra note 253, at 30.

256 See id. at 20.
ensure participation in determining their distribution. The term “social goods” is used in the widest sense here, encompassing any material or immaterial benefit the state, society or its individual members can provide. Socio-economic rights are obviously access rights, but the concept embraces all rights, except existential human rights. For instance, the right to free speech may ensure access to social goods, e.g. if the speaker is aiming to gain the social good of fame by expressing himself. It also ensures a say in the distribution of social goods. Even the right to privacy is a social good human right, since the privilege of being left alone is a good that society can generate. The right not to be discriminated against is also a right that is ensuring access to social goods. It is a right directed against the abuse of power and not a right primarily concerned with the direct affront to dignity constituted by the act of discrimination. What offends the discrimination victim’s dignity is not really the discriminatory conduct but the underlying prejudice that reveals itself through the conduct. The prejudice itself, however, remains intractable to legal commands. Human rights law can only ensure that the prejudice will not hamper the victim’s fair access to the social good he or she desires.

Some human rights are partially existential and partially social good rights, and which protective duties emanate from them will depend on the context. The right to health, for example, is an existential human right to the extent that it protects from the gravest, life-threatening infringements of one’s health. To the extent that it seeks to ensure and promote general physical and mental well-being, it is a social good right. At times, aspects of an existential right can be duplicated in a social good right. Where the right to free assembly protects from violent interference with a demonstration, the right to physical integrity is also concerned. In these cases, the principles applicable to existential rights prevail.

Existential and social good rights contain different sets of protective duties. If non-state conduct threatens to frustrate existential rights, the state always has an obligation to adopt protective measures. The state cannot make a conscious decision to tolerate the injurious behavior. Firstly, this follows from the victim’s perspective. In the realm of existential rights, it makes no difference for the victim whether the injury is inflicted in the

257 David Kinley and Junko Tadaki have considered the related question: What human rights duties ought to bind transnational corporations? They come to the similar conclusion that “core rights,” namely the rights to life, liberty and physical integrity, ought to apply to non-state actors, whereas other rights ought to only be made applicable to transnational corporations where corporate misconduct has a direct impact on human rights holders (“direct impact rights”). See Kinley & Tadaki, supra note 6, at 966-69.
intimate/private or in the prominent/public sphere. Domestic violence requires no less protection than violence against the participants of a political rally. Secondly, one does not have to fear that the protective measure unduly infringes upon the freedom of the attacker. He is prima facie in the wrong, since the denial of an existential right always constitutes an act of cruelty. Cruelty is prima facie wrong because there are natural duties not to injure one another or to inflict unnecessary suffering; these duties hold true between persons irrespective of their relationship.\textsuperscript{258}

Two clarifications must be added. The obligation to protect existential rights is not absolute. The state can consciously abstain from protecting these rights, when protection would infringe upon stronger countervailing rights. For instance, the state does not have to take protective measures against killing in self-defense to the extent that the attacked person’s rights prevail over the attacker’s right to life. The classical case of contention is the case of abortion: Is the woman’s right to privacy so strong that the state may consciously abstain from protecting the life of the unborn child? In deciding which right trumps the other, the state has a margin of appreciation. Due to the importance of existential human rights, though, this margin is small.

Secondly, it must be clarified that we are only dealing with the question of whether a state has a duty to protect or whether it can consciously decide to abstain from doing anything. We are not yet dealing with what protective measures a state has to take. Naturally, a state cannot be obliged to prevent all murders or acts of domestic violence. All it can be required to do is to take reasonable and appropriate measures to the extent of its capacity. This is the issue of the ambit of state responsibility. It will be discussed below.\textsuperscript{259}

Social good human rights only give rise to obligations in the non-state sphere under certain circumstances. In some cases, the state retains a margin of appreciation to decide not to interfere – even if protective measures are within its capacity. Two factors determine whether diagonal obligations flow from a social good right in a given situation. The first factor is the nature of the social good. Access to some intangible, intimate social goods (friendship, love, etc.) is granted in a manner that is inevitably "whimsical, sentimental, irrational, capricious." This is the area, where the human rights language of rights and obligations becomes inappropriate. Conversely, the more tangible and public the social good becomes (e.g. housing, employment, etc.) the more likely it is that diagonal obligations will exist.

\textsuperscript{259} See infra notes 260-77 and accompanying text.
The second factor derives from the fact that distribution of social goods is a competitive process in a free society. People compete for political power, nice housing, good jobs, even friendship, and we accept that. Human rights restraints on the state are, to a great extent, aimed at protecting this competition: The state's unique power to enforce its views by way of legal sanction allows it too great of an opportunity to skew the competition in an abusive manner. For this reason, the state is the primary addressee of human rights law. A non-state actor does not have this unique power and can only rely on a relative advantage in factual power to enforce its view on another non-state actor. Therefore, one has to analyze the factual power relationship and determine to what extent it threatens one side's autonomy: An obligation in the non-state sphere is more likely to exist the more skewed the power balance is. If one person heckled a public speaker in London's Hyde Park, we would accept that (despite the public nature of the social good of political influence), because both can compete for the social good of opinion leadership on the same footing. However, if a great number of hecklers organized themselves to shut down one specific speaker, this might be different because the relative distribution of factual, vocal power skews the competition. Thus, whether a diagonal obligation to protect a social good human right exists depends firstly on how tangible/public the concerned social good is and secondly on how skewed the distribution of power between the competitors for that good is.

2. Ambit of State Responsibility

Once it is established that there is an obligation to protect, the question is what measures have to be taken. This question relates to the ambit of state responsibility. This ambit has two dimensions. The first dimension is its extent. The state's human rights responsibility extends to everything within its jurisdiction. Jurisdiction refers to the state's ambit of "judicial, legislative, and administrative competence" and extends as a minimum to the state territory. International human rights bodies have held that a state can also violate human rights if it exercises control over de jure or de facto agents that are committing breaches abroad. There is no reason

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260 Cf. Raday, supra note 15, at 110; Eckart Klein, *Grundrechtliche Schutzpflicht des Staates*, 42 NEUE JURISTISCHE WOCHENSCHRIFT 1633 (1989). Klein proposes to examine to what extent true voluntarism characterizes the relation between two non-state actors in order to determine if a human right gives rise to a protective duty in a certain situation.

261 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 301 (5th ed. 1998).

why this principle of home state responsibility should not also apply to diagonal obligations. A state might therefore have to take reasonable protective measures to prevent human rights abusive conduct by non-state actors that are based in its territory but commit the abuse in another state that is incapable or unwilling to prevent the conduct itself.263 Thus, a developed state might have to take reasonable measures to prevent one of its transnational corporations from engaging in human rights infringing conduct in a developing state, if that developing state lacks the power, technical expertise or political will to fulfill its own diagonal obligations to protect. Given that many states already successfully apply their antitrust, export control and securities laws to the extraterritorial conduct of non-state actors, such an obligation would not overburden developed states.264 Furthermore, this principle of a subsidiary home state responsibility would not unduly interfere with the sovereignty of the state, where the abusive conduct takes place. The economic sanctions, which various states imposed against Apartheid South Africa, set the precedent that international law permits a state to direct its companies how, and even if, to do business in another state. A strong case can therefore be made that diagonal human rights obligations ought to have an extraterritorial ambit of application. However, there is, unfortunately, still little evidence that this is a recognized principle of positive international law.265

Apart from the ambit of responsibility's extent, there is a second dimension, which one may call the ambit's depth. Protective duties are duties of due diligence rather than duties of result, because human rights law must not place an impossible or disproportionate burden on the authorities.266 Even though the state has a duty to protect human life, for example,


264 See id. at 494.
it is not obliged to successfully prevent every single murder.\textsuperscript{267} The state does not have to do more than to take “reasonable and appropriate measures.”\textsuperscript{268} What is reasonable and appropriate must be determined on a case-by-case basis bearing in mind the specific facts of the case. In Plattform “Ärzte für das Leben” v. Austria, for instance, the European Court of Human Rights found that the state had a wide margin of discretion in the choice of means to be used in order to protect a demonstration. By prohibiting the counter demonstrations and deploying a large number of policemen as well as special riot-control units, when violence threatened to break out, Austria had fulfilled its duty to protect, even though the counter demonstrators still managed to throw eggs and clumps of grass at the demonstrators.\textsuperscript{269}

In setting its protection priorities, the state has to take into account the extent and intensity of the injury to be feared, the degree of probability that the injury will happen, the extent to which the protective measure will cost resources needed to fulfill other obligations, and the possible existence of countervailing human rights that would be limited by the protective measure. A non-state threat to existential rights would generally require stronger measures than one to social good human rights, not least because the enjoyment of the former is the precondition for the enjoyment of the latter.\textsuperscript{270} Bleckmann has argued that legislators’ margin of appreciation in deciding upon protective measures ought to be greater than the administration’s, since the parliament has been democratically legitimized.\textsuperscript{271} This


\textsuperscript{270} \textit{Cf.} JAGERS, supra note 25, at 171-72 (arguing that \textit{ius cogens} norms give rise to stricter protective duties).

\textsuperscript{271} Albert Bleckmann, \textit{Die Entwicklung staatlicher Schutzpflichten aus den Freiheiten der Europäischen Menschenrechtskonvention, in Recht zwischen Umbruch und Bewahrung} 309, 319 (Ulrich Beyerlin et al. eds., 1994).
idea, which is rooted in German constitutional jurisprudence, has no place in international human rights law. In a democracy, the executive and administration are also democratically legitimized, either directly or indirectly.

What protective measures are reasonable and appropriate also depends on a state's capacity. Human rights law cannot ask the impossible from a developing country. At the same time, it should demand more than the lowest common denominator of possible protection from more capable countries. Which protective measures are reasonable and appropriate will therefore be affected by the resources a state has at its disposal. This raises the problem, of course, that countries will be inclined to plead incapability in order to dodge their obligations to protect. However, this problem is mitigated by the fact that even a state with very few resources still has an obligation to allocate those resources without discrimination. A state may not claim, for example, that it lacks the resources to take any measures against domestic violence or female genital mutilation if it has dedicated resources to protect against other forms of violence such as attacks by insurrectionary groups.

While human rights bodies have not recognized substantive duties of result, they have identified specific process rights. In Velásquez Rodríguez, the Inter-American Court noted that a state has "to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." Thereafter, the Court set out specific requirements for investigations into possible forced disappearances:

[The investigation] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government . . . . The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be le-

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272 Farrior, supra note 195, at 303.
gally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.274

Specific process rights are also emerging; such rights involve corporate activity that is detrimental to the enjoyment of human rights.275 These process rights aim to ensure that local populations confronted with harmful corporate activity are placed in a position to make informed decisions and have their voices heard. The goal is to make certain that locals can compete on a more equal footing against an adversary with greater factual power. In Guerra v. Italy, the European Court of Human Rights found that Italy had violated its duty to protect family life by failing to provide essential information that would have enabled the applicants to assess the risks they and their families assumed by continuing to live in the vicinity of an industrial plant producing toxic emissions.276

The African Commission recognized very similar process guarantees, when it considered the human rights violations arising from Shell’s ruthless oil exploration in Nigeria:

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.277

274 Id. ¶¶ 177, 181.
275 See Scott, supra note 111, at 582.
The Inter-American Court’s specific finding that Nicaragua has to delineate, demarcate and grant title to the private property of the Awas Tingi indigenous community is also no more than a process right. Titling the property does not create property rights for the Awas Tingi. It only confirms and fixes them. By itself, it will not keep intruders out of the property. However, it improves the Community’s chance to have their voices heard in legal and administrative proceedings concerning their property and the surrounding area.

3. Injury and Causation

The failure to apply due diligence and adopt reasonable and appropriate protective measures in and of itself does not amount to a human rights violation. There has to have been an injury to a rights-holder. That does not mean that the rights-holder must have suffered tangible or intangible harm (material loss, emotional distress etc.). However, the rights holder has to be directly affected by the failure to protect. In principle, there must also be a causal relationship between the failure to apply due diligence and the injury. However, human rights tribunals take into account that the failure to protect with due diligence typically results from an omission and that the causality of omissions is hard to ascertain. They seem to regard possible causality to be sufficient. X & Y v. The Netherlands concerned sexual assault on a mentally handicapped girl. Due to a procedural gap in Dutch criminal law, the perpetrator could not be prosecuted. In finding that the victim’s right to privacy had been violated, the Court dismissed the respondent state’s arguments that the assault would have occurred even had it been punishable. Similarly, the Inter-American Court construed a duty to investigate cases of forced disappearances from the right to life in Velásquez Rodríguez, even though the victim had probably already been murdered and the investigation could thus not have prevented the injury to the right to life.

278 See supra note 234.
CONCLUSION

The conduct of non-state actors can give rise to human rights violations to a greater extent than one would expect. Human rights law, interpreted in the light of general international law, applies to every private actor that is endowed with state power in any form. It applies to private entities that perform public functions and state-owned entities that are misused for political purposes. The state can also incur human rights responsibility for private conduct that it adopts as its own and for the conduct of de facto agents or hierarchically structured agent groups, over whom it exercises effective control. Finally, human rights responsibility also ensues where non-state groups, such as insurrectionary movements, usurp state power. The Westphalian paradigm of state responsibility has traditionally limited international law to hold only the state (rather than the usurpers themselves) responsible, but this short-coming is gradually being corrected as a customary norm emerges which extends human rights obligations also to non-state actors governing territory.

Abuses of true non-state power are checked as well. Existential human rights are to be protected by reasonable and appropriate measures under all circumstances, bearing in mind countervailing human rights. In addition, the state has human rights obligations to protect the individual from non-state abuses of power, wherever access to public or tangible social goods is concerned and there is a disproportionate power relationship between the competing non-state actors.

However, the current system suffers from one grave weakness. It is based on the premise that states are strong enough to check the range of agents that form part of the machinery of government, and that they can fulfill all their protective duties. If we are really experiencing a power shift away from the state and toward the non-state realm, this foundational premise becomes shaky. At the same time, as state capability to protect is weakening, their ambit of protective obligations to protect is widening, since the non-state sector expands into former state domains. The obvious answer would be to supplement the existing framework of vertical and diagonal human rights obligations with horizontal obligations for those non-state actors that seem to accumulate power, most prominently transnational corporations. The emerging duty for non-state actors not to become complicit in human rights violations of states is a first step in the right direction.