The Challenge of Non-State Actors for Human Rights Law

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[To be published in *International Human Rights Law,* 3rd edn, Oxford University Press edited by Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, with David Harris]

NON-STATE ACTORS

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SUMMARY

It is increasingly recognized that human rights law has to address the challenge posed by non-state actors. This chapter starts with a reflection on how the term 'non-state actor' is used and why it is appropriate to look at the impact of non-state actors on the enjoyment of human rights. It then recalls the 'positive obligations' of states to protect those within their jurisdiction from abuses by non-state actors and how states provide for redress at the national level. In the next part, it considers the human rights obligations of different non-state actors: international organizations, corporations, and armed non-state entities. The chapter argues that we should meet the following challenges: extending and translating certain norms so that they clearly denote the obligations of non-state actors; creating and adapting specific institutions to ensure greater accountability for the activities of non-state actors; and adjusting our assumptions about who are the duty-bearers in the human rights regime.

1 INTRODUCTION

Even though the term 'non-state actor' can be defined quite simply as any entity that is not a state, it deserves some explanation. In some contexts the term is used to refer to benign civil society groups working for human rights—and it has become commonplace (even a cliché) to refer to the need to 'involve non-state actors in the conversation'. In other contexts, however, the term is understood to refer to some very 'uncivil' groups determined to resort to violence and even acquire weapons of mass destruction. Depending on the context, international law provides that states are either obliged to punish non-state actors or, alternatively, obliged to co-operate with them.[1] So the expression non-state actor can conjure up different entities in different contexts, but different non-state actors will have different obligations. For example an armed group may have an obligation not to recruit children, while the European Union may have detailed specific obligations under the Convention on the Rights of Persons with Disabilities.

Like states, non-state actors are seen as embodying the paradox that their capacity to violate contains within it the potential for protection. In this way, non-state actors can be the 'source

[1] See AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009), Art 1; S/RES/1540 (28 April 2004); Cotonou Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (2000), Art 6.

and target of pressure at the same time'. [2]

But even if we admit that the expression 'non-state actor' means different things in different contexts, and that all such actors have the potential both to violate and to promote a variety of human rights, there is another problem we need to address. The problem is that the human rights regime has developed along state-centric lines. Human rights treaties were mainly written by states as sets of obligations for themselves. The accompanying monitoring mechanisms that provide for state accountability are based on traditional rules of state responsibility. To adjust this system, and to revise the assumptions that have grown up around it, tends to trigger considerable resistance from states and international lawyers.

Why would lawyers and governments want to exclude non-state actors from the state-centric regime of international law in general, and human rights law in particular? There are a number of reasons. First, with regard to armed opposition groups (also sometimes characterized as 'terrorists'), it is argued that suggesting such groups have human rights obligations under international law is a sort of recognition which in turn could enhance legitimacy. Second, in some circumstances, governments may be wary of allowing international organizations or corporations to assume state-like features by taking on international obligations, such as those relating to human rights. This has been the case, for example, with regard to the attitude of some governments towards the European Union playing a greater role as the bearer of human rights obligations or towards developing regimes to cover the human rights obligations of private security companies. Third, corporations and international financial institutions such as the World Bank and the International Monetary Fund are usually not keen to take on a raft of responsibilities that they see as properly the responsibilities of states.

With regard to international financial institutions Philip Alston has identified an additional fear from within that an institution like the World Bank could be asked to become a global enforcer, some sort of 'human rights cop'.[3] This of course is far from what civil society is asking for when it appeals for the World Bank to respect human rights and adopt a human rights policy.[4] In the imagined extension of all human rights obligations to corporations, there is an additional perceived danger of undermining or diluting the responsibilities of states. For example, in

[2] Arat, 'Looking beyond the State But Not Ignoring It' in Andreopoulos, Arat, and Juvilier (eds), *Non-State Actors in the Human Rights Universe* (Kumarian Press, 2006) 8.
[3] Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, (UN DocA/70/274: 4 August 2015) esp paras 34-48.
[4] van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualized Way Forward*, (Cambridge: Intersentia, 2015).

2006, John Ruggie, the UN Secretary-General's Special Representative on business and human rights, advised the UN Commission on Human Rights that: 'Corporations are not democratic public interest institutions and … making them, in effect, co-equal duty bearers for the broad spectrum of human rights . . . may undermine efforts to build indigenous social capacity and to make governments more responsible to their own citizenry.'[5]

We have, then, broadly speaking, two perceived problems: a 'legitimacy' problem and a 'dilution' problem. These problems can be quite easily overcome. We can remind that armed opposition groups and their members are increasingly accused of violations of international humanitarian law and even convicted of war crimes. Highlighting violations of these obligations ought to be seen as *de-legitimizing* rather than recognizing some sort of enhanced international status. The problem of legitimizing armed groups evaporates if we decouple human rights from the idea that human rights supposedly emerge from an essential link between governments and their citizens. When we see human rights as rights rather than self-imposed governmental duties, and when we envisage the rights project as founded on better protection for human dignity rather than privileges granted by states, we can start to see how we might imagine human rights obligations for non-state actors. Rather than concentrating on abstract questions of legitimacy we can take a more sentimental approach and imagine ourselves in the shoes of a victim. From the victim's perspective, the inhuman and degrading treatment is an assault on dignity whether it is suffered at the hands of a policeman, a rebel commander, or a private security company.

With regards to dilution, we can suggest that corporations, international financial institutions, and development agencies have to respect human rights in ways that complement the responsibilities of states, rather than replacing state obligations. We can admit that as we come to realize that international organizations and private security companies now have the de facto power to detain and use force, we should provide a normative framework that protects the individuals they come into contact with. The fact that this does not fit easily with a history of human rights that emphasizes the social contract with a government, should not distract us from the urgency of the task.

Moreover, the most promising theoretical basis for human rights obligations for non-state actors is to remind ourselves that the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person's inherent dignity. The implication

[5] Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/2006/97 (22 February 2006) para 68.

is that these natural rights should be respected by everyone and every entity. We should recall that the Universal Declaration of Human Rights is written as a proclamation of rights; the actual obligations of states were not agreed upon at that time. The word 'state' hardly appears in the Declaration. Furthermore, if we leave aside the treaty regimes, with their state-centred monitoring mechanisms, and concentrate on general principles or customary international law, it becomes apparent that even though the jurisdictional clauses of the treaty bodies preclude complaints against non-state actors, the substantive norms themselves may easily be adapted to apply to non-state actors. Before turning to the actual state of human rights law, let us look at five dynamics that have implications for the development of human rights obligations for non-state actors.

2 THE CHALLENGE OF NON-STATE ACTORS: GLOBALIZATION, PRIVATIZATION; FRAGMENTATION; FEMINIZATION; AND CRIMINALIZATION

The *globalization* of the world economy and means of communication have highlighted the power of large corporations and their limited accountability in law for human rights abuses.[6] There exist today increased possibilities for enterprises to outsource different links in the manufacturing chain, by relying on subcontractors all over the world. In addition, competition between states to attract foreign direct investment has sometimes resulted in pressure on labour rights, in particular in the garment sector and in special export-processing zones, with minimal regulation or control over employer practices. Despite some recent national initiatives aimed at goods produced in violation of basic rights, the global picture remains stark for the workers involved.[7]

In separate developments foreign companies working in the extractive industry have had to resort to special security arrangements in the host state. This last practice has led to serious questions about violence at the hands of public and private security guards in this context and the imposition of a human rights based normative framework.[8] It has also led to initiative to

[6] eg Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo!, Microsoft and Google* (2006).

[7] In the UK the Modern Slavery Act 2015 is aimed at human trafficking slavery, servitude and forced or compulsory labour, and see also the Bangladesh Accord which is a 'an independent, legally binding agreement between brands and trade unions designed to work towards a safe and healthy Bangladeshi Ready-Made Garment Industry' http://bangladeshaccord.org/.

[8] eg Voluntary Principles on Security and Human Rights (2000) Jerbi, *The International Code of Conduct for Private Security Service Providers: Academy Briefing 4*, (Geneva Academy of International Humanitarian Law and Human Rights, 2013) Cameron and Chetail, *Privatizing War: Private Military and Security Companies un-*

generate due diligence obligations on the companies with regards to their supply chain.[9]

In a first phase, emphasis was put on the state's duty to protect individuals from such non-state actors. This is sometimes referred to as a duty of due diligence or a positive obligation. However, this approach has considerable limits. Imagine a situation with a host state's institutions failing and break down not only in law and order but also in the rule of law itself. A corporation is called in. By definition the host state is no longer able to fulfill its positive obligations, and, in practice, it is hard to argue that any other state is responsible for all the acts of this corporation. In the real world there are hardly any effective remedies against a host state for failure to exercise due diligence over massive foreign chemical or extractive industries operating with little regard for the health of those being affected. In each case to rely on the states concerned to protect people from such abuses has been unworkable. Accordingly, a second approach has been suggested, namely that corporate activity should be simply directly dealt with by national legal tools such as tort or contract law. Transnational activity, with links to multiple jurisdictions, ought to make it easy to find an accountability mechanism; but the opposite is the case.[10] Globalization reminds us that corporate actors have the possibility to operate from multiple jurisdictions, which will not necessarily ensure that they are held accountable for human rights abuses anywhere. It also reminds us that governments competing for investment have shown little inclination to develop accountability for corporate abuses either at home or abroad.

The *privatization* of sectors such as television, health, education, prisons, water, communications, security forces, and military training has forced us to think again about the applicability of human rights law to the private sector. Many assume that something which is privatized remains subject to human rights law as the concept of human rights is related to so-called 'public functions'. But this assumption is not borne out in practice.

First, the whole point of privatization is to remove certain activity from the state-run sphere, increasing flexibility and usually diminishing accountability. The usual consequence is that the protections that have developed with regard to state activity no longer apply and, although in theory new private remedies should apply, such remedies tend not to include human

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der Public International Law, (CUP, 2013).

[9] *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected Areas*,2nd edn, (2013); see also the sectoral initiatives for example with regard to diamonds (the Kimberly Process) and those listed in OECD, *Gold Industry and Sector Initiatives for the Responsible Sourcing of Minerals*, 2014).

[10] See R. McCorquodale, *Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms*, (London: BIICL, 2015); Solé et al *Human Rights in European Business: A Practical Handbook for Civil Society Organisations and Human Rights Defenders*, (Tragona Centre for Environmental Law Studies, 2016).

rights protection in name. The same act therefore gets relabelled. What was once a human rights violation becomes a civil wrong, a tort, or a breach of contract.

Second, the new entity which has taken on the former responsibilities of the state has something that the state did not have. The new non-state entity may have competing human rights which can be enforced or weighed against anyone claiming their rights against this non-state actor. So, for example, the owners and managers of a private shopping mall dominating a town centre will be able to claim respect for the enjoyment of their private property when protestors claim freedom of expression and assembly in that privatized space.[11]

The *fragmentation* of the power in a state may occur not only by the rise of powerful corporate actors but also through the emergence of armed groups or even through delegated authority or power to international organizations. The exercise of power by armed opposition groups has in recent times led to particular scrutiny from the international community. The demands go beyond international humanitarian law and individual responsibility under international criminal law. As we shall see below, the Commissions of Inquiry and the Special Rapporteurs of the UN Human Rights Council now report on human rights violations by all sides during civil strife, and the state/non-state actor boundary may be difficult to patrol as state influence over such groups waxes and wanes. Worries about recognition may be giving way to concern over ensuring scrutiny and accountability. The so called 'Islamic state' is obviously not a state and yet the UN Human Rights Council has dedicated a resolution to that entity and condemned 'in the strongest possible terms the systematic violations and abuses of human rights … resulting from the terrorist acts committed by the so-called Islamic State.[12]

Under this heading of fragmentation we should also mention the assumption of state-like tasks carried out by the UN or other inter-governmental organizations. Such tasks could even include territorial administration ((Kosovo and East Timor are perhaps exceptional examples) or simply de facto control over people (NATO and the African Union have both developed detention policies with regard to their peace operations). Such 'hands on' work by international organizations has led to new developments with regard to the applicability of human rights law not only to the UN but also to other international organizations. The Cholera crisis in Haiti has

[11] *Appleby v UK* (2003) 37 EHRR 38; whether or not a non-state actor is able to claim rights under the European Convention or should be considered as a governmental organization is a complex question see Williams, 'Strasbourg's Public-Private Divide and the British Bill of Rights', *EHRLR* (2015) 617-30; for a discussion about the problems of balancing the responsibilities of the media with 'the media's own human right to freedom of expression' see Joseph, '"Is Fox News a Breach of Human Rights?": The News Media's Immunity from the Guiding Principles on Business and Human Rights', (2016) 1 *Business and Human Rights Journal* 229-53.

[12] A/HRC/RES/S-22/1, 1 September 2014

forced the United Nations to think not only about issues of responsibility but also liability and accountability towards those harmed.[13]

Although various obstacles may remain when human rights claims are brought against international organizations in national courts, where there is no equivalent legal protection or alternative means to achieve redress some national courts have started to prioritise human rights over claims for immunity from international organizations.[14]

In evoking *feminization* I want to highlight that the developments surrounding the international human rights of women have led to a complete reappraisal of the way in which the public/private divide has been constructed to delimit human rights law. Some treaties now specifically require the state to take action to protect women in the 'private sphere' or to guarantee women's rights in public and private life.[15] International obligations and commitments have been reconfigured through the prism of due diligence, to ensure that they cover daily harm to women and not only a narrow range of concerns of men. The feminization of human rights has shifted the emphasis to issues of violence against women, certain unfair labour practices, sexual exploitation, trafficking, and 'traditional practices' such as 'honour' killings. Moreover the idea that sexual violence at the hands of armed non-state actors is somehow outside the scope of the study of human rights today seems absurd not to say offensive. In particular the sexual violence at the core of some of the activities of the so called 'Islamic state' has to be tackled head on and not as an aspect of the failure of the relevant states.[16]

Lastly, when we consider *criminalization* in the international legal sphere we have to perceive a radical development which we can trace back in part to the Nuremberg moment when international law was clearly accepted as binding entities that were not states; it was declared in 1946 that international law could bypass the state and fix directly on individuals.[17] Today it is more and more likely that international criminal law will become primarily concerned with non-state

[13] See Alston, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights', A/71/367, 26 August 2016.
[14] For useful country-by-country review see Reinisch, (ed) *The Privileges and Immunities of International Organizations in Domestic Courts*, (OUP, 2013), and see especially the Chapter on Argentina where the constitutional right of access to court has been given priority; for examples of national courts prioritizing the right of access to a court under the European Convention of Human Rights over the claim of functional immunity by an international organization see Reinisch, 'Privileges and Immunities', in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011) 132-155 at 143-6.
[15] See Chapter 16, above.
[16] Zainab Bangura, 'Faith in Islam & Faith in Women: Why Gender Justice is Key to an Islam Without Extremes', International Crisis Group, 2015 .
[17] Scharf, *Customary International Law in Times of Fundamental Change: Grotian Moments*, (CUP, 2013); see more generally Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, (CUP, 2016)

individuals as opposed to state officials. The Statute of the International Criminal Court provides that its jurisdiction can be triggered by a state party that refers a situation in which relevant crimes appear to have been committed.[18] Several states have referred their own situations to the court. In nearly all situations—Uganda, Central African Republic, the Democratic Republic of the Congo, Mali, and Gabon—the government concerned is in part often cooperating in order to see non-state actors tried before the Court. Thus, the first trials before the International Criminal Court have veered towards prosecuting crimes committed by rebel leaders rather than crimes committed by state actors.[19] To the extent that any new Criminal Chamber of the African Court of Justice and Human Rights will prosecute individuals under its Statute, it is already clear that there will be more obstacles to prosecuting state officials than there will be for prosecutions against non-state individuals.[20]

Similarly, the only prosecution in the UK for the international crime of torture concerned an Afghan, non-state, warlord who had been fighting the government.[21] Attempts to prosecute state actors are met with a variety of obstacles including reliance on the international law of state immunity.[22] Although this migration of international law from state actors to non-state actors has mostly been observed at the level of individual criminal responsibility, there is no convincing conceptual reason why international law should not be extended to cover corporate actors and rebel groups as such.[23] We will return below to the increasing prospect of criminal prosecutions of corporations for violations of international law.

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[18] Art 14.

[19] See Chapter 24, above.

[20] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014 Art 46A bis 'No charges shall be commenced or continued before the Court against any serving Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.' Tladi, 'The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff', vol. 13 *JICJ* (2015) 3-17.

[21] *R v Zardad*¸ Central Criminal Court (7 April 2004). See Clapham, *Human Rights Obligations of Non-State* Actors, OUP (2007), 342–3.

[22] *The Queen on the application of Freedom and Justice Party and others v Secretary of State for Foreign and Commonwealth Affairs and others*, [2016] EWHC 2010 (Admin).

[23] For a debate on this issue, see (2008) 6 *JICJ* 899–979; Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', vol. 47 *New York University Journal of International Law and Politics* (2014) 121-206; F. Jeßberger, 'Corporate Involvement in Slavery and Criminal Responsibility under International Law', (2016) 14 *JICJ* 327-41.

3 THE LEGAL FRAMEWORK

3.1 Human Rights Treaties and the State's Positive Obligations

All human rights treaties have been held to contain positive obligations that oblige states to protect those within their jurisdiction from harms committed by non-state actors.[24] Different treaty bodies and international courts have addressed the extent of these obligations in different contexts. The Human Rights Committee has stated in relation to the International Covenant on Civil and Political Rights (ICCPR) that:

> 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 of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 [ICCPR] would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[25]

Although several UN human rights treaty bodies have tended to concentrate on the obligations of the states parties to the treaties, rather than explaining what is actually expected of the non-state actors themselves,[26] a new direction may be emerging as evidenced by the more recent General Comment prepared by the UN Committee on the Rights of the Child which recognized that:

> duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and the Optional Protocols thereto.[27]

There is a rich vein of case law that allows us to determine the extent to which it is reasonable to expect states, not only to punish, but also to prevent, non-state actors from interfering with

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[24] See Chapter 5, above.

[25] HRC, General Comment 31, HRI/GEN/1/Rev.9 (Vol 1) 243.

[26] See for example the 'Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights' by the Committee on Economic Social and Cultural Rights, E/C.12/2011/1, 20 May 2011, but there is an acknowledgment that 'corporate activities can adversely affect the enjoyment of Covenant rights. Multiple examples of the related problems range from child labour and unsafe working conditions through restrictions on trade union rights and discrimination against female workers, to harmful impact on the right to health, standard of living, of including indigenous peoples, the natural environment, as well as to the destructive role of corruption.' At para 1.

[27] General Comment 16 (2013) on 'State obligations regarding the impact of the business sector on children's rights, at para 8. For a detailed look at this see Gerber, Kyriakakis, and O'Byrne, 'General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights: What is its Standing, Meaning and Effect?' vol 14 *Melbourne Journal of International Law* (2013) 1-36.

the enjoyment of human rights under human rights treaties.[28] There are a number of possibilities through which states may give effect to their positive obligation to protect individuals from harms committed by non-state actors.

3.2 National Law

First, some states may give effect to certain international human rights by simply incorporating treaty rights and obligations into their national legal orders. In some situations this may mean that the human rights obligation applies to certain non-state actors even in the absence of special legislation.[29] Recent judgments in the Court of Appeal have gone so far as to apply human rights, such as the right to a remedy, found in the EU Charter of Fundamental Rights in a 'horizontal way' against entities not party to the EU treaties in ways which displace the provisions in a UK Act of Parliament.[30] The extent to which these fundamental rights can continue to be applied directly in the UK courts against non-state actors will depend on the terms of the Brexit and any successful appeals to the Supreme Court. The prospect that more and more EU fundamental rights will come to apply directly and horizontally (ie against non-state actors) through the national legal orders of the other 27 states is nevertheless very real.[31]

A second possibility is that the jurisdiction in question allows for human rights claims against private entities in its constitution (such as South Africa) or has some legislation that is applied to facilitate human rights claims against non-state actors. The cases litigated under the US Alien Tort Statute (ATS, also known as the Alien Tort Claims Act) may still prove significant in this context. The ATS confers upon US federal district courts original jurisdiction over 'any civil action by an alien for a tort only, committed in violation of the law of nations' wherever it may have taken place.[32] US courts have been gradually refining the list of violations of the 'law of nations' that will be justiciable in this context. Rulings have determined that genocide, slave trading, slavery, forced labour, and war crimes are actionable even in the absence of any con-

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[28] eg *X and Y v The Netherlands* (1985) 8 EHRR 235; *Velásquez Rodriguez v Honduras*, IACtHR Series C No 4 (29 July 1988); 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso*, ACommHPR; see generally Clapham n 26, chs 8 and 9, and Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *HRLR* 225

[29] eg the situation in the Netherlands: Jägers and van der Heijden, 'Corporate Human Rights Violations: the Feasibility of Civil Recourse in the Netherlands' (2008) 33 *Brooklyn JIL* 834, 856. For more examples see Oliver and Fedtke (eds), *Human Rights and the Private Sphere* (Routledge-Cavendish, 2007).

[30] See *Benkharbouche v Sudanese Embassy* [2015] EWCA Civ 33; *Google v Vidal Hall* [2015] EWCA Civ 311.

[31] Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality', (2015) 21 *ELJ* 657-79.

[32] 28 USC § 1350.

nection to the state.[33] In addition, according to the *Kadic v Karadzic* judgment, where rape, torture, and summary execution are committed, these crimes 'are actionable under the Alien Tort Act, without regard to state action, to the extent they were committed in pursuit of genocide or war crimes'.[34] In fact, even though US courts, including the Supreme Court, have determined that violations of the 'law of nations' under this Statute must be those that are 'specific, universal and obligatory' and have suggested that the drafters of the ATS probably had in mind a narrow set of violations such as piracy or an assault on an ambassador, the list is not exhaustive, as international law continues to evolve.[35]

In the 2013 case of *Kiobel v Royal Dutch Petroleum*, the US Supreme Court avoided the question as to whether or not a corporation could be a defendant in a case concerning a violation of the 'law of nations'. Instead, it focused on the presumption against extraterritorial application of legislation and required that claims demonstrate a nexus with the USA.[36] At the time of writing the issue may yet come again before the Supreme Court as different Circuits in the US Federal Court system have been split on whether the law of nations can attach to corporate defendants under this Statute. As explained in 2015 by the Second Circuit there is 'a growing consensus among our sister circuits that the ATS allows for corporate liability. To date, the other circuits to have considered the issue have all determined that corporate liability is possible under the ATS.'[37] It has also become clear from the 2011 *amicus* brief by the United States that, at least in the view of the United States, international norms defined with sufficient specificity can apply to corporations.[38]

A third possibility is that the incorporating legislation for the human rights treaty addresses the issue of non-state actors explicitly. This is the case for the Human Rights Act 1998 in the UK. Section 6, entitled 'Acts of public authorities', provides that it is unlawful for a pub-

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[33] *Wiwa v Royal Dutch Shell Petroleum (Shell)*, Case 96 civ 8386 (KMV), Opinion and Order of 28 February 2002, 39. See also *Doe I v Unocal Corporation* (2002) 395 F 3d 932, paras 3 ff.

[34] *Kadic v Karadzic* (1995) 70 F 3d 232, 243–4.

[35] *Sosa v Alvarez-Machain et al.* (2004) 542 US 692, 732 and 734–7.

[36] *Kiobel v Royal Dutch Petroleum* (2013) 569 US. .

[37] *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2nd Cir. 2015)At 156 They then reference the following: '*Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *see also Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014) ... *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999).'

[38] 'At the present time, the United States is not aware of any international-law norm of the sort identified in Sosa that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can.' Brief for the United States, *Kiobel*, No. 10-1491 (U.S. filed Dec. 21, 2011) at 7; the approach is insightfully explained by Dodge, 'Corporate Liability under Customary International Law', vol. 43 *Georgetown Journal of International Law* (2012) 1045-51.

lic authority to act in a way which is incompatible with a Convention right, and that a 'public authority' includes 'any person certain of whose functions are functions of a public nature', but that 'In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.'So a non-state actor with functions of a public nature carrying out acts that are not of a private nature has human rights obligations under the Act. Interpreting this conundrum has given rise to a rich stream of case law and has split what was then called the Appellate Committee of the House of Lords (today the Supreme Court) in the context of a complaint against a residential care home,[39] and led to new legislation,[40]

Stepping back from the detailed statutory interpretations in these cases, the question of whether to apply human rights to non-state actors has forced judges to reflect on the foundational rationale for human rights—to protect individual dignity—and admit that it does not matter from which side of the public/private divide the harm comes. At this point we find that opinions divide, not only on whether certain functions such as education, healthcare, restaurants, rented accommodation, social housing, shopping malls, telephone services, residential care for the elderly, detention, and security are 'obviously' public functions, but also on the question of how much power should judges have to interpret such 'new' obligations for private actors. Our answer depends in part on our approach to human rights: must they be granted through the authoritative process of law-making? Or are they inherent in the individual, generated from a basic obligation on us all to protect human dignity and autonomy?

In a case brought by Naomi Campbell against Mirror Group Newspapers for a breach of her privacy in respect of publication of a photograph of her leaving Narcotics Anonymous, the issue arose as to the weight (if any) to be given to her right to privacy as opposed to the freedom of expression and information claims made by the newspaper. In the past such a claim might have been seen as having nothing to do with human rights due to the absence of a state actor. Today, the expectations are different. Lord Hoffmann reflected this in his speech:

> What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state—I have particularly in mind the position of the media, to which I shall return in a moment—but I can see no logical ground for saying that a person should have less protection against a private individual

[39] *YL (by her litigation friend the Official Solicitor) (FC) (Appellant) v Birmingham City Council and others (Respondents)* [2007] UKHL 27.

[40] See Social Care Act 2009, s 145; Care Act 2014 s 73. See also Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP, 2013) 85-8.

> than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.[41]

Lastly, in other jurisdictions, legislation and the constitution have been *interpreted* to cover human rights claims brought against non-state actors. We can find a pervasive percolation of human rights values into judicial reasoning and constitutional interpretation, in ways that indirectly apply human rights obligations to non-state actors.[42]

4 THE OBLIGATIONS OF INTERNATIONAL ORGANIZATIONS

A traditional starting point for the assertion that international organizations have international obligations is the International Court of Justice's statement that international organizations are subject to 'general rules of international law'.[43] As Christian Tomuschat points out:

> Substantively, international organizations may be characterized as common agencies operated by States for the fulfilment of certain common tasks. Now, if States acting individually have been subjected to certain rules thought to be indispensable for maintaining orderly relations within the international community, there is no justification for exempting international organizations from the scope *ratione personae* of such rules.[44]

Many would agree with Tomuschat that, even if states can limit the powers of the organization they create, they 'cannot thereby shield their creation from becoming liable towards other subjects of international law on account of [their] activities'.[45] This reasoning has been reflected in the approach of the European Court of Human Rights and some national courts when individuals claimed a denial of their human rights due to the immunity accorded to international organizations in national courts. [46]

Now that it is plain that international organizations can have human rights obligations, two questions arise: where do these obligations come from? And how to build accountability mech-

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[41] *Campbell v MGN Limited* [2004] UKHL 22, para 50.

[42] See Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 *Michigan LRev* 387; Barak, 'Constitutional Human Rights and Private Law' in Friedmann and Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001) 13; Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *Intl J Const L* 79; Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland*, (Pretoria University Law Press, 2014).

[43] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* [1980] ICJ Rep 73, 89–90.

[44] Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law' (1999) 281 *RdC* 9, 34–5.

[45] Ibid, 129–30.

[46] *Waite and Kennedy v Germany* (2000) 30 EHRR 261, para 67; Reinisch, 'Privileges and Immunities', in Klabbers and Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 132-155.

anisms that would help to influence their behaviour and provide redress for victims?[47] To answer the first question would take us way beyond the scope of this introduction, many might agree with the conclusions of Faix that 'inasmuch as human rights can be considered to form general principles of international law and international customary rules, they can be considered relevant sources of international obligations of international organisations, subject to the implications of specialty.'[48]

One option to ensure clear content and accountability is to ensure that human rights treaties allow for international organizations to become contracting parties. This is currently the case for both the Convention on the Rights of Persons with Disabilities and its Optional Protocol. The Convention explains that it allows for 'regional integration organizations' to become parties where those organizations are 'constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention'.[49] The European Union formally confirmed in 2011 its participation in the treaty regime and declared the extent of its competence with respect to matters governed by the Convention. .

In the same way, Protocol No 14 ECHR allows for the European Union to become a party to the European Convention and its Protocols so that complaints could eventually be brought against the Union before the European Court of Human Rights. These formal solutions are however riven with complications at the political and technical levels.[50] The way forward is more likely to revolve around international organizations detailing their own human rights obligations and attendant monitoring. In turn the existing human rights mechanisms are adapting to include recommendations to the relevant international organizations.

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[47] The Institutions of the European Union are bound to respect the rights in the Charter of Fundamental Rights of the European Union, see Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', (2011) 11 *HRLR* 645-82, as well as aspects of international human rights law see Ahmed and de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective ', (2006) 17 *EJIL* 771-801; see also Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', (2014) 25 *EJIL* 1071-91.

[48] Faix, 'Binding International Organisations to Human Rights Obligations - Some Underlying Questions', in Šturma and Baez, (eds), *International and Internal mechanisms of Fundamental Rights Effectiveness*, (RW&W, 2015) 37-52 at 51-2 and 'Are International Organisations Bound by International Human Rights Obligations? ', (2014) 5 *Czech Yearbook of Public and Private International Law* 267-90. See also Mégrét and Hoffmann, 'The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', vol. 25 *Human Rights Quarterly* (2003) 314-42.

[49] Arts 42–4.

[50] For the draft agreement on accession, see Fifth Negotiation Meeting between the CDDH and Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final report to CDDH, 47+1(2013) 008. The European Court of Justice has however concluded that agreement on accession is not compatible with the Treaty on European Union and its Protocol 8, see Opinion 2/13 of 14 December 2014.

The idea that international organizations have human rights obligations has been reinforced by the UN human rights treaty bodies. For example, general comments prepared by the Committee on Economic, Social and Cultural Rights on topics such as the right to health, the right to food, the right to water, and the right to work, now include the duty of states to protect individuals from non-state actors that might infringe on the enjoyment of these rights. The Committee also has a chapter at the end of its general comments entitled 'Obligations of Actors Other than State Parties'. This includes, for example, in the context of the right to work, recommendations for 'individuals, local communities, trade unions, civil society and private sector organisations'.[51] Special attention is given to 'private enterprises—national and multinational'. The respective general comment goes on to address the role of 'the ILO [International Labour Organization] and the other specialized agencies of the United Nations, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system'.

5 CORPORATE SOCIAL RESPONSIBILITY AND THE MOVE TOWARDS ACCOUNTABILITY

Some businesses have expressed human rights commitments out of a sense of corporate social responsibility. This can stem from a desire to: protect reputation; reduce risk of disruption through strikes, protests, and boycotts; enhance their attractiveness for future and current employees; and because it is the 'right thing to do'. Major companies now have human rights policies as a matter of course and few now claim openly (as they used to do) that 'human rights are none of our business'. Several factors are now forcing greater attention to the human rights implications of corporate activity.

First, studies and mechanisms being developed by international organizations such as the UN, the ILO, and the Organisation for Economic Co-operation and Development (OECD) are reinforcing the notion that companies have international responsibilities. Worthy of particular mention are the multiple studies produced by the Special Representative of the UN Secretary-General, John Ruggie, and the possibility of complaining to an OECD National Contact Point that a company has failed to respect human rights.[52]

[51] CESCR, General Comment 18, HRI/GEN/1/Rev.9 (Vol I) 243.

[52] OECD, *OECD Guidelines for Multinational Enterprises 2011 Edition* (OECD, 2011); but see Daniel, Wilde-Ramsing, Geovese, and Sandjojo, *Remedy Remains Rare: An Analysis of 15 years of NCP cases and their con-*

In 2005, the United Nations appointed John Ruggie to identify and clarify the relevant human rights standards for corporate responsibility and accountability. In 2011 the resulting Guiding Principles were endorsed by the Human Rights Council and rest on a protect, respect, remedy framework with three pillars:

- the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication;
- an independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;
- the need for greater access by victims to effective remedy, both judicial and non-judicial.

In Ruggie's words: "Simply, put: states must protect; companies must respect; and those who are harmed must have redress."[53] Paragraph 12 in the UN Guiding Principles on Business and Human Rights states:

> The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

But the imperative that companies have responsibilities and 'must respect human rights', is conceived in this context as a moral (rather than legal) demand. The Commentary to the UN Guiding Principles suggests that legal obligations are found elsewhere: 'The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.'[54] Although these Guiding Principles have led to multiple initiatives aimed at changing the policies of governments and business,[55] civil society organizations (joined by some states) consider that there needs to be a more robust international legal framework ensuring not just a (moral) sense of responsibility on the part of companies but concrete forms of legal accountability that go beyond action plans and reporting obligations.

Secondly, in response to this dissatisfaction, a UN governmental working group was es-

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tribution to improve access to remedy for victims of corporate misconduct, (OECD Watch, 2015)

[53] J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, (New York: W.W. Norton, 2013) at xx-xxi.

[54] A/HRC/17/31, 21 March 2011, at 14.

[55] For the national action plans prepared so far see http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx; for OHCHR guidance on implementing the 'access to remedy for victims of business-related human rights abuse' see A/HRC/32/19, 10 May 2016 and A/HRC/32/19/Add.1, 12 May 2016; and the companion document of 5 July 2016 'Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse'.

tablished in 2014 'to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[56] Civil society and leading scholars have presented various projects for consideration. The options being proposed cover a wide spectrum. They range from a treaty which would create obligations for states to provide legal remedies under national law for corporate non-compliance with human rights obligations, through to additionally defining the obligations for corporations both under criminal law and civil law, right up to proposals for a world court of human rights which could hear cases against corporations.[57]

Thirdly, human rights compliance is increasingly factored into investment decisions, in particular by funds which advertise an ethical investment dimension. Perhaps the most well-known process in this respect is the Norwegian Council on Ethics for the Government Pension Fund—Global. Under Section 3 of the Council's Guidelines,

> Companies may be put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for:
> a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour
> b) serious violations of the rights of individuals in situations of war or conflict
> c) severe environmental damage
> d) acts or omissions that on an aggregate company level lead to unacceptable greenhouse gas emissions
> e) gross corruption
> f) other particularly serious violations of fundamental ethical norms.[58]

Fourth, and lastly, the assumption that international criminal law only applies to individuals has been seriously challenged. Let us in the next section consider three recent developments.

The first is a new treaty, adopted by the African Union in 2014 which adds a criminal chamber to the African Court of Justice and Human Rights and does so in a way that makes clear that

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[56] The reports from the first two meetings held in 2015 and 2016 are available as UN Doc A/HRC/31/50 and A/HRC/**/**.

[57] D. Bilchitz, 'The Necessity for a Business and Human Rights Treaty', vol. 1 *Business and Human Rights Journal* (2016) 203-27.; De Schutter, 'Towards a New Treaty on Business and Human Rights', vol. 1 *Business and Human Rights Journal* (2015) 41-67; Özden, *Transnational Corporations' Impunity*, (Geneva: CETIM, 2016); Martens and Seitz, *The Struggle for a UN Treaty: Towards global regulation on human rights and business*, (Bonn/New York: Global Policy Forum/Rosa Luxemburg Stiftung, 2016); ESCR-Net and FIDH, *Ten Key Proposals for the Treaty*, (ESCR-Net, 2016) Nowak and Kozma, *A World Court of Human Rights – Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag, 2010) esp Article 4 and Commentary. 33-4.

[58] For listing of which companies have been excluded or put under observation see https://www.nbim.no/en/responsibility/exclusion-of-companies/. See generally Hebb, et al (eds) *The Routledge Handbook of Responsible Investment*, (Routledge, 2016)

corporations can be prosecuted for certain international crimes in this new Chamber.[59] For the members of the African Union at least there is now no doubt as to the applicability of international criminal law to corporations.[60]

Whether or not the new Criminal Chamber is quickly established, we are now a step closer to designing procedures for *national* prosecutions of corporations for international crimes. Considering that this new international jurisdiction will be complementary to national jurisdictions, in the same way that the International Criminal Court (ICC) allows for inadmissibility of certain cases that are properly pursued at the national level, one has to assume that national legislation will be drafted to ensure that cases can be prosecuted at the national level. This will have to go beyond the existing legislation related to the ICC, not only because of the new possibility of corporate criminal responsibility, but also because the list of crimes, including the list of war crimes, has been considerably extended, including for example the following: The Crime of Unconstitutional Change of Government; Piracy; Terrorism; Mercenarism; Corruption; Money Laundering; Trafficking in Persons; Trafficking in Drugs; Trafficking in Hazardous Wastes; and Illicit Exploitation of Natural Resources.

We have now come a long way from the assumption that international legal principles do not apply to corporations, or that if they do this would be limited to 'certain war crimes and crimes against humanity'.[61] I expect some will dismiss this development as 'a regional anomaly', but companies (of whatever nationality), operating in Africa will have to consider that they could in the future be prosecuted for these crimes and that their behaviour will be judged against these norms. In sum, we now have an international treaty, adopted by states, that assumes or creates international obligations for corporations, and proposes that they be held accountable for any violations of these obligations in courts of law nationally and at the international (regional) level.

The second development is located in the Special Tribunal for Lebanon. On 2 October 2014 the Appeals Panel ruled that a corporation could be prosecuted for contempt of court before this international criminal tribunal. The Panel drew two interesting conclusions, the first with regard to human rights law and the second with regard to criminal law. Having reviewed developments

[59] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2014) Article 46 'Corporate Criminal Liability' (C)(1) 'For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States'.
[60] For research on the war crimes of pillage and plunder as they apply to corporations see J. G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, (New York: Open Society Institute, 2011).
[61] See E/CN.4/2006/97 at para 60.

in human rights law, in particular at the UN Human Rights Council and the UN Human Rights Committee, the Panel concluded that 'that the current international standards on human rights allow for interpreting the term "person" to include legal entities for the purposes of Rule 60 *bis* [their contempt jurisdiction'.[62] With regard to criminal law it examined a number of developments at the national level as well as treaties that refer to corporate criminal responsibility, and concluded that 'corporate criminal liability is on the verge of attaining, at the very least, the status of a general principle of law applicable under international law.'[63]

The third development relates to crimes against humanity. The Drafting Committee of the International Law Commission (ILC) provisionally adopted a text in 2016 which confirmed that corporations can commit crimes against humanity. In the context of the ILC's Draft Articles on Crimes Against Humanity the following text was adopted:

> Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.[64]

6 ARMED NON-STATE ACTORS

According to the International Committee of the Red Cross (ICRC) it is 'undisputed' that that the core international humanitarian law rules, such as those found in Common Article 3 to the Geneva Conventions, apply to the non-state party to an internal armed conflict.[65] Nevertheless there is an apparent problem with the application of human rights law to such armed groups. We

[62] *New TV Karma Mohamed Tashin Al Khayat* Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt proceedings, STL-14-05/PT/AP/AR126.1, 2 October 2014 at para 60; note this ruling has now been rejected by one been rejected by the Contempt Judge in a related proceeding: STL-14-06/PT/CJ, 6 November 2014; see also Bernaz, 'Corporate Criminal Liability under International Law: The *New TV S.A.L.* and *Akhbar Beiruit S.A.L.* Cases at the Special Tribunal for Lebanon', (2015) 13 *JICJ* 313-30.

[63] Ibid at para 67.

[64] 'Text of draft article 5, paragraph 7, provisionally adopted by the Drafting Committee on 7 July 2016', UN Doc. A/CN.4/L.873/Add.1, 8 July 2016.

[65] See most recently the 2016 ICRC Commentary to the First Geneva Convention of 1949 at para 508 and at 505 'it is today accepted that common Article 3 is binding on non-State armed groups, both as treaty and customary law.' See also Henckaerts and Doswald-Beck, *Customary International Humanitarian Law - Volume 1: Rules*, (Cambridge University Press, 2005). Commentators often refer to the statement in the Judgment of the International Court of Justice in the *Nicaragua v USA* (1986) case at para. 219: 'The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character.' We might also mention the Appeals Chamber of the Special Court for Sierra Leone holding that 'it is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties'. *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL-2004-14-AR72(E) (31 May 2004) para 22.

might suggest that this could be for two main reasons. First, because in contrast to international humanitarian law, human rights law is seen by some as specifically designed for states as human rights treaties only rarely address non-state armed groups.[66] Second, there is a perception that engaging with rebel groups on human rights issues lends them a certain legitimacy. This is in part related to the first issue: by claiming that a group has violated human rights one is implying that they are a state-like entity because it is presumed that only states have human rights obligations.

Both these apparent obstacles are, it is submitted, being eroded. The human rights monitoring mechanisms are starting to include reporting on non-state armed groups in their range of activities. Although several commentators have insisted in the past that only states have human rights obligations in this context,[67] and that non-state actors are exclusively bound by international humanitarian law, this is being challenged in direct and indirect ways. One challenge comes in the form of increasing demands by different international entities that armed groups respect human rights. These demands can come in the form of Security Council Resolutions, in the reports of the various truth commissions (such as those in Guatemala and Sierra Leone) which detail the human rights violations committed by non-state actors, or in the findings of commissions of inquiry and other expert panels.

Before we look at the exact terms of these inroads to the traditional approach , let us pause to consider some of the theoretical issues.[68] How can a treaty or indeed custom bind any entity which has not consented to be bound? Here I would suggest that the development of international criminal law has made it clear that international law is capable of binding entities other that states and their creations (international organizations). In the past it was sometimes suggested that this is because states create obligations for their nationals through the ratification of treaties, but it is clear that the obligations under international criminal law, inside and outside armed conflict extend beyond the nationals of states parties. If states can create obligations on third parties for the purposes of prosecution, why can this not happen for non-criminal responsibility?

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[66] One exception being the Optional Protocol to the CRC on the involvement of children in armed conflict. See below for an application in the case of Syria.

[67] Moir, *The Law of Internal Armed Conflict* (CUP, 2002) 194; Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP, 2002) 53;

[68] For a discussion of some of the theories that have been proposed to justify the application of human rights law to armed groups, see Sivakumaran, *The Law of Non-International Armed Conflict* (OUP, 2012) 95-100; Murray, 'How International Humanitarian Law Treaties Bind Non-State Armed Group', *Journal of Conflict and Security Law* (2014) 1-31; Clapham, 'Focusing on Armed Non-State Actors', in Clapham and Gaeta, (eds), *The Oxford Handbook of International Law in Armed Conflict*, (OUP, 2014) 766-810.

The next doctrinal obstacle is the idea that human rights law is inherently incapable of creating legal obligations for non-state actors. This is often said to be because of how human rights law is traditionally conceived. As suggested above, the same commentators that have assertively argued that international humanitarian law (IHL) is incontestably binding on non-state actors, deny the applicability of international human rights law (IHRL) in this context.

> 'IHL applies to all parties to the conflict, including (in the case of a non-international armed conflict) non-state organised armed groups. On the other hand, IHRL traditionally only applies to states and significant controversy exists as to whether, and if so, to what extent, non-state armed groups incur IHRL obligations. The ICRC's position is that non-state armed groups generally do not have IHRL obligations as a matter of law, subject to the exception where a non-state armed group's de facto responsibilities can be recognised by virtue of its *de facto* capacity to act like a state government.'[69]

But this exception is in the end not really admitted to be a proper legal exception, as Breitegger explains later in the same article:

> 'This review shows that there is no consensus among states and experts that non-state armed groups incur legal obligations under IHRL. However, there is an enhanced recognition that where non-state armed groups as entities have the semblance of state authority and exercise *de facto* authority over a population, they are expected to respond positively to the moral rather than legal expectations of the international community to respect IHRL.[70]

If we drill down a little and consider the theoretical justifications for applying international humanitarian law to armed groups we find that there is nothing that would exclude human rights law from applying to the same groups. Sivakumaran has helpfully grouped these theoretical justifications under seven headings which he says together 'explain how non-state parties to [non-international armed conflicts] are bound by IHL.' [71] They include:

- through ratification by the state;
- through domestic law;
- the binding nature of treaties on third parties;
- consent of the armed group to be bound by Common Article 3;
- claims of the armed group to represent the state;
- the armed group's exercising state-like functions; and
- on the basis of customary international law.

The doctrinal debates surrounding the suitability of these routes for providing a convincing legal argument are carefully explained by Sivakumaran and need not detain us here. It seems to the present author that each of these routes is potentially capable of providing a rationale for armed groups being bound by international human rights law (and not just international humani-

[69] A. Breitegger, 'The legal framework applicable to insecurity and violence affecting the delivery of health care in armed conflicts and other emergencies', vol. 96 *International Review of the Red Cross* 889, (2013) 83-127, at 88.
[70] Ibid at 103 and see the clarification at fn 104 at 89 'Note that the terminology used by the ICRC is 'responsibilities' and thus falls short of recognising legally binding obligations.'
[71] 'The Addressees of Common Article 3', in Clapham, Gaeta, and Sassòli, (eds), *The 1949 Geneva Conventions: A Commentary*, (Oxford: Oxford University Press, 2015) 415-31 at 417.

tarian law). Let us turn to some practical applications of human rights obligations to armed non-state actors: first, the work of the Security Council with regard to children's rights; second, the work of the UN special mechanisms/ad hoc inquiries; and third, the work NGOs including Geneva Call.

6.1 THE UN SECURITY COUNCIL ON CHILDREN AND ARMED CONFLICT

The UN's work on children and armed conflict has led to an innovative approach which details violations by non-state actors. Reports by the UN Secretary-General to the Security Council on certain situations now list the actual non-state actors concerned and whether they are involved in any of six 'grave violations':

(1) Killing or maiming of children;
(2) Recruiting or using child soldiers;
(3) Attacks against schools or hospitals;
(4) Rape or other grave sexual violence against children;
(5) Abduction of children;
(6) Denial of humanitarian access for children.

The UN Secretary-General's initial report explains that these violations are based on international norms, commitments that have been made by the parties to the conflict, national laws, and peace agreements.[72] Subsequent reports on various country situations have detailed the 'grave violations of children's rights' committed by the non-state actors concerned.[73] These reports dedicate as much, if not more, space to the violations committed by the non-state actors as they do to addressing the states concerned. The mechanism vis-à-vis the non-state actors works not only through naming and shaming, but by encouraging them to submit an 'action plan' to the Security Council. In this way, the groups can be removed from the list of violators. The Security Council also has in mind that it could adopt:

> country-specific resolutions, targeted and graduated measures, such as, inter alia, a ban on the export and supply of small arms and light weapons and of other military equipment and on military assistance, against parties to situations of armed conflict which are on the Security Council's agenda and are in violation of applicable international law relating to the rights and protection of children in armed conflict.[74]

Although the focus started with the recruitment of child soldiers, the Security Council has requested the Secretary-General to include in his reports 'those parties to armed conflict that engage, in contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed con-

[72] Report of the Secretary-General on Children and Armed Conflict, S/2005/72 (9 February 2005).
[73] See eg Report of the Secretary-General on Children and Armed Conflict, S/2009/158 (26 March 2009).
[74] SC Res 1612 (26 July 2005) para 9.

flict'.[75] Even if the reports refer in general terms to the rules of international law that are actually being violated, the prospect of follow-up sanctions by the Security Council is premised on the idea that these groups have violated international law and not simply a set of moral or political imperatives. Each year the Secretary-General lists those entities that are engaged in grave violations separating out the violations and highlighting those which can be considered 'persistent perpetrators' (those who have appeared on the list for five years).[76]

This activity is complemented by the Special Representative of the Secretary-General on children and armed conflict whose work not only feeds into the reports to the Security Council but also relies on country visits, engagement with non-state actors, and facilitation of commitments by those armed groups. Let us look, however, at the work of the UN special procedures more generally.

6.2 UN SPECIAL PROCEDURES AND AD HOC INQUIRIES

The former UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, grappled with the question of the human rights obligations of armed non-state actors in the context of his 2006 report on Sri Lanka..[77]Alston went on to include specific human rights recommendations addressed to the non-state actor.[78] A similar approach was also applied in the joint 2006 report on Lebanon and Israel by a group of four Special Rapporteurs[79] , and later in 2008 by the UN High Commissioner for Human Rights with regard to Hamas, simply 'recalling that non-State actors that exercise government-like functions and control over a territory are obliged to respect human rights norms when their conduct affects the human rights of the indi-

[75] SC Res 1882 (4 August 2009).

[76] See Eg A/70/836, S/2016/360, 20 April 2016, listing around 30 persistent perpetrators from Afghanistan, Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq, Myanmar, Philippines, Somalia, South Sudan, Sudan, Syria, and Yemen.

[77] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Mission to Sri Lanka, E/CN.4/2006/53/Add.5 (27 March 2006) para 25.

[78] Ibid, para 85. See also the letter addressed directly to the LTTE concerning prevention of killings, lack of investigations, and the application of the death penalty: 'Allegation letter sent 21 November 2005', E/CN.4/53/Add.1 (27 March 2006) 320.

[79] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Representative of the Secretary-General on human rights of internally displaced persons; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/2/7 (2 October 2006) para 19. In this context the report also explains that some *de facto* authorities will have their acts attributed to the state on whose behalf they are acting: 'Furthermore, the obligations of Lebanon under international human rights law continue to apply in territories under the control of de facto authorities. Their acts are classified, under the law on State responsibility, as acts of the State to the extent that such authorities are in fact exercising elements of governmental authority in the absence or default of the official authorities, and in circumstances which call for the exercise of such authority' 28 at fn 19.

viduals under their control.'[80]

More recently in 2012, the Commission of Inquiry on Syria applied a limited set of human rights obligations to the armed non-state groups. The Commission stated with regard to the Free Syrian Army (FSA) that:

> [A]t a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified. [81]

In 2013 the Commission went further in the context of enforced disappearances and stated: '[a]lthough anti-Government armed groups are per se not a party to the Convention [for the Protection of All Persons from Enforced Disappearance], their actions may be assessed against customary international legal principles, and they are subject to criminal liability for enforced disappearance amounting to a crime against humanity.'[82] Using the expression 'customary legal principles' suggests a set of human rights principles that do not necessarily have to be proven as customary international rules developed specifically for non-state actors, but rather fundamental standards that ought to apply to all actors in all circumstances.

The Panel of Experts appointed by the UN Secretary-General to report on accountability in Sri Lanka explained their approach as follows:

> With respect to the LTTE, although non-state actors cannot formally become party to a human rights treaty, it is now increasingly accepted that non-state groups exercising *de facto* control over a part of a State's territory must respect fundamental human rights of persons in that territory. Various organs of the United Nations, including the Security Council, have repeatedly demanded that such actors respect human rights law. Although the Panel recognizes that there remains some difference of views on the subject among international actors, it proceeds on the assumption that, at a minimum, the LTTE was bound to respect the most basic human rights of persons within its power, including the rights to life and physical security and integrity of the person, and freedom from torture and cruel, inhuman or degrading treatment and punishment.'[83]

Perhaps the clearest list of obligations has come in the context of the 2014 UN report on South Sudan:

> The most basic human rights obligations, in particular those emanating from peremptory international law (*ius cogens*) bind both the State and armed opposition groups in times of peace and during armed conflict.

[80] HRC/8/17 para 9. (6 June 2008).
[81] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/19/69 (22 February 2012) paras 106–7. See also the approach of the Report of the International Commission of Inquiry to investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, A/HRC/17/44 (1 June 2011).
[82] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/22/59 (5 February 2013) para 85.
[83] At para 188 (31 March 2011); see further Ratner (a member of the panel), 'Accountability and the Sri Lankan Civil War', vol. 106 *AJIL* (2012) 795-808 at 801..

> In particular, international human rights law requires States, armed groups and others to respect the prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any violations that amount to war crimes, crimes against humanity, or genocide. [84]

The UN report by Thomas Hammarberg on human rights in Transnistria under the preliminary heading 'legal obligations' considers that the starting point is 'customary international law obligating *de facto* authorities to uphold the most fundamental human rights norms.'[85] The right to freedom of religion or belief has also arisen with regard to conscientious objection from military service in territories controlled by de facto regimes (non-state actors) in places such as Transnistria (Moldova) and the Turkish Republic of Northern Cyprus.[86] In the latter situation Bielefeldt, the Special Rapporteur on Freedom of Religion or Belief, called for 'strict compliance with in strict compliance with article 18 (3) of the International Covenant on Civil and Political Rights and article 1 (3) of the 1981 Declaration.'[87]

Although findings that human rights treaties have been violated usually refer to states, we can see here the application of treaty law to non-state actors. An even more precise example is provided by the Commission of Inquiry on Syria concluding in 2013 that '[a]nti-Government armed groups are also responsible for using children under the age of 18 in hostilities in violation of the CRC-OPAC [Optional Protocol to the Convention on the Rights of the Child], which by its terms applies to non-State actors.' The summary also makes the same point: 'Both Government-affiliated militia and anti-Government armed groups were found to have violated the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Syrian Arab Republic is a party.'[88] The complexity of the situation of detainees in Libya forced the Office of the High Commissioner to abandon any pretense of separate regimes or vocabulary:

> In the present report the term "detention" and its variants ("detainee", "detention facilities") is intended to reflect deprivation of liberty by both State and armed groups in view of the complex factual situation in Libya, in particular given that armed groups remain in control of many facilities, and that many armed groups were theoretically brought under the purview of the Ministries of the Interior, Defence or Justice

[84] 8 May 2014, at para 18; available at http://www.unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf
[85] Report on Human Rights in the Transnistrian Region of the Republic of Moldova (14 February 2013) 4.
[86] Bielefeldt, Ghanea, and Wiener, *Freedom of Religion or Belief: An International Law Commentary*, (Oxford: OUP, 2016) at 286-288.
[87] A/HRC/22/51/Add.1, 24 December 2012, para 82.
[88] Report of the Commission of Inquiry on Syria, A/HRC/22/59, 5 February 2013, at para 44 2.

during integration processes carried out after 2011. The term "conflict-related detainee" is used as a reference to persons detained as a result of the conflicts in Libya in 2011 or 2014 and 2015.[89]

On the basis of these reports and resolutions, we might conclude that the practice of the UN Human Rights Council, relevant UN experts, and the Office of the High Commissioner is to investigate and condemn violations of human rights by de facto regimes and armed groups in more or less the same terms as those used for states. In some situations with dozens of groups all in positions of control over people various groups may or may not be operating under the control or auspices of the state on any one day. As research in other social sciences demonstrates, the idea that there is at all times a clear bright line between state and non-state groups is fallacious. In some contexts armed groups can be better described as 'spin offs' from the state rather than non-state actors, and those same groups may at various stages take on functions that the state chooses not to entrust to its own forces.[90]

We might also conclude, that even if the approach at one stage may have been to confine the application of human rights law to those politically organized groups that had effective control over territory and persons, the challenge of reporting on groups such as the Lord's Resistance Army, Boko Haram, or the hundreds of groups in Syria and Libya, means that we may have to admit that it is no longer possible always to ground the application of human rights law in 'territorial control'.[91] In fact there is no real reason to ground human rights obligations in issues of territory (in this way we could avoid the problematic issues of sovereignty and loss of governmental control). Human rights obligations should flow from the fact that the group have control over *people* and duties towards those they are affecting. This would better mirror the approaches in international humanitarian law and international criminal law.[92]

6.3 NON-GOVERNMENTAL REPORTING AND ENGAGING WITH ARMED NON-STATE ACTORS

Engagement with such groups is not, however, limited to UN human rights mechanisms. NGOs increasingly engage with armed groups and denounce human rights abuses committed by armed

[89] A/HRC/31/CRP.3 (23 February 2016) para. 130; and see also paras 30 and 50 'Libya does not have a straightforward delineation of State security forces and opposition forces. Instead, it has a complex set of armed actors, with varying degrees of association with the State and each other.'

[90] Schlichte, 'With the State against the State? The Formation of Armed Groups', in Krause, (ed), *Armed groups and Contemporary Conflicts: Challenging the Weberian State*, (London: Routledge, 2010) 45-63;

[91] See also Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, A/HRC/28/66, (29 December 2014) at paras 54-5

[92] Apart from the specific case of 1977 Additional Protocol II, the international law of armed conflict applies when the group is organized and there is an intense level of violence. It is worth noting that the International Criminal Court has dropped any reference to control of territory with regard to the threshold of violence for war crimes in non-international armed conflict, see Article 8(2(d) and (f).

non-state actors. Such reporting may go beyond concerns about killings, torture and detention, and cover all sorts of human rights violations including for example denial of freedom of association,[93] or failure to ensure fair trials.[94]

Human Rights Watch explains the minimal human rights framework it applied in reporting on detention and trial by the opposition groups in Syria:[95]

> Under human rights law, certain rights are considered so fundamental that they may not be suspended, even during an emergency. These rights include not only the prohibition on torture and other ill-treatment, but the prohibition on arbitrary detention, specifically the need for judicial review of detention, and the guarantees of a fair trial. Thus, even during an emergency, only courts of law, made up of independent and impartial judges, can try and convict, and people can only be tried for crimes that are set out clearly in the national or international law – and that were crimes at the time of the offense. They also have the right to legal representation and to an opportunity to prepare their defense and challenge all the evidence and witnesses against them.

The NGO Geneva Call has engaged armed groups in 'Deeds of Commitment' regarding a 'total ban on anti-personnel mines and for cooperation in mine action', 'the protection of children from the effects of armed conflict' and 'the prohibition of sexual violence in situations of armed conflict and towards the elimination of gender discrimination.' Having negotiated the signature of the Deed, Geneva Call receives the armed non-state actors' regular reports, monitors compliance with the Deed, and, in the context of land mines, helps arrange mine action including demining and destruction of stocks. It is worth inquiring at this point what might be the incentives for a non-state actor to bind itself to such a Deed or indeed to develop their own codes of conduct dealing with human rights issues.[96]

First, rebel groups realize the advantages of being seen to abide by international norms in the context of moves towards peace negotiations. Second, it is much easier to criticize governments and their armed forces for committing international crimes if the group has policies in place to avoid and punish such crimes. Third, factions may be able to distinguish themselves from other armed groups and thus 'get ahead' in terms of dialogue with the government or other actors. Lastly, in some circumstances, entering into such commitments will facilitate access to assistance from the international community, for example in the form of mine clearance.

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[93] Amnesty International 'Yemen: Huthi armed group must end crackdown on human rights defenders and NGOs' MDE 31/2931/2015, 2015.

[94] Human Rights Watch, *'Being Neutral is Our Biggest Crime': Government, Vigilante, and Naxalite Abuses in India's Chhattisgarh State* (2008) 98. Compare Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice?' (2009) 7 *JICJ* 489; see also the project undertaken by the Manchester International Law Centre, the Syrian Legal Development Programme and Lawyers for Justice in Libya in order to prepare guidelines to be used by armed non-state actors in their for judicial processes.

[95] See eg Human Rights Watch 'Syria: End Opposition Use of Torture, Executions', 2012.

[96] For a detailed review see Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups*, (Small Arms Survey, 2012)

Such explicit recognition of specific obligations by the groups themselves helps to transform the debate about the human rights obligations of non-state actors. If armed groups are prepared to take on such obligations, arguments about their non-applicability under international law lose much of their force. States may fear the legitimacy that such commitments seem to imply, and international lawyers may choose to accord them no value, but from a victim's perspective such commitments may indeed be worth more than the paper they are written on.

7 CONCLUSION

This chapter suggests three challenges posed by non-state actors. First, there is a need to find ways to translate existing norms to create appropriate obligations for non-state actors. This work has started in that it is now clear that individual non-state actors will be prosecuted for certain international crimes. Furthermore, corporations and armed groups are increasingly expected to respect not only international criminal law but human rights obligations as well. The second challenge concerns the development of monitoring and accountability. As we have seen, while the jurisdictional state-centric limits of the traditional human rights courts and bodies remain, the UN and NGOs have developed their own ways of monitoring non-state actors. Lastly, it is suggested that a further challenge is to question our own assumptions about what it means to talk about human rights and who has human rights obligations. It is hoped that those readers who have reached this point may be starting to meet this last challenge.

FURTHER READING

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FORTIN, 'The Accountability of Armed Groups under Human Rights Law', (Utrecht University, 2015, PhD thesis) forthcoming with OUP in 2017

KAHANA AND SCOLNICOV, (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* , (CUP, 2016)

MCBETH, *International Economic Actors and Human Rights*, (Routledge, 2010)

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RODLEY, 'Non-state actors and human rights', in SHEERAN and RODLEY, (eds), *Routledge Handbook of International Human Rights Law*, (Routledge, 2013) 523-44.

THOMAS, *Public Rights, Private Relations*, (Oxford: OUP, 2015)

ZIEGLER, *Human Rights and Private Law: Privacy as Autonomy*, (Oxford: Hart, 2007)

USEFUL WEBSITES

Business and Human Rights Resource Centre: <http://www.business-humanrights.org/Home>OECD Watch: <http://oecdwatch.org/>International Corporate Accountability Roundtable <http://icar.ngo>

CORE <http://corporate-responsibility.org/>

European Human Rights in Business <http://humanrightsinbusiness.eu/>

Geneva Call: <http://www.genevacall.org/>