

# NON-STATE ACTORS' HUMAN RIGHTS OBLIGATIONS AND RESPONSIBILITY UNDER INTERNATIONAL LAW

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Summary. I. INTRODUCTION. II. DOUBLE STANDARDS AND LIMITED NATURE OF THE STATES' OBLIGATIONS OF PROTECTION OF HUMAN RIGHTS FROM NON-STATE ACTORS' ACTS. III. THE QUESTION OF INTERNATIONAL SUBJECTIVITY: GIVING INTERNATIONAL DUTIES TO NON-STATE ACTORS. IV. (POSSIBLE) NEGATIVE CAPACITIES OF NON-STATE ACTORS UNDER INTERNATIONAL HUMAN RIGHTS LAW. V. RESPONSES TO OBJECTIONS RAISED AGAINST THE CREATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS. VI. CONCLUSION.

## I. INTRODUCTION

International norms in the human rights field have developed obligations according to which States must protect individuals' Human Rights from the actions of other particular actors and thus must prevent, punish and treat properly and accordingly any Human Rights violation even when they are committed by a non-state actor. These obligations are known as guarantee and protection obligations<sup>1</sup>.

On the other hand, in certain cases States are directly responsible and hence accountable for the violation of human rights when those violations have been committed by non-state actors. This may happen in the following cases: (a) whenever the non-state actor is a mere instrument and its actions are dependent on the State and rely on its support<sup>2</sup>; (b) when the non-state actor has been entitled to exercise public functions and acts under that entitlement<sup>3</sup>; (c) in case the State exercises control over the non-state actor –there is apparently some disagreement as to what extent this control must be exercised: whereas the International Court of Justice requires an effective and specific control over every action, the International Criminal Court for the former

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<sup>1</sup> *Inter alia*, article 1.1 of the American Convention on Human Rights.

<sup>2</sup> INTERNATIONAL COURT OF JUSTICE, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment. 26 February 2007, par. 392.

<sup>3</sup> INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Article 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

Yugoslavia deems that the degree of control may vary depending on every case's circumstances<sup>4</sup>.

At first glance one may believe that the former regulations bring enough protection for human beings against violations of their rights committed by non-state actors, taking into account that States must comply with international norms that require them to prevent and punish those violations because otherwise the State will be held responsible for the violation of Human Rights under international law. Nonetheless, this is insufficient and does not fully guarantee the complete and full protection of Human Rights under International Law, as we will see below.

## **II. DOUBLE STANDARDS AND LIMITED NATURE OF THE STATES' OBLIGATIONS OF PROTECTION OF HUMAN RIGHTS FROM NON-STATE ACTORS' ACTS.**

As the reader may infer, States' obligations that seek the protection of Human Rights from non-state actors' abuses have a limited nature and are thus effective only in a limited way because a violation may occur in spite of a State's effort and actions to prevent and punish it. In case a State's domestic law proves unable to protect the victim –which may happen for a variety of reasons as, for instance, a case when the violator is more powerful than the State or has fled to a country with which the State has no extradition agreements-, it would be unjust, unfair and contradictory to simply state that international law has nothing to do with non-state actors that violate human rights but only with State responsibility.

As a matter of fact, the purpose and object of the human rights field is the protection of human dignity<sup>5</sup>, and this protection fails if we consider that only certain victims are important: those “lucky” enough to have had their rights violated by a State. If we take into account that international law proclaims that human rights are to be universally effective<sup>6</sup>, we must consider that the universality of human rights is related not only to a space or geographical consideration but also to the victims and protected subjects: human beings. Moreover, we should say, the goal of Human Rights law is the protection of every human person's rights and dignity, whether or not his rights are endangered by the actions of a State.

The problems and insufficient nature of States' obligations have been reflected and demonstrated not only in legal theory but also in the practice and judgments of international courts: this is the case of the *Mastromatteo vs. Italy* judgment, which was

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<sup>4</sup> INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts. General Assembly, 56<sup>o</sup> period of Sessions, Supplement N<sup>o</sup> 10 (A/56/10).

<sup>5</sup> We should take into account, at the same time, that there is a “*humanitarian, moral and social purpose of the law*”. In: A. CLAPHAM, *Human Rights Obligations of Non-State Actors*, Oxford University Press 2006, p. 28.

<sup>6</sup> Vienna Declaration and Programme of Action, 1993. Par I.1.

decided by the European Court of Human Rights. The facts of the case are as following: a young man was murdered by a convict despite the Italian authorities' efforts to find and imprison him. The Italian State was considered not responsible under both domestic and international law because it had acted with due diligence and had employed the proper means that were available to it in order to prevent crimes committed by the murderer<sup>7</sup>. We may consider that the mere fact of imprisoning this man would give the dead man's father just satisfaction, but that is not the case: as we will see below, the implementation of international responsibility of non-state actors for the violation of human rights has many advantages and is the only way to truly protect human rights in an universal way.

### **III. THE QUESTION OF INTERNATIONAL SUBJECTIVITY: GIVING INTERNATIONAL DUTIES TO NON-STATE ACTORS.**

Despite the fact that currently most of the scholars, Courts and legal actors agree that States are not the sole and only subjects of international law, many still raise the question –or eyebrow- on whether non-state actors can have international human rights obligations, and consider that only States can be held accountable at the international level for their violation. Ironically, they –correctly- hold unanimously that certain non-state actors –human beings- have international rights.

Anyone who gives a fresh look to the subject and reads those authors' books will wonder why non-state actors can legally have international rights and the possibility of granting them obligations must be discarded. As a matter of fact, if it is possible to grant an actor an international right there should not be an impediment to imposing him an obligation, unless very special circumstances –related to logic- arise.

The previous debate shows the importance of dealing with the issue of international legal personality and the chance of creating non-state actors international obligations before analyzing their responsibility for the violation of human rights.

First of all, it must be said that some scholars state that in order to consider an actor as an international subject he/she must first meet some requirements. Generally speaking, they believe that it is not enough for an actor to have been granted rights by international norms in order to be considered a subject of international law, because in order to be considered such he must have an active legal entitlement that allows him to claim his rights at the international level or the passive entitlement that makes it possible for him to be tried and held accountable before an international body<sup>8</sup>.

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<sup>7</sup> EUROPEAN COURT OF HUMAN RIGHTS, GRAND CHAMBER, *Case of Mastromatteo v. Italy*. Judgment. 24 October 2002.

<sup>8</sup> J. A. PASTOR RIDRUEJO, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Tecnos 2003, p. 186.

Two objections can be raised against the previous approach: in the first place, it is possible to have rights without remedies or actions and, likewise, to have obligations without accountability, especially in international law, because in relation to its norms “[there is a] huge gap between the normative level and implementation”<sup>9</sup>.

On the other hand, the concept of legal subjectivity itself is useless and proves to confuse and complicate things a lot instead of contributing to the better understanding of international law. In this way, it has been said that “the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and [...] no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint”<sup>10</sup>.

Those words, written by Rosalyn Higgins, summarize the truth behind the concept of international subjectivity. After all, the question on whether or not an actor’s actions are treated under international law depends relies and depends on a political decision: lawmakers (States in most of the cases) may determine that a non-state actor’s deeds impact the international community to an extent that makes it necessary or advisable to have its actions regulated by international norms and, thus, those lawmakers can accordingly create customary or treaty-law norms<sup>11</sup> –which may be peremptory norms- that deal with those actors’ rights and/or duties –depending on whether special protection must be granted them or it is necessary to constrain their actions-. Thus, in order to determine if an actor has international rights and duties one should do nothing but reviewing and determining whether there is a norm that creates such a right or duty.

The previous reasoning has led some authors to state that it is advisable to replace the concept of international subjectivity with the theory of capacities<sup>12</sup>, which is nothing but a mere allegory that pretends or intends to explain the regulation of non-state actors at an international level in a simple and graphical way. According to this theory, one should imagine or draw a matrix over whose vertical axis actors/subjects are located, while different capacities –for example, specific rights and duties; procedural rights- should be placed on the horizontal axis.

Taking into account the previous theory, in the next section we will deal with the different negative capacities non-state actors may have under international human rights law.

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<sup>9</sup> A. CASSESE, *International law*, Oxford University Press 2004, p. 17.

<sup>10</sup> A. CLAPHAM, *op. cit.*, p. 63.

<sup>11</sup> N. CARRILLO SANTARELLI, *Los Retos del Ius cogens : La transformación de los derechos internacional y colombiano gracias al ius cogens internacional*. Tesis de grado, Bogotá, Universidad Externado de Colombia 2005.

<sup>12</sup> *Ibid.*, pp. 70-73.

#### **IV. (POSSIBLE) NEGATIVE CAPACITIES OF NON-STATE ACTORS UNDER INTERNATIONAL HUMAN RIGHTS LAW.**

Generally speaking, there may be two broad categories of negative capacities of non-state actors under international human rights law: primary-substantive capacities and secondary-procedural capacities.

As to the former ones, they are related to the expected behaviour of non-state actors towards human rights, whereas the latter capacities deal with the way a claim can be raised against the actor at the international level in order to make him comply with the primary rules/capacities. In relation to this, the International Law Commission of the United Nations has stated that there are primary norms that regulate duties, the violation of which brings international responsibility. On the other hand, there are secondary rules of responsibility that are related to the conditions that must be satisfied in order to consider an actor as internationally responsible and to the legal consequences of this responsibility<sup>13</sup>.

##### **1. Negative substantive capacities of non-state actors under international human rights law.**

In the first place we must say that the most elementary negative substantive capacity a non-state actor may have is to be given an obligation to respect, protect or guarantee Human Rights (which may be related to all, a group or some specific rights). Accordingly, a second negative substantive capacity is the capacity of being responsible at an international level whenever he commits a violation of the previous set of obligations. In this way International Nüremberg Tribunal and its Chart stated that “[a]ny person who commits an act which constitutes a crime under international law is responsible thereof and liable to punishment”<sup>14</sup>.

Finally, there is a third negative substantive capacity, according to which an actor is given new obligations and relations whenever he does not comply with his international obligations and duties<sup>15</sup>. These new obligations are: to comply with his former obligations, to finish the wrongful act, to guarantee that the violation is not going to happen again and to bring remedies and repair any damages he has caused<sup>16</sup>. This must be complemented with the *lex specialis* whenever it exists because it prevails<sup>17</sup>.

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<sup>13</sup> INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.*

<sup>14</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*. 1950, Principle I.

<sup>15</sup> INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *op. cit.*

<sup>16</sup> *Ibid.*

<sup>17</sup> INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS. Article 55 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

For this reason, we must examine whether international human rights law has special norms related to the third negative substantive capacity. This branch of international law expressly recognizes that a non-state actor may be forced and obliged to repair a victim<sup>18</sup> and certainly contains special regulations for the duty to repair: a proper human rights reparation must include “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”<sup>19</sup>.

We must express that the possibility of giving a non-state actor the obligation to repair a human rights violation through international norms enhances the protection of human dignity because sometimes the only way to truly remedy damages that arise with its violation is to ensure that the violator himself will bring the reparations.

We may think, for example, that there is a right to know the truth about a violation<sup>20</sup>, and in order to tell this truth there is no one in a better position than the violator himself. Likewise, no one but the violator himself can really guarantee that similar human rights violations will not occur in the future. The implementation of these reparation actions made by non state actors, related to the human rights *lex specialis*, will benefit the victim and thus accomplish the true purposes and goals of reparations. Otherwise, the victims’ “right to reparation would make little sense if it insisted on a doctrinal division between violations committed by non-state actors”<sup>21</sup> and States.

## **2. Negative procedural capacities of non-state actors under international human rights law.**

The first negative procedural capacity a non-state actor can have is the possibility of being party to a claim brought against him as at the international level in order to determine if he has violated a human rights obligation, is responsible thereof, and what legal consequences arise from his behavior. This could allow claims to be brought before international Courts, non-judicial bodies such as Committees and Commissions, new bodies that could be created with the special task of judging such violations or before States themselves under, for example, universal jurisdiction<sup>22</sup>.

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<sup>18</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. par. 15.

<sup>19</sup> *Ibid.*, par. 18.

<sup>20</sup> Since the knowledge of the violation’s truth is part of the right to satisfaction, which is a component of the right to reparation, as stated in: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *op. cit.*, par. 22.b.

<sup>21</sup> A. CLAPHAM, *op. cit.*, p. 73.

<sup>22</sup> The conditions that must be met in order to exercise this jurisdiction are not agreed upon. We recommend the reading of: A. CASSESE, “When May Senior State officials Be Tried for International Crimes? Some comments on the *Congo v. Belgium* Case”, *European Journal of International Law*, vol. 13 (2002), 854-875.

The trials we have been commenting about could be criminal or non-criminal trials, and since human rights include different categories of rights, they could include investigations of the violation of economic, social and cultural rights, for example. On the other hand, these trials can be held after a violation has been committed or previously, such as when precautionary measures are delivered and decided.

Finally, we must remember that “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law”<sup>23</sup>. In consequence, international trials against non-state actors can be held even if domestic law fails to forbid or prohibit certain human rights violations.

The second negative procedural capacity that can be created by a norm is the possibility of implementing international –or even domestic- decisions and judgments where responsibility has been found against non-state actors by force.

This is by no means necessarily a domestic law issue. As Hans Kelsen has stated, as international law evolves it will deal with issues considered to be merely domestic before, and accordingly the principle of individual responsibility based on guilt will tend to replace the principle of collective responsibility based on results<sup>24</sup>. If we consider that collective sanctions and punishments may harm entire populations affecting countless innocent persons and their economic, social and cultural rights<sup>25</sup>, we can not help noticing the benefits of non-state actors' international negative procedural capacities.

### **3. Overview.**

In order to end this section we must keep in mind that non-state actors may have some or all of the capacities we have been studying so far, but political considerations will -and humanitarian considerations should- determine in the end whether of not an

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<sup>23</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*. 1950, Principle II.

<sup>24</sup> H. KELSEN, *Teoría pura del derecho* : Introducción a la ciencia del derecho, Editorial Reflexión, pp. 203.

<sup>25</sup> It has been stated that “[w]hile the impact of sanctions varies from one case to another [...] they almost always have a dramatic impact on the [economic, social and cultural] rights [...] Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive élites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged élites which manage it, enhancement of the control of the governing élites over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights”. In: Committee on Economic, Social and Cultural Rights, *The relationship between economic sanctions and respect for economic, social and cultural rights*. General Comment No. 8 (1997), par. 3.

international norm is issued giving an actor any negative substantial or procedural capacity.

## V. RESPONSES TO OBJECTIONS RAISED AGAINST THE CREATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS.

Until now we have been studying the possibility of adjudicating international human rights obligations to non-state actors and have concluded that it is legally possible not only to create obligations but also to determine responsibilities and to enable international bodies to decide cases brought against those actors in the matters we have been dealing with. These possibilities are anchored and rooted firmly in an ethical and logical need to truly enhance the universal protection of human rights without discriminating certain victims. Nonetheless, some objections have been raised against the creation of negative capacities non-state actors must bear with in the human rights field. Thus, it is necessary and important to analyze their arguments and reasons in order to define whether international human rights accountability of non-state actors must be supported or not.

A first group of opponents proclaim that human rights are historically and currently “designed” to protect human beings from State abuses. We, on the contrary, disagree and believe that they are “meant” to protect human rights, that is, to protect the rights of any human person, aside from considerations of who is the potential violator of those rights. Regarding the design of human rights we must say along with Andrew Clapham that in most of the cases the norms they are contained in are not written or defined “with regard to a specific duty-holder”<sup>26</sup>, a fact that is reflected in statements like “everyone has a right to...”, “no one will be subject to...” and so on.

On the other hand, we firmly believe that it is foolish and stubborn to claim that a particular approach to human rights held years or centuries ago must remain as the only valid and legitimate approach, since it ignores that law tends to evolve and increase the protection it offers by taking into account new realities. Currently, as it is not hard to see, many individuals suffer from abuses committed by powerful –or not so powerful– non-state actors, such as those operating in drug dealing and traffic, those powerful enough to harm and affect the environment, international criminals, terrorists and many others<sup>27</sup>.

Summarizing it is important to keep in mind that human rights should be conceived as a sword in the hands of victims instead than as a shield against the State<sup>28</sup>.

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<sup>26</sup> A. CLAPHAM, *op. cit.*, p. 34.

<sup>27</sup> F. GALINDO VÉLEZ, “Consideraciones sobre la Determinación de la Condición de Refugiado”. In: S. NAMIHAS (coordinator), *Derecho Internacional de los Refugiados*, Fondo Editorial 2001, 45-80, pp. 60-61.

<sup>28</sup> A. CLAPHAM, *op. cit.*, p. 56.

Others claim that making it possible for non-state actors to be accountable for the violation of human rights would allow States to avoid complying with their duties by justifying their own violations claiming that they are to be deemed as necessary in order to prevent non-state actors violations, or by making others over-focus on the human rights dimension before non-state actors<sup>29</sup>.

In order to discard the latter objections it is important to note that granting negative capacities to non-state actors increases the number of subjects forced to abide by human rights norms and hence “increases” their protection instead of “modifying” previous norms that bind States. We can accordingly state that the extension of human rights liability and responsibility to actors other than States improve the protection granted to human beings, who are potential victims of threats from different entities since “governments are not the sole centres of power capable of violating human rights”<sup>30</sup>.

Another set of critics believe that enabling non-state actors to have human rights duties dignifies them and grants them a better status, specially because the fact that States have human rights' obligations allows them to perform some interventions<sup>31</sup>. This is not the case, however, because as we studied in the previous section international actors may have positive and negative capacities depending on whether a norm grants them to them. Thus, acquiring obligations does not imply acquiring rights and in fact highlights the fact that it has been observed that they tend to harm human rights, a fact that by no means legitimates them or improves the perception the population has of them. In other words, giving non-state actors human rights' duties implies that lawmakers desire to limit their activities for the better protection of those rights.

Finally, it has been stated that it is right or even necessary to impose obligations upon non-state actors, but that in order to do this it is enough to provide domestic norms and thus international law has nothing to do and its intervention is not required.

In order to discard this complaint it must be noted that international human right law is supposed to be subsidiary and complementary to domestic law<sup>32</sup> and is accordingly called to operate in absence of proper internal law or whenever a State is unable to deal with violations despite having the necessary domestic regulations, a thing that may happen for many reasons, such as the fact that some States do not have control over their whole territory or because they face very dangerous and powerful actors that challenge and even match or surpass their own power, such as international criminals and terrorists<sup>33</sup>. Accordingly, the mere fact of having international norms that

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<sup>29</sup> Ibid., p. 42.

<sup>30</sup> Ibid., p. 44.

<sup>31</sup> Ibid., p. 53.

<sup>32</sup> C. VILLÁN DURÁN, *Curso de Derecho Internacional de los Derechos Humanos*, Editorial Trotta 2006, p. 105.

<sup>33</sup> F. GALINDO VÉLEZ, *loc. cit.*, 45-80, p. 60.

complement, reinforce and even guarantee and ensure the application of domestic law translates into a better and more universal protection of human rights.

Finally, we must say that we believe that rights and responsibilities have the same source and reason: human dignity.

## **VI. CONCLUSION.**

Going over the possibility and implications of granting international negative capacities to non-state actors in the human rights field we can't but conclude that it is necessary in order to enhance the protection of human beings, who will then have more guarantees that their rights are going to be protected against any threat to their rights, whether they come from the State or from other entities. On the contrary, deeming that only States have human rights responsibilities decreases the aforementioned protection and denies the universal nature of human rights, besides discriminating those victims who have not had the luck of being harmed by a State.

On the other hand, current international law institutions allow many negative capacities to be given to non-state actors. In this respect, they can be granted substantive capacities such as holding duties and obligations, responsibilities and new rights whenever it has been demonstrated that they are responsible, and procedural capacities such as being able to be parties to claims brought against them as defendants at the international level and to be forced to abide by the decisions made in international bodies.