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Human Rights Obligations of Non-State Actors

The Collected Courses of the Academy of European Law
Edited by Professor Gráinne de Búrca,
Professor Bruno de Witte, and Professor Francesco Francioni
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Human Rights Obligations of Non-State Actors

ANDREW CLAPHAM

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A.B.C.

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Contents

Table of Cases

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

EUROPEAN COMMISSION OF HUMAN RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

INTER-AMERICAN COURT OF HUMAN RIGHTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

INTERNATIONAL COURT OF JUSTICE

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

SPECIAL COURT FOR SIERRA LEONE

UNITED NATIONS ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE TRIBUNAL OF THE ILO

UNITED NATIONS COMMITTEE AGAINST TORTURE

UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

UNITED NATIONS HUMAN RIGHTS COMMITTEE

NATIONAL COURTS

Canada

France

United States

Table of Treaties, Legislation, and other Relevant Instruments

NATIONAL LEGISLATION

Table of Abbreviations

General

ACHPR	African Charter on Human Peoples' Rights
ACHR	American Convention on Human Rights
ACP	African, Caribbean and Pacific Group of States
ATCA	Alien Tort Claims Act (US) (see also ATS below)
ATS	Alien Tort Statute (US)
BIAC	Business and Industry Advisory Committee (OECD)
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CIME	Committee on International Investment and Multinational Enterprises (also known as the Investment Committee)
CSR	corporate social responsibility
DSU	Dispute Settlement Understanding (WTO)
ECGD	Export Credit Guarantees Department (UK)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOMOG	ECOWAS Cease-fire Monitoring Group
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
EPZs	export processing zones
FTZs	free trade zones
GA	General Assembly of the United Nations
GATT	General Agreement on Tariffs and Trade
IACHR	Inter-American Commission on Human Rights
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICHRP	International Council on Human Rights Policy

ICRC	International Committee of the Red Cross
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IFIs	international financial institutions
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMT	International Military Tribunal (at Nuremberg)
IOE	International Organisation of Employers
IPPR	Institute for Public Policy Research
KFOR	NATO Kosovo Force
MEA	multilateral environmental agreement
MNCs	multinational corporations
MNEs	multinational enterprises
MSF	*Médecins sans frontières*
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NCPs	national contact points
NGOs	non-governmental organizations
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights (UN)
OSCE	Organization for Security and Co-operation in Europe
PCC	Press Complaints Commission (UK)
PSF	private security firm
RAID	Rights and Accountability in Development
TEC	Treaty Establishing the European Community
TNCs	transnational corporations
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TUAC	Trade Union Advisory Committee (OECD)
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPF	United Nations Peace Forces
UNTS	United Nations Treaty Series

VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Journals

AJIL	*American Journal of International Law*
AJPIL	*Austrian Journal of Public and International Law*
ALJ	*Alternative Law Journal*
AYBIL	*Australian Year Book of International Law*
Berkeley JIL	*Berkeley Journal of International Law*
BJIS	*British Journal of International Studies*
Brooklyn JIL	*Brooklyn Journal of International Law*
Col JTL	*Columbia Journal of Transnational Law*
EHRLR	*European Human Rights Law Review*
EJIL	*European Journal of International Law*
Ford ILJ	*Fordham International Law Journal*
Harv CR-CLLR	*Harvard Civil Rights-Civil Liberties Law Review*
Harv HRJ	*Harvard Human Rights Journal*
HICLR	*Hastings International and Comparative Law Review*
HLR	*Harvard Law Review*
HRLJ	*Human Rights Law Journal*
HRQ	*Human Rights Quarterly*
ICLQ	*International and Comparative Law Quarterly*
IJRL	*International Journal of Refugee Law*
ILM	*International Legal Materials*
IRRC	*International Review of the Red Cross*
JIEL	*Journal of International Economic Law*
LQR	*Law Quarterly Review*
Mich LR	*Michigan Law Review*
MJIL	*Michigan Journal of International Law*
MLR	*Modern Law Review*
NILR	*Netherlands International Law Review*
NJIL	*Nordic Journal of International Law*
NQHR	*Netherlands Quarterly of Human Rights*
RCADI	*Recueil des Cours de l'Académie de Droit International de la Haye*
SAJHR	*South African Journal on Human Rights*

UCLA JIL & FA	*University of California Los Angeles Journal of International Law and Foreign Affairs*
UPLR	*University of Pennsylvania Law Review*
URLR	*University of Richmond Law Review*
Van JTL	*Vanderbilt Journal of Transnational Law*
Virg JIL	*Virginia Journal of International Law*
Yale HRDLJ	*Yale Human Rights and Development Law Journal*
YLJ	*Yale Law Journal*

1

Old Objections and New Approaches

This book is concerned with those occasions when non-state actors act in ways which threaten the enjoyment of human rights. We will focus on international organizations, transnational corporations, and armed opposition groups. As the human rights debate has expanded to address these actors, the response has been far from uniform. At the legal level, much depends on one's approach to international law. Reflecting this we can identify multiple responses by lawyers to ensuring the accountability of non-state actors for human rights abuses. Let us condense these to three broad approaches.

The first approach would insist on the importance of states as the main actors in the international system and the only bearer of human rights obligations under international law. Such an approach focuses on state responsibility and demands that human rights problems concerning non-state actors are simply dealt with as questions of the relevant government's obligation to ensure respect for human rights. Human rights law is said to be adequate, in that it already demands that governments protect everyone from those who might undermine those rights. The whole human rights system has been based on the responsibility of states and this is said to be the best medium through which to tackle the growing concern over threats emanating from non-state actors. It is said that attempting to extend legal duties under human rights law to non-state actors bestows on such actors an unfortunate legitimacy, which will undermine the authority of the state and dilute the responsibilities of states with respect to their human rights obligations. According to this first approach, to change course now would allow the whole human rights project to unravel. The state is, at least in many cases, already accountable for failing to enforce its own laws against abusive non-state actors. In addition, there are several ways in which popular participation can influence outcomes in government policy and improve legislation to constrain abuses by non-state actors. Better to put our faith in the current state-centred system than in a new, unknown, and necessarily diffuse accountability arrangement which would inadvertently give non-state actors greater 'status'.

The second approach suggests that governments are increasingly irrelevant and powerless and that attention should focus on other actors such as transnational corporations and international institutions such as the International Monetary Fund and the World Bank. According to this approach, we should face up to the

fact that, in a globalized economy, the trading which accompanies economic exploitation or civil wars is no longer in the hands of governments (even if they were minded to seriously tackle these issues). New ways of understanding transnational justice and global law are needed to respond to globalization. For Gunther Teubner: 'Today's globalization is not a gradual emergence of a world society under the leadership of interstate politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role.'[1] In this vein, global law is not bound by the territories of nation states but 'rather, by "invisible colleges", "invisible markets and branches", "invisible professional communities", "invisible social networks" that transcend territorial boundaries but nevertheless press for the emergence of genuinely legal forms'.[2] Teubner's response is a proposed legal pluralism 'defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal'.[3] The emphasis is on a plurality of legal discourses rather than a hierarchy of legal orders. This approach may also combine with a vision of human rights as pre-existing moral claims, derived from moral philosophy rather than positive law.[4] In particular, when one encounters attempts to make human rights legitimate and effective at a popular level, the foundations and justifications for human rights obligations may build on religion and inductive appreciations of the importance of human dignity.[5] As Andrea Bianchi suggests, it may be that transnational civil society networks and non-governmental organizations 'create our understanding of human rights' even where this operates 'independently of the existence of binding obligations under international law'.[6]

Such an approach may come close to explaining the normative forces at work in various sectors, but is difficult for international human rights lawyers to embrace fully, as many work from the assumption that human rights norms have some sort of special status which is legitimized through the accepted law-making process of national and international law. In some circumstances, it has even been agreed that human rights laws should have a higher status than other norms and should be given priority over other goals. Many human rights lawyers would be loathe to abandon the special status accorded to human rights as law (traditionally understood) and move to law as a *multiplicity of communicative processes*, or accept

[1] G. Teubner, ' "Global Bukowina": Legal Pluralism in the World Society' in G. Teubner (ed) *Global Law Without a State* (Aldershot: Dartmouth, 1997) 3–28, at 5. [2] Ibid, at 8.

[3] Ibid, at 14.

[4] C. Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999). See also A. Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (New York and London: Routledge, 2000).

[5] See A. A. An-Na'im, 'The Synergy and Interdependence of Human Rights, Religion, and Secularism' in J. Runzo, N. M. Martin, and A. Sharma (eds) *Human Rights and Responsibilities* (Oxford: Oneworld Publications, 2003) 27–49.

[6] A. Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors' in G. Teubner (ed) *Global Law Without a State* (Aldershot: Dartmouth, 1997) 179–212, at 201.

arguments about *world law*, *multi-level governance*, or the identification of accountable non-state actors through the use of criteria such as *autonomy* or *representativeness*.[7]

Asserting the importance of non-state actors cannot easily be equated with an assertion that international law must therefore (obviously) impose duties on them. Most international lawyers still adhere to a vision of international law as the product that emerges from an established law-making process, starkly described by Anthony Clark Arend as follows:

> . . . states are still the main actors in the international system and the primary creators of international law. Even though nonstate actors exist, and, in some cases, these nonstate actors have entered into international agreements, these actors do not enter the process of creating general international law in an unmediated fashion. In other words, the interactions of nonstate actors with each other and with states do not produce customary international law. Only state interactions can produce custom.[8]

Having presented the traditional understanding of international law formation, Arend goes on to imagine a possible future system, inspired by the medieval international society evoked by Hedley Bull in *The Anarchical Society*. In such a future system, he suggests, the rules for the formation of customary international law would change.

> If, however, the state were to lose its monopoly in a neomedieval system, the most basic general principle about the nature of international law—the notion that *states* create international law through their consent—would now have to be expanded. If this were to be the case, the international law-creating process would be fundamentally changed . . . [T]he process of creating customary international law could become much more complex. There could, in fact, be multiple levels of customary international law. At one level, there could be some rules of customary international law that were binding on all types of international actors. In those cases, instead of authoritative state practice alone producing customary legal rules, the mutual interactions of a variety of international actors—states, substate actors, 'peoples,' and international organizations—would constitute general customary international law. If a scholar or other observer wished to determine the existence of a rule of international law of this nature, he or she could not examine merely state practice, but would need to examine the practice of this entire panoply of actors.[9]

This approach suggests a future legal order where the rules for who has the authority to develop the rules have developed to include non-state actors as rule-makers. Arend points to the disintegration of states and the ensuing emergence on the scene of non-state actors such as the Bosnian Serbs, the rise of authorities such as the European Community, organized private violence committed by criminal

[7] For a thought-provoking essay on these possibilities, see C. Harding 'Statist assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty-first century' 1 *Non-State Actors and International Law* (2001) 107–125, esp. 112, 121.

[8] A. C. Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999) at 176.

[9] Ibid, at 176–177.

gangs and terrorists, and asks whether the state system will be replaced 'by a fundamentally different paradigm for international relations'.[10] His prediction is that in a new system: 'General international law will come about through the many interactions of the multiple international actors . . . It does not seem unreasonable to expect the emergence of such a system in the early part of the twenty-first century.'[11]

I should like to suggest a third approach. My approach retains as a starting point the principles and rules of public international law with its origins in the law-making power of the nation-state. But I want to go beyond the traditional, narrow, state-focused approach and argue that some of the obligations found in public international law, and traditionally only applied to states, also apply to non-state actors. I recognize the importance of non-state actors and their influence without suggesting that they have achieved the role of law-maker. We should indeed examine their activity and their interaction with states and others to determine the duties and rights that states have fixed them with. Such an examination elevates them to subjects of interest without any automatic legitimizing effect. Such an examination will reveal the concern of states to address the behaviour of non-state actors that threatens international human rights.

My main argument is that the existing general rules of international human rights law, created and acknowledged by states, now fix on non-state actors so that they may be held accountable for violations of this law. Of course this radical rethink could be dismissed by proponents of the first approach as simply incorrect. But I am going to challenge the assumptions they have built into their approach. This may betray an adherence to a legal method which accepts that values are omnipresent as we seek to determine the applicability of rules. In this sense, I would follow the approach of Rosalyn Higgins when she writes: 'Reference to "the correct legal view" or "rules" can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purpose of the law.'[12] I would submit that one can accept that international law is mostly generated by accepted processes between nation states,[13] but still reject the prevalent assumptions that: first, the bearers of international obligations are limited to presumed, so-called, 'subjects' of

[10] A. C. Arend, *Legal Rules and International Society* at 179. [11] Ibid, at 185.

[12] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 5.

[13] In considering the international legal order, Christian Tomuschat points to the policy school which 'deals with law, but totally refrains from referring to the norms as they appear in "normal" text books'. International Law: Ensuring the Survival of Mankind on the Eve of a New Century: *General Course on Public International Law* 281 *RCADI* (The Hague: Nijhoff, 2001) at 54. The subsequent construction of a 'contextual norm for the case at hand according to a cannon of preferential criteria unilaterally proposed by the authors' is said to give rise to 'absolute freedom to revise the existing law at any time according to a balancing of the pros and cons that can be identified in a given case, without having to go through the normal processes available for reviewing and reforming deficiencies in the law that have emerged in the course of its application'. Our approach will be to apply law which would be recognizable to the readers of 'normal' textbooks, the values identified to contextualize

international law;[14] and second, that public international law is inoperative outside established enforcement regimes such as international tribunals. I would also argue that public international law can apply in the networks and sectors that focus on duties for non-state actors. And, I would suggest we can construct such a framework without the existing law of state responsibility crumbling and without inappropriately legitimizing the relevant non-state actors.

1.1 THE EXPANDING SCOPE OF INTERNATIONAL LAW

International law has for some time served to tackle individual criminal responsibility for certain acts committed by individuals: slavery, war crimes, genocide, crimes against humanity, disappearances, and torture. International law can attach to certain non-state actors at all times and irrespective of their links to the state. Article I of the Convention on the Prevention and Punishment of the Crime of Genocide confirms that 'genocide, whether committed in time of peace or in time of war, is a crime under international law'. Article IV reminds us that persons committing acts of genocide shall be punished 'whether they are constitutionally responsible rulers, public officials or private individuals'. The key obligations under this treaty have clearly become customary obligations for all states, even regarding crimes committed outside their territory.[15] Furthermore, genocide 'is a crime under international law for which individuals shall be punished'.[16] This means in effect that there are international obligations for every individual. In fact, although at one stage it was said that the broader category of crimes against humanity had to be pursued in furtherance of a *state* policy, this restriction is no longer applied. In the words of the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia 'although a policy must exist to commit these acts, it need not be the policy of a State'.[17] The Chamber relied on the work of the International Law Commission of the United Nations as well as practice from the courts of the United States in reaching this conclusion:

> Importantly, the commentary to the draft articles of the Draft Code [of Crimes Against the Peace and Security of Mankind], prepared by the International Law Commission in

interpretation will be self-consciously chosen but there will be an attempt to derive the legitimacy of such value choices from the reasoning of recognized institutional authorities within the legal order. The legitimacy of the process for the evolution of the legal order may not be recognized by some as part of the 'normal' process for law reform—but our understanding of what is normal in the present context may be changing.

[14] The issue of subjectivity under international law is dealt with in Ch 2.

[15] See the International Court of Justice *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)* (Preliminary Objections), (1996) ICJ Reports para. 31.

[16] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) S/25704, 3 May 1993, para. 45.

[17] *Prosecutor v Tadić* Case IT–94–1–AR72 and Case IT–94–1–T, Judgment of 7 May 1997, para. 655.

> 1991, which were transmitted to Governments for their comments and observations, acknowledges that non-state actors are also possible perpetrators of crimes against humanity. It states that:
>
> > [i]t is important to point out that the draft article does not confine possible perpetrators of the crimes [crimes against humanity] to public officials or representatives alone . . . the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code.[18]
>
> Similarly, the United States Court of Appeals for the Second Circuit recently recognized that 'non-state actors' could be liable for committing genocide, the most egregious form of crimes against humanity, as well as war crimes.[19]

In other words, for some behaviour, customary international law has fixed obligations on the individual, even in the absence of a state nexus, and the violation of these international obligations will be punishable at the national and international level.

Does international law confine its reach to states and individuals? No, there are well-known categories of entities besides states and individuals that are capable of bearing rights and obligations under general international law. Inter-governmental organizations such as the United Nations have the requisite international personality to claim rights and fulfil their duties on the international plane.[20] A further category comprises certain parties to internal armed conflicts sometimes described as 'civil wars'.[21] A vexed question is the status of corporations or legal persons in general. We shall discuss this in detail in Chapter 2; for present purposes let us simply refer to the discussions during the Rome Conference for an International Criminal Court. The draft Statute for the International Criminal Court before the delegates at the start of the Rome Conference in 1998 actually included a paragraph in brackets, which ensured the possibility of trying 'legal persons, with the exception of States, when the crimes were committed on behalf of such legal persons or by their agents or representatives'.[22] This paragraph did

[18] At this point, footnote 167 in the original reads: '*I.L.C. 1991 Report*, 266.'

[19] At this point, footnote 168 in the original reads: '*Kadic v. Karadžić*, 70 F.3d 232 (2nd Cir. 1995), cert. denied, 64 U.S.L.W. 3832 (18 Jun. 1996).'

[20] We discuss this in further detail in Ch 2, at 2.2. For a general overview see P. Sands and P. Klein, *Bowett's Law of International Institutions* (London: Sweet and Maxwell, 2001) Ch 15, 'Legal Personality'.

[21] We discuss this further in Ch 7. Note the recent elaboration of this issue by the International Law Institute, Resolution adopted 25 August 1999 in Berlin: 'The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties.' See also W. Kälin, *Guiding Principles on Internal Displacement: Annotations* (Washington, DC: Studies in Transnational Legal Policy No. 32, American Society of International Law, 2000) at 9. 'Humanitarian law applicable in situations of noninternational armed conflicts (common Article 3 Geneva Conventions and Protocol II) binds not only state actors but all parties to the conflict.'

[22] Art. 23(5), UN Doc. A/CONF.183/2/Add.1, 14 April 1998. The background and fate of this proposal is discussed in Ch 6 and in greater detail in A. Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in M. Kamminga and S. Zia-Zarifi (eds) *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer, 2000) 139–195.

not survive, due in part to the fact that, according to the Co-ordinator of the working group on general principles, 'Time was running out'.[23] However, there is no reason to believe that certain international law obligations cannot attach to non-state actors in the form of legal persons. At no point during the drafting of the Rome Statute was it claimed by any delegation that the 'legal persons' referred to in the draft could not demonstrate the requisite legal capacity to be the bearers of international obligations.

The point is that international law is already concerned with the duties of individuals both in their public and private capacities. International law has already extended this concern to inter-governmental organizations, and there is no evidence that the international legal order cannot accommodate duties for other kinds of actor. Although there are only rare instances where a corporation could be the respondent in a dispute before an international tribunal (such as a case before the Seabed Disputes Chamber of the Law of the Sea Tribunal),[24] a non-state actor such as a corporation can still be the bearer of international duties outside the context of international courts and tribunals. Lack of international jurisdiction to try a corporation does not mean that the corporation is under no international legal obligations. Nor does it mean that we are somehow precluded from speaking about corporations breaking international law.

In fact, states can be bound in international law to ensure that the corporations respect duties defined in international treaties. The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Wastes within Africa goes further than most treaties and explicitly demands national legislation 'for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct'.[25] The Convention defines 'person' as meaning 'any natural or legal person'.

In thinking about the obligations which arise with regard to conduct prohibited under international law, it is crucial to understand that the same act, say an act of genocide, can violate multiple obligations. The single action can constitute a violation of the international obligations of the person committing the act—constituting an international crime under customary international law; and should the person's acts be attributable to a state, then that state may have violated the state's international treaty obligations to other states parties as well as its obligations under customary international law. There may even be additional

[23] See P. Saland 'International Criminal Law Principles' in R. Lee (ed) *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, Results* (The Hague: Kluwer, 1999) 189–215, at 199.

[24] See Arts 187 and 291(2) of the UN Convention on the Law of the Sea (1982).

[25] Reproduced in 30 *ILM* (1991) 773. See especially Arts 1(16) (definition); 4(1) 'Such import shall be deemed illegal and a criminal act'; and 9(2) (Obligation on States parties to introduce criminal penalties on all persons guilty of illegal imports).

breaches of non-binding guidelines or codes of conduct applicable to a corporate or non-governmental actor.[26]

Apart from multiple violations, there could be multiple fora in which to hold the various actors accountable—the national courts (for criminal and civil liability of the natural and legal persons), an international criminal court (for individual criminal responsibility), and the relevant international human rights treaty monitoring bodies and courts (to hold the state accountable for violations of its treaty obligations). There may even be arrangements made under non-binding schemes for investigations by the designated authority.[27]

There is little controversy over a multiplication of obligations concerning a crime such as genocide. However, a more general extension of human rights obligations towards non-state actors has met with a series of objections. Those who have built up the state-centred approach seem sometimes to suggest that an extension of human rights scrutiny to non-state actors will chip away at the foundations of the human rights monument, thereby accelerating the chances of its eventual disintegration and ruin. But I would suggest that the strength of the human rights system has always been its ability to adapt to new demands and new needs. There are now demands for protection from the effects of big business and non-state actors. The human rights machinery and norms are pliant enough to be reoriented to cope with these new demands. In response to those concerned about the strain such a reorientation would place on the system, we might consider the following passage by Christine Chinkin:

> There is apprehension that to transform the vision of human rights to include acts by private individuals would disturb and undermine the entire edifice of human rights. Women in turn argue that the system has excluded harms most frequently inflicted upon them and that the vision has never held out the same promise of fulfilment of human dignity to them as to men. If human rights law is so fragile that it can not withstand such reconceptualization, then it is barely worth preserving.[28]

But suggesting that we should 'privatize' our thinking about human rights, or that non-state actors and private individuals have duties under human rights law that can be judicially enforced, has been met, not only with apprehension, but also with several argued objections. These can be grouped under five headings.

[26] An example of such a non-binding obligation is the OECD Guidelines for Multinational Enterprises discussed in Ch 6 below.

[27] E.g. the OECD procedures for bringing complaints before the National Contact Points (NCPs) have referred to allegations of 'violations' or 'breaches' of the OECD Guidelines; see, e.g. the statement by the UK NCP concerning De Beers (undated 2004); the French NCP was seized by various trade unions with regard to forced labour in Myanmar and the subsequent recommendation suggests practical steps to be taken by the multinationals; see statement of 28 March 2002.

[28] C. Chinkin, 'International law and human rights', in T. Evans (ed) *Human Rights Fifty Years On: A reappraisal* (Manchester: Manchester University Press, 1998) 105–129, at 115.

1.2 THE TRIVIALIZATION ARGUMENT

First, there are those who object that applying human rights obligations to private actors trivializes human rights and ignores their historical pedigree. They argue that the thing that makes human rights important is the fact that they relate only to serious abuses of state power, and this is what distinguishes human rights from ordinary crime or breaches of the law. In response to a ruling of the Constitutional Court of Malta that the prohibition on inhuman and degrading treatment applied, not only to state actors, but also to private actors, a serious letter appeared in the Maltese *Sunday Times*. The letter to the editor complained that this sort of extension of human rights law into the private sphere undermines the human rights project. The author of the letter welcomed the first part of the judgment whereby the Court:

> . . . recognized the *principle* that only the state is actionable for the violation of human rights. Human rights are what the state owes to the individual, and it is only the state that can infringe them. A *private* violation of human rights by a private individual is, on principle, constitutional heresy. It would have been amazing had the Court held otherwise. Our supreme tribunal has finally recognized what for the rest of the world has been elementary doctrine since the beginning of codified human rights.
>
> The Constitutional Court then went on to observe that the makers of Constitutions may, and sometimes do allow some specific exceptions to this principle. Of course, if the Constitution so wills, some specific human rights may be made actionable against individuals. Here too one finds nothing to dispute. What I must respectfully, but very forcefully, disagree with is how the Court is to identify those specific human rights provisions which are actionable not only against the state, but against private individuals as well.
>
> The Constitutional Court seems to have laid down the test that when the wording of the human rights provision is generic, and is not limited to protection against state action, then that particular human right is actionable against private individuals too.
>
> This, I submit, is totally untenable. If the wording of the constitutional provisions does not expressly, or by necessary implication, make individuals actionable, then it is the general rule that must apply, viz, that only the state is actionable for breaches of human rights. Obviously, it is always the exception to the rule that must be specifically spelt out, not the other way around.[29]

We are told there is a 'general rule' that only the state is actionable for breaches of human rights. If we look for evidence of the general rule the results are inconclusive. International human rights are usually traced to the Universal Declaration of Human Rights of 1948. Early drafts mentioned the duties of the individual at the beginning of the Declaration, stating that 'Man is essentially social and has fundamental duties to his fellow men. The rights of each are therefore limited by the rights of others'.[30] The Declaration starts with a recognition of the inherent

[29] Maltese *Sunday Times*, 22 October 1989.

[30] Draft Art. 3 presented by Cassin, as cited by J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 243. For the full drafting history of the duties under the final Declaration see 239–252.

dignity and inalienable rights of everyone. It proclaims rights for everyone and defines them with no reference to the state or any other duty-holder. Everyone has the rights to life, no one shall be held in slavery, no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation'.[31] Whilst one paragraph mentions the family's entitlement to 'protection from society and the State',[32] there is only one concrete individual entitlement expressed as an entitlement *vis-à-vis* the state (with regard to social security).[33] The last two Articles in the Declaration proclaim that 'Everyone has duties to the community' and that the Declaration does not imply that any 'State, group or person' has a right to engage in activity aimed at the destruction of the rights in the Declaration.[34]

So only some rights are specifically concerned with the relationship between the individual and the state. In general, rights are simply proclaimed as belonging to individuals. Individuals and groups are precluded from relying on their right to infringe or destroy the rights of others. The rule appears to be that most human rights are not defined with regard to a specific duty-holder. If other rights are exclusively applicable only against the state, these should be spelt out expressly.

The author of the letter to the Maltese *Sunday Times* concludes that the Court's generic test invited 'judicial bedlam' (chaos). For him:

> The decision can only bring a regrettable involution of human rights and a trivialization of the formidable concept of protection against abusive state action. The teenager whose love letters are opened by her mother now has an action for human rights redress just like the political dissenter whose correspondence is spied on by the political police. The wife who is beaten up by her husband henceforth has an action for fundamental rights redress on an equal footing with the political detainee who is beaten up by his interrogators! Which with all due respect, pulls inside out the very concept of human rights.[35]

In response, one might argue that to confine examination of human rights violations to violence by the state in this way excludes certain important categories of violence from serious discussion and attention. From this perspective, domestic violence and violence against prisoners both deserve attention and remedies. One

[31] See Arts 3, 4, 5, and 12. [32] See Art. 16(3).

[33] Art. 22 reads: 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

[34] See Arts 29 and 30. Art. 29: '1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. 3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations'. Art. 30: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.' [35] Maltese *Sunday Times*, 22 October 1989.

victim should not be prejudiced by the 'private' nature of the violence. As will be discussed, international law (as a regime that focused on inter-state relations) has inevitably skewed the rules and procedures one way, towards an examination of state action. In addition, the focus has been on prohibitions on states rather than demands for action. As Catherine MacKinnon put it: 'The role of international law has been largely, in Isaiah Berlin's sense, negative. It could be more, but it fosters human rights less through mandating governmental interference than through enforcing governmental abstinence. In other words, if your human rights are going to be violated, pray it is by someone who looks like a government, and that he already acted, and acted wrong.'[36]

At this point one might suggest that, rather than trivializing human rights, it is possible to apply human rights obligations to non-state actors in a way which shifts human rights discourse from the realms of rhetoric and ideology into the sphere of daily reality and social progress. Two counter-arguments present themselves in response to the trivialization argument. First, the trivialization argument is based on an assumption that human rights, as a rule, are only actionable against the state, and that exceptions to this rule have been explicitly spelt out. In fact, a case can be made that, as a rule, human rights are to be respected by all persons, groups, and states, and that exceptional additional duties for the state have been explicitly articulated. The second counter-argument tackles the very premise of trivialization, i.e. that political prisoners are a legitimate subject of concern and violence against women in the home is not. What can be considered trivial depends on who you are and what are your interests.

1.3 THE LEGAL IMPOSSIBILITY ARGUMENT

A second line of resistance is presented as a legal argument that private non-state actors simply cannot incur responsibilities under international law. Partisans of this thesis point to a lack of evidence that international law accepts such a general development. They argue that treaties are negotiated and entered into by states and that these treaties cannot bind those who are not a party to them. In addition, other forms of international law, such as customary international law, result from the behaviour of states and their willingness to accept new rules as binding on them. These rules should be seen as binding only those explicitly addressed by states. Adherents to the legal impossibility argument would admit that some non-state entities, such as inter-governmental organizations, can incur duties under international law through entering into treaties or through the application of customary international law. So, for example, the United Nations and the European Community can violate international law binding on them. The fact

[36] C. MacKinnon, 'Crimes of War Crimes of Peace' in S. Shute and S. Hurley (eds) *On Human Rights: the Amnesty Lectures* (New York: Basic Books, 1993) 83–110, at 92.

that they cannot be parties to a case before the International Court of Justice does not mean that they do not have rights and obligations under international law; disputes have to be settled in a different forum.[37] Even where an international regime allows for individual complaints against the state, one should not assume that these procedural possibilities (rights) determine the reach of the substantive rights under the treaty.[38]

Those who insist on an approach based on the traditional scope of international law would also admit that international law creates international crimes for individuals in fields such as piracy, genocide, crimes against humanity, and war crimes. But these are explained away as explicit exceptions for individuals. For some lawyers, such as Liesbeth Zegveld, the answer lies in the assertion that 'human rights law purports to govern the relations between the government representing the state and the governed', so that any suggested extension to armed opposition groups would be unintended and inadequate.[39] Furthermore, Zegveld suggests that, with regard to international criminal law, criminal responsibility for the group would be unnecessary due to the existence of both civil responsibility for the group and criminal responsibility for the individual members.[40] Room is left for 'application of human rights law to armed opposition groups that act as de facto governments or groups with a stable presence in part of the state territory. In those cases, the basic features of human rights law, namely the relationship between government and governed, is present'.[41] However, this concession should be of limited impact as, according to Zegveld: 'Armed opposition groups rarely function as de facto governments.'[42]

In response, it is possible to point to situations where armed groups that cannot be compared to governments, such as the rebel groups in Sierra Leone, have been

[37] E.g. the treaty obligations of the European Community under the UN Convention on the Law of the Sea (1982) can be litigated before the Law of the Sea Tribunal or under some appropriate arbitration arrangement.

[38] See R. Higgins, 'Conceptual thinking about the individual in international law' 4 *BJIS* (1978) 1–19, esp. at 4; and *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 48–55. Note also the suggestion by Martin Scheinin that, with regard to a new World Human Rights Court, non-state actors such as international organizations and corporations could make unilateral declarations accepting the jurisdiction of a new court. M. Scheinin 'Towards a World Human Rights Court?' Conference at the Graduate Institute of International Studies, Geneva, 18 December 2002 (unpublished mimeograph on file with the author).

[39] L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002) at 54–55.

[40] Ibid, at 58.

[41] Ibid, at 54. Note also the approach adopted by the Truth Commission in El Salvador: 'It is true that, in theory, international human rights law is applicable only to Governments, while in some armed conflicts international humanitarian law is binding on both sides: in other words, binding on both insurgents and Government forces. However, it must be recognized that when insurgents assume government powers in territories under their control, they too can be required to observe certain human rights obligations that are binding on the State under international law. This would make them responsible for breaches of those obligations.' 'From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador', UN Doc. S/25500, 1 April 1993, at 20.

[42] Ibid, at 152.

investigated for committing human rights abuses. The Truth and Reconciliation Commission of Sierra Leone had a mandate which read as follows:

> 6. (1) The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.[43]

The Commission's Report contains detailed examinations of activity by multiple actors, including not only the insurgents, rebels, and international peace-keepers, but also the private security firm, Executive Outcomes. It 'found the RUF [Revolutionary United Front] to have been responsible for the largest number of human rights violations in the conflict'[44] and uses the expression 'human rights violations' with regard to all actors.

The earlier report of the Guatemalan Historical Clarification Commission similarly referred to human rights violations by the insurgents. The legal analysis is perhaps more developed as it refers to 'general principles common to international human rights law', thus suggesting that the insurgents could not be burdened with all the human rights obligations of the state:

> 127. The armed insurgent groups that participated in the internal armed confrontation had an obligation to respect the minimum standards of international humanitarian law that apply to armed conflicts, as well as the general principles common to international human rights law. Their high command had the obligation to instruct subordinates to respect these norms and principles.
>
> 128. Acts of violence attributable to the guerrillas represent 3% of the violations registered by the CEH. This contrasts with 93% committed by agents of the State, especially the Army. This quantitative difference provides new evidence of the magnitude of the State's repressive response. However, in the opinion of the CEH, this disparity does not lessen the gravity of the unjustifiable offences committed by the guerrillas against human rights.[45]

[43] Supplement to the Sierra Leone Gazette, vol. CXXXI, No. 9, dated 10 February 2000.

[44] Para 15 of the 'Overview' accessible at http://www.nuigalway.ie/human_rights/publications.html. See also vol. Two, Ch Two, paras 106 and 107, where the Commission found that the RUF was 'the primary violator of human rights in the conflict' and responsible for 60.5% of the violations (24,353 out of 40,242 violations). See further paras 115–172. The RUF were not the only non-state actor dealt with in the report. ECOMOG (the Ecowas Cease-Fire Monitoring Group and Executive Outcomes (the Military Security Company) are both considered. With regards to ECOMOG, the Report points (at para. 396) to 'human rights violations' including summary executions of civilians. With regard to Executive Outcomes, the Report states (at para. 402) that the Commission recorded no 'allegation of any human rights violation against the mercenaries'.

[45] *Guatemala Memory of Silence*, Executive Summary Conclusions and Recommendations, UN Doc. A/53/928 Annex, 27 April 1999. For the relevant part of the full Spanish report see paras 1699–1700 in vol. II at pp 312–313. Christian Tomuschat, Chair of the Commission and has highlighted the way in which the Commission determined that outside times of armed conflict the insurgents were bound by these common principles. See C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 261 and cited in Ch 7 below.

Today one can point to the international preoccupation with terrorism and suggest that it has opened the door even further to an approach which simply admits that insurgents, guerrillas, or terrorists do indeed violate human rights in the course of some of their attacks. A background paper for an expert meeting on 'Human Rights, the United Nations and the Struggle Against Terrorism' explained the issue in the following way:

> The proposition that terrorism violates human rights should not be controversial. Yet classical interpretations of human rights hold that only states can violate human rights. Only states are bound by human rights treaties, not individuals, non-state actors or others. Fortunately, human rights thinking and even jurisprudence has evolved and now certain non-state actors like rebel groups and multi-national corporations can be held responsible for rights violations. Certainly organizations like al Qaeda would fall into this category . . .[46]

The point here is that preoccupations with terrorism have led to a number of assertions, not only by commentators and non-governmental organizations but also by key UN organs, that terrorists violate human rights. Already in 1994, the UN General Assembly's Declaration on Measures to Eliminate Terrorism contains a preambular paragraph which expresses concern that terrorists resort to violence 'violating basic human rights'.[47] Two years later in 1996, following the hostage-taking at the Japanese Embassy in Peru, the President of the Security Council responded with the following statement: 'The Security Council has always firmly condemned terrorist acts, whatever the circumstances, in the most unequivocal terms. Such acts constitute a violation of the basic principles of international law and of human rights.'[48] More recently the UN Secretary-General transmitted a report to the General Assembly and Security Council which simply asserted: 'it must be understood clearly that terrorism itself is a violation of human rights. Terrorist acts that take life violate the right to life set forth in article 6 of the International Covenant on Civil and Political Rights'.[49] We might mention the voted 2003 Resolution of the UN Commission of Human Rights which expressed the Commission's concern at 'the gross violations of human rights perpetrated by terrorist groups' and condemned terrorist acts and 'the violations of the right to life, liberty and security'.[50] Lastly, we can note that the United Nations may condemn terrorist attacks as attacks on rights such as the right to life.[51]

[46] William O'Neill, unpublished paper on file with the author.

[47] Annexed to Res. 49/60 of 9 December 1994, the full paragraph reads: 'Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights.'

[48] Statement at press conference by Ambassador Fulci, 19 December 1996.

[49] Report of the Policy Working Group on the United Nations and Terrorism established by the Secretary-General UN Doc. A/57/273–S/2002/875, 6 August 2002, at para. 26.

[50] Human rights and terrorism, Res. 2003/37, adopted by a recorded vote of 30 votes to 12, with 11 abstentions.

[51] See, e.g. 'The acting High Commissioner condemns this attack on the right to life in the strongest possible terms.' *Acting Rights Chief Condemns Kandahar Bombings*, UN Press Release, 7 January 2004.

The explicit focus by the UN Human Rights Commission on violations of human rights by terrorist groups has met with opposition from some governments that fear such a focus could distract from the Commission's task of holding governments accountable. Whether or not this is a reasonable policy to adopt with regard to the work of the Commission, it does not really determine whether non-state actors have human rights obligations.

The UK Foreign and Commonwealth Office's 2004 position with regard to the obligations of non-state actors focused on the direct obligations of states as parties to international instruments to protect and promote human rights for all individuals within its jurisdiction. But the position also reiterated the state's duty to protect people from non-state actors that threaten human rights, and recognized the possibility of human rights obligations applying to non-state actors:

> States must not themselves violate those rights or, through inaction or negligence, allow non-state actors to prevent people from enjoying those rights. Non-state actors are not parties to international human rights instruments and not bound directly by them. However, whether and how to make human rights obligations binding on e.g. insurgent groups, multinational corporations is likely to be one of the main debates in the human rights field in the years to come.[52]

The position of various other governments can be gleaned from statements submitted to the UN Special Rapporteur on terrorism and human rights which, on the whole, avoid the theoretical issue.[53] We might simply extract here a few submissions. The Argentinian Government stated:

> The Government noted that it does not accept the argument that the acts of international terrorism constitute a human rights violation, since, by definition, only States are capable of violating human rights. To consider acts of terrorism as violating human rights often conceals the intention to justify the use of anti-terrorist methods and practices by States agencies which themselves ignore human rights standards.[54]

This approach defines non-state actors as outside the category of duty-holders under the international law framework without further explanation. Some may say it is *obvious* that human rights are defined as rights exclusively applicable against the state, but no international definition states this in these terms. In fact, as we saw above, the Universal Declaration was carefully drafted to avoid suggesting that the

[52] *Human Rights Guidelines*, Human Rights Policy Department (Foreign and Commonwealth Office), June 2004, at 8. The UK has also suggested that: 'Any ongoing process should not seek to place companies in the same position as States with regard to obligations in international human rights law. To avoid confusion of their legal status, texts relating to the responsibilities of business with regard to human rights should not use legally-binding treaty language.' Reply to the request by the Office of the High Commissioner for Human Rights (OHCHR) for input from states regarding the report concerning 'Responsibilities of transnational corporations and related business enterprises with regard to human rights', at para. 3; see Decision of the Commission 2004/116. See also http://www.ohchr.org/english/issues/globalization/business/contribution.htm.

[53] UN Doc. E/CN.4/Sub.2/2003/WP.1/Add.2, 8 August 2003, Sub-Commission on the Promotion and Protection of Human Rights, Additional progress report prepared by Ms Kalliopi K. Koufa, Addendum, Summary of comments received.

[54] Ibid, para. 2.

state has specific duties, the rights are written in the form 'everyone has the right to . . .'. The focus is on the inherent possession of the right, and references to duties can be found to society, the state, groups, and individuals.

Moreover the Argentine position is bolstered, not by reference to legal arguments but rather by invoking a policy argument suggesting that pointing to human rights obligations for terrorists allows states to use the fight against terrorism as an excuse to violate human rights themselves. This policy argument is further examined in the next section. Nevertheless, the position of the Argentinian Government is ambivalent. The submission later concludes:

> The Government noted that it espouses the concept that human rights violations can only be committed by the State or State agents, which was at the heart of the international codification of human rights. In recent years, however, the theoretical basis of this concept has been reappraised so as to extend it to non-State actors, in much the same way as humanitarian law was extended to non-governmental armed groups.[55]

The submission seems ambivalent; on the one hand it is said that human rights violations can only be committed by the state, on the other hand the theoretical basis of this notion has been *reappraised* so that human rights violations can be committed by non-state actors. The submission of Cuba is much less ambiguous:

> In its view, terrorism is an unacceptable practice and a violation of the most basic human rights, whoever the victims or the terrorists might be. The Government did not share the view that only States are capable of committing human rights violations. Individuals and groups of individuals have not only rights but also duties and human responsibilities.[56]

The Indian Government put the issue as follows:

> The Government also noted that it is inevitable that in tackling terrorism, some of the measures may impact on the unfettered exercise of human rights. The challenge is to get the necessary balance between the imperative of dealing with terrorism and safeguarding human rights. It has to be recognized that [the] terrorist is a violator of human rights. In finding the requisite balance, States are currently engaged in adopting new measures with built in safeguards to ensure that they are not abused or misused.[57]

Kuwait noted that it 'participates in all international efforts to combat international terrorism and affirmed that terrorism, at whatever form or manifestation and by whomever committed, is a grave crime against humanity and a violation of human rights'.[58] Turkey stated that it held 'the firm belief that the terrorists violate the most sacred human right, the right to life'.[59]

Some lawyers might still argue that such official statements by governments are not enough to create international human rights obligations for terrorists; but taken together, the statements suggest that in various contexts some governments already consider that at least one type of non-state actor—terrorists—has international

[55] See n 53 above, para. 4. [56] Ibid, para. 10. [57] Ibid, para. 19.
[58] Ibid, para. 22 [59] Ibid, para. 28.

human rights obligations.[60] Just as the Second World War ushered in a shift in legal thinking, so that it was thereafter assumed that individuals could commit international war crimes and crimes against humanity, so the terrorist attacks at the beginning of the twenty-first century are ushering in an era when states acting in the United Nations are willing to attach human rights obligations to non-state actors in general and to terrorists in particular.

Whatever semantic or definitional position governments may take, there are numerous examples in everyday media reports of armed groups being described as abusers of human rights. For example, on the eve of the release of the International Monitoring Commission report in 2004, an Irish newspaper reported that the document 'examines continuing human rights abuses by both loyalist and republican paramilitaries'.[61] There are many other examples of injustices of all sorts being characterized as human rights abuses. Of course, *claiming* a human rights abuse does not generate a human rights duty in law; but the term 'human rights' has generated meanings and significance beyond the realm of international legal obligations owed by states. It is commonplace that government ministers from all over the world refer to rights carrying with them corresponding responsibilities.[62] Some governments may wish to restrict the meaning or understanding of the term 'human rights', but excluding any obligations for non-state actors through appeals to the 'definition', 'essence', or 'original sense' of the term 'human rights' are unconvincing.

1.4 THE POLICY TACTICAL ARGUMENT

A third set of objections emerges from what could be called 'tactical' considerations. These objections centre on the fact that some governments may choose to

[60] Although Zegveld (2002: 45) considers that references to human rights violations by armed groups in the context of the UN Human Rights Commission and peace agreements such as the San José agreement in San Salvador are of little evidentiary weight in determining the extension of human rights obligations to armed opposition groups; she also rejects the argument 'that the characterization of acts committed by armed opposition groups as human rights violations might legitimize human rights violations by the state', citing the rules which ban reprisals in armed conflict.

[61] Alan Murray, 'Report on NI paramilitaries "won't miss" ' *Sunday Independent*, 11 April 2004, at 4. The Irish Independent Monitoring Commission Act 2003 states in Art. 4: 'In relation to the remaining threat from paramilitary groups, the Commission shall: (a) monitor any continuing activity by paramilitary groups including: i. attacks on the security forces, murders, sectarian attacks, involvement in riots, and other criminal offences; ii. training, targeting, intelligence gathering, acquisition or development of arms or weapons and other preparations for terrorist campaigns; iii. punishment beatings and attacks and exiling; (b) assess: i. whether the leaderships of such organisations are directing such incidents or seeking to prevent them; and ii. trends in security incidents.'

[62] See, e.g. letter from Keith Vaz MP, Minister for Europe, with regard to the EU Charter of Fundamental Rights stating that the Charter might 'Underline the fact that all rights carry with them a matching responsibility, on individuals as well as governments, to respect the rights of others'. Letter to Lord Tordoff, Chairman of the European Communities Committee, House of Lords, 8 December 1999 (on file with the author).

concentrate on individual duties in order to highlight the actions of rebels, or what they may prefer to label as 'terrorists'. This shift in focus then opens the way for the implicit, or even explicit, suggestion that governmental measures that respond to these actions are actually designed to protect human rights. In this way, human rights law may be cynically captured and abused to justify further oppression. The fear is that, by allowing the language of human rights to be applied to the actions of insurgents, we are seduced away from the international responsibility of governments to secure human rights for everyone within their jurisdiction. Absolute distrust of governments is difficult to maintain in a climate where there is a genuine fear of terrorism and terrorist networks. Some of the security measures being taken in the name of the 'war on terrorism' may be disproportionate and unnecessary; but others are indeed appropriate in order to protect the human rights of others.

There is a longstanding concern that an extension of human rights into the realm of duties for non-state actors would allow governments to deflect criticism by pointing to violations committed by armed opposition groups. In an influential article, Nigel Rodley outlined a legal framework which would exclude applying the term human rights violations to anybody except states, death squads acting in collusion with the government, and armed opposition groups exercising effective power over a significant segment of the population and conducting sustained, organized armed hostilities.[63] His main argument was as follows: 'A government, particularly one facing activities of an armed opposition group that commits acts which, if committed by a government, would be called human rights violations, will wish to discredit that group and call its activities human rights violations.'[64] According to Rodley, it will be especially inclined to do this if its own agents are committing violations 'with the aim of dissipating the discredit'.[65] In turn, the government may discredit those non-governmental organizations (NGOs) that bring attention to the government's violations and identify those involved in reporting human rights violations as collaborators with the opposition, or as terrorists themselves. For Rodley, to use the language of human rights violations is not only wrong legally speaking, but amounts to taking a policy approach he suggests it is not even in the interests of governments and NGOs. It is not in the interests of governments as they may in fact 'dignify' the armed opposition 'as having government-like attributes'.[66] And he states that, in any event, such use of the language of human rights to denounce the violence of such groups may simply encourage governmental counter-insurgency policies which are not in the long-term

[63] 'Can Armed Opposition Groups Violate Human Rights' in K. E. Mahoney and P. Mahoney (eds) *Human Rights in the Twenty-first Century* (Dordrecht: Martinus Nijhoff, 1993) 297–318. The reference to 'effective power' is taken from the Resolution by which the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment, UN GA Res. 3452(XXX), 9 December 1975.

[64] Ibid, at 314. [65] Ibid, at 315. [66] Ibid, at 315.

interests of the state. Turning to look at the issue from an NGO perspective, Rodley's policy arguments are more radical:

> The 170-odd governments of the world owe their positions to various factors, ranging from popular legitimation by pluralist, constitutional institutions to the threat or use of naked terror. Adherents of all the political doctrines, except perhaps absolute pacifism, would encompass the legitimacy of internal resort to armed force to displace governments at the latter end of the range. Yet they would not agree on which those governments are, nor could they do so without abandoning the principle of impartiality towards all governments. So a politically viable conception of human rights must avoid ruling out resort to armed opposition. And, until an armed opposition group has succeeded in becoming an entity exercising effective power as defined in the previous section, there are few traditional manifestations of armed resistance that could not also be described as human rights violations, were they to be undertaken by governments.[67]

This politico-tactical objection is echoed by others looking at the issue in terms of NGO reporting.[68]

In response, however, I suggest that by blinkering our outlook so as to focus on governments and exclude armed opposition groups, we also blind ourselves to the opportunities presented by including corporations, mercenaries, international organizations, criminal organizations, and terrorists within the category of those capable of committing human rights violations. The policy argument deserves a policy-orientated response. It is necessary to weigh up the risks of further governmental violations due to the governments succeeding in 'dissipating the discredit', as against a human rights strategy that would encompass a much broader range of actors, including not only terrorists but also other powerful non-state entities.

Terrorist attacks may violate international law when they amount to war crimes, genocide, crimes against humanity, or the international crime of terrorism.[69] Where such acts deny people their human rights, it seems doctrinaire to insist that terrorists cannot violate human rights. To avoid the conclusion that terrorists can be said to violate human rights is to risk being seen to apologize for terrorist violence in violation of international law. On balance, the risk to the human rights movement of losing the backing of those that support armed struggle no longer seems as pressing as it once perhaps seemed. Moreover, the inevitability of taking

[67] Ibid, at 317.

[68] E.g. Ravi Nair warns against 'taking an overall moral position on violence and getting confined within the liberal framework of the State, which suggests that the State has the sole and legitimate right to recourse to force. It is often argued that the increased recourse to violence by political opposition groups is a reflection of the generalized closure of legitimate, democratic space for dissent, that it is State terrorism and lawlessness that begets political terrorism and violence'. 'Confronting the Violence Committed by Armed Opposition Groups' 1 *Yale HRDLJ* (1998) 1–15, at 13. Nair agues for a cautious approach and (at 14) urges NGOs 'to be careful that their critique of abuses perpetrated by *certain* armed opposition groups not be taken to mean a condemnation of *all* such violence'.

[69] For the argument that terrorism is already a crime under international law, see A. Cassese 'Terrorism as an International Crime' in A. Bianchi (ed) *Enforcing International Norms against Terrorism* (Oxford: Hart Publishing, 2004) 213–235; and see further Ch 3, at 3.4 below.

civilian casualties no longer seems central or even acceptable to many of those who might support armed opposition today.

A further corollary and striking dimension to the exclusion of non-state actors from human rights obligations is the fact that, by allowing private violence to be relegated to a blindspot, the human rights movement would be unable to accommodate the main concerns of those fighting to protect women's rights in the context of violence against women. If the concern is consistency and maintaining a broad support base, then the political arguments favour a wider, rather than a narrower, definition of those who can be accused of human rights violations. Once one accepts that governments are not the sole centres of power capable of violating human rights, it may indeed be logical that the pressure will inevitably be partly eased on governments as we come to cover the full range of threats to the enjoyment of human rights. But in fact, it is perhaps more likely that governments will come under new pressures to introduce human rights protection in spheres which had not previously been given such attention.

A second tactical issue relates to the extension of human rights norms to cover the activity of corporations. From one perspective it is self-evident that the power and influence of some corporations rival those of some governments; moreover, the corporate responsibility movement has extended corporations' 'horizon of interest beyond the traditional areas of markets and the workplace, to include the community (both proximate and distant) and the natural environment'.[70] Does this mean that governments should encourage a normative extension—or should we consider such activity as voluntary initiatives based on enlightened self-interest and as outside the scope of human rights law?

As with the extension of human rights scrutiny to terrorists, diplomats at the UN Human Rights Commission fear that a focus on corporations will allow some governments to shift attention from their own behaviour.[71] The United States' position has been articulated as follows: 'attempts to craft norms of this nature dangerously shift the focus of accountability for human rights violations away from States and toward private actors, thus creating the perception that States have less of a responsibility to end human rights abuses for which they are responsible'.[72]

[70] M. McIntosh, M. R. Thomas, D. Leipziger and G. Coleman, *Living Corporate Citizenship: Strategic routes to socially responsible business* (London: Prentice Hall, 2003) at 47.

[71] In the words of one observer, Koen De Feyter, there is a 'perception that the raising of the responsibility of transnational corporations at human rights fora is a ploy by developing countries to escape monitoring of their domestic human rights record'. K. De Feyter, 'Corporate Governance and Human Rights', Institut international des droits de l'homme, *Commerce mondial et protection des droits de l'homme: les droits de l'homme à l'épreuve de la globalisation des échanges economiques* (Brussels: Bruylant, 2001) 71–110, at 106.

[72] Response from the US Government to the request by OHCHR for input from states regarding the report concerning 'Responsibilities of transnational corporation and related business enterprises with regard to human rights', Decision of the Commission 2004/116, at p 3, see: http://www.ohchr.org/english/issues/globalization/business/contributions.htm.

The detailed foreign policy arguments are sometimes surprising and contradictory. On the one hand, governments have been prepared to participate in the elaboration of international texts that direct corporations to respect human rights and labour standards. On the other hand, governments, such as the US Administration, have been at pains to prevent any legal accountability for human rights violations where this involves companies acting abroad. In one well-known case, the Department of State suggested that, should the US Court allow a case regarding human rights abuses allegedly committed in Indonesia by the US corporation EXXON to proceed, this would undermine the 'war on terrorism', as the Indonesian Government might thereafter be disinclined to cooperate with the United States.[73] The US Justice Department filed an *amicus curiae* brief in a similar case before the US federal courts concerning the oil company Unocal, relating to human rights abuses in Myanmar; arguing in similar terms that such extraterritorial suits could undermine the Government's 'war on terrorism' as officials from allied governments in that fight could find themselves subjected to claims in the US courts.[74]

In response, one is struck by the fact that such consequentialist reasoning sits uneasily with policies dedicated to spreading respect for human rights, the rule of law and transparency. The US courts have not yet addressed such foreign policy arguments based on the need to ensure cooperation in the 'war on terrorism'. US courts have, however, reasserted that corporations do have obligations under international human rights law. In the preliminary stages of a case against Talisman Energy Inc, concerning abuses in Sudan, expert briefs were produced by the oil company which argued that international law had no regime under which to hold companies liable. In response, Judge Schwartz concluded: 'substantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA [Alien Tort Claims Act] against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception'.[75]

Two years later, the company again sought dismissal of the case, this time on the grounds that new case-law cast doubt on the existence of corporate aider and

[73] The State Department argued that the case should not proceed as anti-terrorist efforts in Indonesia might be 'imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests'. 'State Dept. opposes suit against Exxon over Indonesian venture' *International Herald Tribune*, 8 August 2002, at 4. See also 'Human rights and terror' *International Herald Tribune*, 14 August 2002, at 4, and K. Roth 'U.S. hypocrisy in Indonesia', ibid.

[74] United States Court of Appeals for The Ninth Circuit, *John Doe I, et al v Unocal Corp, et al*. Brief for the United States of America, as *amicus curiae*, 8 May 2003, esp. at 3.

[75] *The Presbyterian Church of Sudan et al v Talisman Energy Inc, Republic of the Sudan* Civil Action 01 CV 9882 (AGS), US District Court for the Southern District of New York, Order of 19 March 2003, at p 47.

abettor liability in international law.[76] District Court Judge Cote was careful to canvass the ways in which customary international law is formed and concluded that international law did indeed bind corporations. Judge Cote paid particular attention to the fact that no state had ever objected to US courts exercising jurisdiction over corporations on the grounds that these corporations have been accused of having violated international law:

> . . . in this action, the Government of Canada ('Canada') has transmitted a letter via the U.S. Department of State to this Court expressing political concerns about the foreign policy implications of exerting extraterritorial jurisdiction over a Canadian corporation based on events occurring in Sudan. Pointedly, Canada has not objected to the notion that customary international law provides for corporate liability for violations of jus cogens norms. Indeed, Talisman has not cited a single case where any government objected to the exercise of jurisdiction over one of its national corporations based on the principle that it is not a violation of international law for corporations to commit or aid in the commission of genocide or other similar atrocities. If this issue was a genuine source of disagreement in the international community, it would be expected that the assertion of such a rule as customary would provoke objections from States whose interests were implicated by the assertion of the rule in those cases against their nationals.[77]

1.5 THE LEGITIMIZATION OF VIOLENCE ARGUMENT

A fourth objection has arisen out of the debate as to whether non-governmental organizations (NGOs) should condemn armed groups for violent acts. Let us first consider the application of humanitarian law, as this is seen as the 'obvious' starting point for a situation involving serious armed violence. Some activists (especially those that promote non-violence) have argued that when NGOs address armed opposition groups as entities with obligations under international law, this may seem to legitimize the use of violence by both sides.

Rachel Brett explains the reticence of human rights groups to adopt or adapt a humanitarian law framework to report on incidents in internal armed conflict:

> In Northern Ireland, for example, to oppose the killing of 'civilians' (those not taking active part in the conflict) by the IRA on the basis of common Article 3 could be seen as legitimizing IRA killings of members of the British armed forces. Moreover, if application of Article 3 implies that this is an armed conflict, could it not also legitimize the alleged 'shoot to kill' policy of the government, since international humanitarian law permits members of the armed forces to kill members of the opposing armed forces? For human rights NGOs, the possibility of legitimizing killings is an issue even though there

[76] *The Presbyterian Church of Sudan et al v Talisman Energy Inc* [2005] WL 1385326 (SDNY) Opinion and Order of 13 June 2005.

[77] Ibid, at para. 4.

> is definitely an armed conflict. But the question becomes thornier if, as in the example of Northern Ireland, there is not in fact an armed conflict, or where the situation is in doubt. In such circumstances, human rights NGOs are invoking the *principles* of common Article 3 in their dealings with the non-State entities involved in the situation, rather than the provision itself. This avoids the problem of having to hold the government to this same standard and it ensures that certain conduct, such as deliberately killing innocent bystanders, is condemned.[78]

A strict application of humanitarian law generates dilemmas for such organizations. Part of the problem is that the thresholds for the application of the law of internal armed conflict can be quite high, and there are situations where armed non-state actors are involved in violent incidents even where that threshold has not been reached, thus reliance on international humanitarian law leaves one unable to comment in obviously violent situations. Decisions concerning condemnation could become exercises in determining whether the conflict had reached the intensity necessary to trigger the application of international humanitarian law. If one relies on international humanitarian law to guide one in this field then certain sporadic violent acts would have to go uncondemned as they would fall outside the humanitarian law framework. The accountability exercise would get caught in subjective argumentation about whether the threshold has been reached.[79] In addition, it is well known that governments actually involved in an internal armed conflict situation often deny the applicability of humanitarian law, and although UN bodies may from time to time make a determination, this is done in a selective and tardy way; a fundamental problem remains the denial of the applicability of humanitarian law by the states concerned.[80]

Turning to international human rights law, even when the threshold for an armed conflict is reached, human rights law continues to apply to governments. NGOs taking a traditional legal approach to such situations, whereby human rights law only applies to states, thus risk creating an imbalance. In this way Brett argues:

> Human rights NGOs could, therefore, find themselves invoking both human rights law and international humanitarian law vis-à-vis the government while referring only to international humanitarian law vis-à-vis [the] armed opposition group. Does it matter whether the government is held to higher or different standards than the opposition? Furthermore, Protocol II only applies if the State concerned is a party to it. Should the non-adherence of a government prevent human rights NGOs from insisting that its provisions be complied with by non-State-entities to whom those provisions would otherwise apply?[81]

[78] R. Brett, 'Non-governmental human rights organizations and international humanitarian law' 324 *IRRC* (1998) 531–536, at 535.

[79] For an example of a report condemning non-state violence outside the context of an armed conflict, see Human Rights Watch, *No Exit: Human Rights Abuses Inside the MKO Camps* (May 2005).

[80] See Zegveld (2002: 12–13) for further discussion.

[81] Brett (1998: 534).

In response, one might suggest that the problems stem not from the application of the international humanitarian law framework, but rather, from the selective application of human rights law. Looked at another way, the problems outlined by Brett can be easily dispatched. It is not that international humanitarian law really permits or 'legitimizes' lethal force against hostile forces engaged in attacks in an *internal* armed conflict? International humanitarian law simply does not prohibit this. In an internal armed conflict, international humanitarian law does not grant any sort of immunity to anyone using lethal force against the enemy—it simply fails to outlaw it.[82] Lethal force in such a situation falls to be governed by human rights law, national law, and the international standards on the use of force and firearms. In the context of the internal armed conflict in Chechnya, the UN Human Rights Committee recently stated that the Committee acknowledges:

> . . . that abuse of and violations against civilians also involve non-State actors, but reiterates that this does not relieve the State party of its obligations under the Covenant. In this regard, the Committee is concerned about the provision in the Federal Law 'On Combating Terrorism' which exempts law enforcement and military personnel from liability for harm caused during counter-terrorist operations.[83]

Looking at the other side, killings of members of the armed forces and civilians by the rebel fighters will remain individual crimes under national law and no combatant immunity will apply.[84] And where these acts involve intentionally targeting civilians such acts could be international crimes where the fighting develops into the sort of armed conflict covered by international humanitarian law.[85] In situations of armed conflict, the deliberate killing of civilians will remain a crime and will be contrary to the principles of humanitarian law and represent international war crimes where the civilians are targeted as such. Holding rebel forces to these norms of behaviour, to the rules of armed conflict, need not imply that they have the right to kill the government's armed forces—nor does it permit the claim that the government has the right to shoot to kill in counter-insurgency or counter-terrorism operations.

[82] On the other hand, in a conventional international armed conflict, one cannot ordinarily try lawful combatants from one state for simply engaging in combat with combatants from armed forces of the other state.

[83] Concluding Observations of the Human Rights Committee, Russian Federation, 6 November 2003, CCPR/CO/79/RUS, at para. 13.

[84] Unless the relevant government recognizes the insurgents as belligerents, see A. Cassese, *International Law* (Oxford: Oxford University Press, 2nd edn, 2005) at 126, or unless Protocol I Additional to the Geneva Conventions of 1949 applies and the people are fighting in the exercise of their right to self-determination as defined in Art. 1(4) and are represented by an authority which has taken the requisite steps under Art. 96(3).

[85] See the Rome Statute for the International Criminal Court, Art. 8(2)(e)(i). For the threshold for armed conflict see Common Art. 3 to the Geneva Conventions 1949 and Protocol II Additional to those Conventions. The test in customary international law can be found in the *Tadić* appeal judgment of the ICTY, Case IT–94–1, AR72, Judgment of 2 October 1995, para. 70: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.

Internal armed conflicts in places such as Rwanda, Colombia, and Chechnya have led human rights groups to re-examine the utility of the humanitarian law framework contained in Common Article 3 to the Geneva Conventions of 1949 and Protocol II.[86] With regard to situations such as Colombia, the UN Commission on Human Rights calls directly on the rebel groups to comply with international humanitarian law and to respect the right of the population to exercise their human rights.[87] For some time there has been an attempt to tackle this issue by admitting that non-state actors have to obey human rights norms but distinguishing them from state actors by labelling them human rights *abusers* rather than *violators*. According to David Weissbrodt: 'When non-State actors do not comply with human rights norms, they should be criticized for "abusing" the rights of individuals rather than committing "violations".'[88] But the reasons for such a distinction are, seemingly, tactical and political rather than imbued with legal meaning. According to Weissbrodt: 'The term "human rights violation" should be limited to misconduct by governments, so as to avoid giving greater recognition and undue status to non-State entities.'[89] This approach has been the dominant approach of groups such as Amnesty International and has also been adopted by the United Nations in its training materials: 'While most human rights are perceived as individual rights vis-à-vis the Government, human rights norms may also apply to non-State actors (such as *armed opposition groups*, corporations, international financial institutions and individuals who perpetrate domestic violence) who commit human rights abuses.'[90]

Amnesty International explains its position as follows:

> As a matter of customary law (law which is binding on all states, whether or not they are bound by treaty law), basic human rights norms (directed for the most part at states) might apply to armed groups where they exercise de facto control over territory and take on responsibilities analogous to a government. Indeed, in a number of situations armed groups have expressly indicated their commitment to human rights principles.[91]

[86] Carrillo-Suárez, 'Hors de logique: contemporary issues in international humanitarian law as applied to internal armed conflict' 15 *American University International Law Review* (1999) 1–149.

[87] Note the Commission on Human Rights' Chairperson's Statement in 2003: '25. The Commission firmly condemns all acts of violence and breaches of international humanitarian law committed by paramilitary groups, particularly against the civilian population. It also strongly condemns the growing practice of extrajudicial, summary and arbitrary executions. 26. The Commission strongly condemns all breaches of international humanitarian law committed by other illegal armed groups, especially FARC, in particular through attacks on the civilian population. It urges all illegal armed groups to comply with international humanitarian law and to respect the legitimate exercise by the population of their human rights.' OHCHR/STM/CHR/03/2 Situation of human rights in Colombia.

[88] D. Weissbrodt, 'Non-State Entities and Human Rights within the Context of the Nation-State in the 21st Century' in M. Castermans, F. van Hoof, and J. Smith (eds) *The Role of the Nation-State in the 21st Century* (Dordrecht: Kluwer, 1998) 175–195, at 194.

[89] Weissbrodt (1998: 195).

[90] Office of the High Commissioner for Human Rights, *Professional Training Series No. 7, Training Manual on Human Rights Monitoring* (New York and Geneva: United Nations, 2001) at para. 26.

[91] Amnesty International, *It's in our hands: Stop violence against women*. AI Index ACT 77/001/2004, at 56. The report explains: 'There are many different—and passionate—views on whether and when it is legitimate to use violence to achieve change or to confront state power.

In practice, so far, most armed opposition groups have been addressed through the prism of the principles in Common Article 3 to the Geneva Conventions of 1949, and as groups in control of territory with attendant human rights responsibilities. But the issue does arise of how to deal with interferences with, what Ravi Nair calls, 'intermediate, gray situations of political violence. The gray situation can be distinguished from situations of "normal" crime or war'.[92] Moreover human rights groups have been confronted with dilemmas over how to report on abuses of rights committed by criminal organizations taking on a political role as well as political organizations engaging in criminal activity.[93]

It is suggested that is clearly no longer feasible for human rights groups to avoid reporting the killings by rebels on the ground that they are mandated simply to apply a strict framework of international humanitarian law and human rights law as traditionally understood. The moral and political context is too fraught to rely on such a formulaic approach. Imagine the head of a human rights organization having to explain to a government why the organization condemns the army's violence in the search for terrorists—yet never says a word about organized rebel attacks on civilian targets. One could say one is strictly applying a humanitarian law framework and the bombings have not reached the required threshold—but this is unlikely to convince any government that there is no bias involved.[94] Writing from his experience in India, Ravi Nair points out:

> By not criticizing armed opposition groups, human rights organizations also threaten their legitimacy as unbiased observers. The repeated and vociferous criticism of the government on the human rights front, when seen in conjunction with the apparent silence of some human rights groups regarding the abuses committed by armed opposition groups, meets with a hostile reception. The activities of the human rights groups can be construed as partisan and unfair, if not fundamentally misdirected, leading to an increasing loss of credibility and further marginalization, even within the victim groups.[95]

Human rights organizations have met this challenge in two ways. First, an organization such as Amnesty International has, through its publications and the media, simply 'opposed' torture, hostage taking, and unlawful killings by non-governmental groups

Amnesty International takes no position on this issue—we do insist, however, that groups which resort to force respect minimum standards of international humanitarian law, justice and humanity. Armed groups, no less than governments, must never target civilians, take hostages, or practise torture or cruel treatment, and they must ensure respect for basic human rights and freedoms in territory they control.'

[92] Nair (1998: 11). Nair gives the examples of Jammu and Kashmir, Assam, other parts of North East India, and areas in Andhra Pradesh. [93] Nair (1998: 5).

[94] Similarly, with regard to bodies such as the Inter-American Commission on Human Rights, it has been pointed out that: 'If a human rights body does not also direct its attention to the actions of a nonstate actor in terms of compliance with international humanitarian law, it may leave the perception of not being evenhanded. The body may even come to be seen as a tool for restricting the activities of one party to a conflict.' K. Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' 98 *AJIL* (2004) 1–34, at 30. [95] Nair (1998: 10).

that use armed force for political reasons.[96] Similarly, Human Rights Watch has published reports detailing the human rights abuses by, for example, the Mojahedin Khalq Organization, an armed Iranian opposition group operating out of a camp in Iraq. In its reports it details policies of compulsory divorce, prolonged incommunicado detention, coerced confessions, beatings, and torture that in two cases were said to have led to death.[97] The significance of these reports is that the organizations neither see a need to establish the application of the laws of armed conflict, nor to assimilate the armed opposition group to a *de facto* government. The armed opposition group is simply treated as having human rights obligations.

It is further suggested that the use of some of the rules from international humanitarian law does not necessarily legitimize violence on either side of an internal armed conflict.[98] International humanitarian law simply adds a more detailed set of prohibitions for both parties to the internal armed conflict. In an internal armed conflict, applying the applicable international humanitarian law does not entitle the rebels to privileges such as combatant and prisoner of war status.[99] This means that governments can try rebels for treason or taking up arms. Such trials would not be allowed if the conflict were an international armed conflict or an internationally recognized war of national liberation.[100] The use of international humanitarian law to judge the conduct of all sides in an internal armed conflict does not lead to a new legitimacy for the fighters, or to impunity for those who have used violence. In formal terms, the international humanitarian law instruments explicitly state that the application of the norms to a party 'shall not affect the legal status of the Parties to the conflict',[101] and in general terms, the provisions do not legitimize any violence; they only set down further international prohibitions to complement applicable law.

With regard to impunity, it is clear that the winning side may try the fighters it has captured as they enjoy no combatant immunity in a strictly internal armed conflict. However, Protocol II, while not demanding the release of those captured

[96] See *Amnesty International Handbook*, AI Index ORG 20/001/2002, at 33. More detail is given with regards to a wider range of abuses addressed in AI reports in Ch 7 below.

[97] Human Rights Watch, *No Exit: Human Rights Abuses Inside the MKO Camps* (May 2005).

[98] Should the conflict between the armed group and the state or states be considered part of an armed conflict between states (whereby the armed group was actually working as part of the armed forces of a state), such a categorization would in effect mean that one accepts that the rules of international armed conflict apply and this would indeed legitimize attacks by the military on military objectives of the adversary. The consequent combatant immunity would mean that captured combatants would enjoy prisoner of war status and would have to be released at the end of the conflict. See further Ch 7, 7.1 below.

[99] The parties remain free to accord such a status, and Common Art. 3 specifies that the provisions are not only a minimum but that the parties should endeavour to apply as much as possible of the Geneva Conventions of 1949. See H. McCoubrey, *International Humanitarian Law* (Aldershot: Ashgate, 2nd edn, 1998) at 264.

[100] For a discussion of when international law recognizes the legitimacy of an NLM and the applicable international humanitarian law, see H. A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Oxford University Press, 1988) and G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) 165 *Recueil des cours* IV, at 353–445.

[101] Common Art. 3 to the Geneva Conventions and Art. 4 of Protocol I.

(as would be the situation in an international armed conflict), does include a provision on amnesty. Article 6(5) reads: 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' This provision requires some explanation. According to McCoubrey:

> . . . the Protocol in no way denies the right of the lawful authority to try those who have set up armed opposition to it—an activity which almost any state would tend to categorize as criminal, if not treasonable. The great question is what, in a context of non-international armed conflicts, is a lawful authority. In practice, this tends to be whatever authority has emerged victorious in the territory, or part thereof, in question. The reference of Protocol II is to criminal proceedings, and whilst offences such as treason clearly have a 'political' element in their motivation, it may be suggested that this should not extend to merely having sympathised with a losing and/or subversive party. The call for amnesty goes further, and suggests that merely *fighting* on an adverse side should not lead to punishment in such circumstances, although this may not include higher command functions and other more specific offences such as terrorism and war crimes *stricto sensu*.[102]

In any event, the application of the laws of war contained in Protocol II, designed to better protect human rights, can not really be seen to endorse violence or legitimize the use of force against the state or any other group. The provision on amnesty relates to the larger problem of ensuring national reconciliation after an internal armed conflict.

The fourth objection, which we have labelled 'the legitimization of violence argument', seeks to fix governments with the highest standards and avoid legitimizing violence on either side. It argues that human rights organizations should steer clear of reporting on violations/abuses committed by rebels or terrorists in times of armed conflict. In reality this argument turns on a view of humanitarian law as a legal regime that seems to authorize lethal force by both sides in internal armed conflict. It is suggested that humanitarian law does no such thing. It simply supplements and interprets existing human rights rules.[103] Fixing human rights and humanitarian obligations on non-state actors in an internal armed conflict, or even human rights obligations in the context of internal disturbances which do not rise to this level, in no way legitimizes violence; nor does it change the rules about who is or is not a legitimate target, or who should be granted prisoner of war status or amnesty.

The legitimization of violence argument rests on two pillars. Both can be demolished. First, it is wrong to presume that the application of international obligations to armed opposition groups, as such, entitles them to use any sort of violence. It simply further limits them with regard to their legal obligations. Second, to suggest that the application of international duties to an armed group

[102] McCoubrey (1998: 275). [103] See Ch 4, at 4.1.3 below.

increases its legitimacy in the eyes of observers has no basis in law and would be hard to demonstrate empirically. There may be a problem of perception, but this argument, like the others, depends more on policy preferences of the objector rather than any inherent legal or practical impossibility with regard to the application of international law to the behaviour of non-state actors.

1.6 THE RIGHTS AS BARRIERS TO SOCIAL JUSTICE ARGUMENTS

The last type of objection builds on the critique of rights which has questioned the utility of human rights as tools for social justice. Philip Alston summarizes this critique as follows: 'it has often been said that the international human rights system makes an important contribution to the legitimacy of states, both by enabling them to claim the moral high ground and by giving them the opportunity to take on obligations which, in effect, legitimize a more activist or interventionist role for the government within society'.[104] For those who critique the human rights movement from such a perspective, there is a fear that one 'legitimizes' actors by giving them human rights obligations and implies powers which may themselves erode, rather than enhance, human freedom and autonomy. Such a critique is hard to dismiss out of hand, but the idea that labelling someone a human rights violator dignifies them with legitimacy only holds true if one has already assumed that only legitimate actors, such as states, have human rights obligations. Ever since the Nuremberg Tribunal held individuals accountable for war crimes and crimes against humanity,[105] it has been clear that having international law obligations does not imply respectability, legitimacy, or decency. If this point holds with regard to the law of crimes against humanity, it can also hold for the law of human rights violations.

We can also see that, to deny the applicability of human rights law to powerful non-state actors, is to deny the empowerment which accompanies human rights claims. As Chris Jochnick explains, referring to a failed approach by his human rights organization, one can not expect to get very far by telling communities in Ecuador threatened by the activities of an oil company that 'private companies are technically immune to human rights claims, that they do not sign covenants guaranteeing human rights, and that only the state is responsible for ensuring these rights'.[106] In

[104] P. Alston, 'Downsizing the State in Human Rights Discourse' in N. Dorden and P. Gifford (eds) *Democracy and the Rule of Law* (Washington, DC: Congressional Quarterly Press, 2001) 357–368, at 359.

[105] *Trial of Major War Criminals (Goering et al)*, International Military Tribunal (Nuremberg) Judgment and Sentence, 30 September and 1 October 1946 (London: HMSO) Cmd. 6964. This judgment is discussed in Chs 6 and 12 below.

[106] C. Jochnick 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' 21 *HRQ* (1999) 56–79, at 58.

fact, holding the public/private line in this way risks actually undermining the opportunities for progressive change by shielding the nature of private activity that threatens human well-being. As he explains: 'the intended approach risked the uncomfortable prospect of doing more harm than good. Insisting solely on governmental obligations would obscure the true nature of the violation, reinforce Texaco's impunity, and most importantly, detract from the communities' long-overdue sense of injustice and resolve'.[107] To apply the traditional state/non-state distinction risks obfuscating the real violators; to insist on the exclusive applicability of human rights law to governments generates a dangerous sense of impunity for those who are undermining people's rights.

At another level the critique has been put forward that rights have historically been used to protect a private sphere from public interference. This has in many cases resulted in the protection of private power from attempts to ensure social justice. According to this argument, it is unrealistic to expect the law, and the judges, to turn rights on their head and use them against the same private interests they have historically protected. My approach, which looks to judicial enforcement of human rights in the private sphere, has been specifically criticized in a considered and constructive way by Gavin Anderson. He suggests that such a 'jurisdictional approach' is 'self-limiting, and thus fails to take into account ways in which human rights discourse itself contributes to the protection of private power'.[108] For Anderson 'the history of rights is not one of neutrality, but of partiality: in juridical form, human rights have been largely synonymous with the protection of private activities from public power'.[109] This may be true from a constitutional law perspective that is concerned about the role of a Supreme Court in building a theory of constitutional rights in the national polity.[110] In some constitutional arrangements, decisions by judges over the scope of constitutional rights may override the will of the people, as expressed through legislation, and commentators have been wary of new applications of constitutional (supreme) rights as law. Scholars such as Tushnet and Fudge, writing about the judiciary in the United States and Canada respectively, voice considerable scepticism over the faith placed in judges as the ultimate arbiters of conflicting policies and

[107] C. Jochnick *HRQ*, at 58.

[108] G. W. Anderson 'Rights and the Art of Boundary Maintenance' 60 *MLR* (1997) 120–132, at 121. (Book review article on *Human Rights in the Private Sphere* (1993)). See also in this context L. M. Seidman, 'Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law' 96 *YLJ* (1987) 1006–1059.

[109] Anderson (1997: 122).

[110] Anderson also refers to the problems associated with a rights theory that fails to tackle the 'reality of constitutional adjudication which prohibits governmental interference with private power' (1997: 129). Anderson also refers to the discussion by B. A. Ackerman, 'Beyond *Carolene Products*' 98 *Harv LR* (1985) 713–746. Ackerman's concerns rest in part on the fact that the promise of *Carolene Products* is deceptive as: 'The victims of sexual discrimination or poverty, rather than racial or religious minorities, will increasingly constitute the groups with the greatest claim upon *Carolene*'s concern with the fairness of pluralist process' (at 718).

freedoms.[111] Reviewing the record of the courts in the United States and Canada, they argue that courts should not be the only forum for enforcing fundamental human rights. And in the words of Fudge: 'Ultimately, the question of whether an entrenched bill of rights enforced by the ordinary common law courts enhances respect for fundamental rights and democracy is an empirical question.'[112]

Although much of this book will focus on the decisions of courts, this does not imply that human rights claims are confined to litigation and fora where remedies exist. The focus on courts in this book is, in part, to illustrate that human rights arguments are already used to hold non-state actors accountable for actions in the private sphere. By honing the arguments used in litigation, I aim to develop a more coherent approach to the human rights obligations of non-state actors, even in the absence of applicable tribunals entitled to hand down binding decisions. We might also suggest that the dangers of entrenching subjective values through judicial activism are of a different order when applied outside the context of a constitutional court with the ultimate legal say over the validity of national legislation. We shall mainly focus on the scope of international human rights as applied on the international plane rather than the scope of constitutionally protected rights in national law. The two sets of rights are not congruent in their scope or enforcement.

In the end, Anderson's objection to extending rights into the private sphere rejoins the first type of argument, labelled the 'trivialization thesis' in section 1.2 above; namely, that our suggested approach ignores the historical pedigree of rights. Anderson's approach emphasizes that: 'Rights have not been about the limitation of power, with the nature of that power just happening to be public in most cases—their whole purpose and analytical framework has had public power as their specific object. Thus their enforcement against private actors is not a simple matter of extending existing practice and beliefs but, as it seeks to reverse the focus of protection of private power, would in fact entail standing them on their heads.'[113]

Both arguments consider that the application of human rights obligations to non-state actors distorts our understanding of human rights. Such an application is said to pull 'inside out the very concept of human rights'.[114] Alternatively, we are accused of 'standing them on their heads'. Of course most people's historical understanding of rights is that rights are embodied in a contract between government and the individual, and that rights protect individuals and private groups from state interference in a number of specified domains. In this conception, rights operate as a sort of buffer between the state and the private sector. Moreover,

[111] M. Tushnet, 'Scepticism about Judicial Review: A Perspective from the United States' in T. Campbell, K. D. Ewing, and A. Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001) 359–374; J. Fudge, 'The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts', also in Campbell *et al* (2001: 335–358).

[112] Ibid, at 357. [113] Anderson (1997: 123).

[114] Letter to the Maltese *Sunday Times*, see 1.2 above.

the private sector has relied on human rights to protect the boundaries of its private sphere. But these physical analogies have limitations; they can no longer explain how human rights are observed in action today as limitations on private power.

I suggest that, at the beginning of the twenty-first century, we need a paradigm shift in our understanding of the power and utility of human rights. If human rights once offered a shield from state oppression in the vertical relationship between the individual and the state, they now also represent a sword in the hands of victims of private human rights abuses. Perhaps we do have to pull human rights inside out and acknowledge that they can be used against other human rights holders. Perhaps we have to turn human rights on their heads and realize that while they have protected private power, they also contain the seeds for action against private power—in the same jurisdictions that have historically curtailed public power when such power has threatened private autonomy.

1.7 NEW WAYS OF LOOKING AT HUMAN RIGHTS

The metaphors that suggest physical deformation of our traditional understanding of human rights entrench a traditional approach to civil rights, which prevents us imagining a different set of qualities for human rights. Why not imagine a system where human rights obligations attach both to states and to non-state actors? Is such an attachment really as contradictory and impossible as the various arguments outlined above suggest? In the world of physics there were conundrums that confronted scientists for a great part of the last century. Assumptions were challenged and a new vocabulary emerged.

In classical physics it was assumed that light had to be described either in terms of particles, or as waves, even though scientists seemed to discern both properties in different experiments. The elusive search for the true nature of light (particles or waves) is partially resolved by the notion of *complementarity*.[115] In 1927, Niels Bohr formulated a new way of looking at the dilemma. He considered that, although wave and particle behaviour seem to mutually exclude each other, we need to understand both qualities for a proper appreciation of the object's properties. Most importantly, he pointed out that whether or not the object behaves as a wave or a particle depends on the experiment you use for looking at it. This has been explained as follows: 'To decide if it's a wave, [physicists] diffract it through slits and see whether they get interference fringes. To decide whether it's a particle, they bounce it off things and see if it holds together. They ask wavy questions to decide whether it's a wave, particley questions to decide whether it's a particle.'[116]

[115] We return to this concept, along with those of complexity and complicity in Ch 12 below, in the guise of a conclusion.

[116] J. Cohen and I. Stewart, *The Collapse of Chaos: Discovering Simplicity in a Complex World* (Harmondsworth: Penguin, 1994) at 276.

Just as light was understood to have different qualities depending on the apparatus used to experiment on it, we cannot describe with certainty the nature of the object under investigation as either one thing or the other. The uncertainty of the state of an atomic system is much more complicated than suggested here; but the principle of complementarity helps us to see that conflicting views of the quality of something may not necessarily be contradictory. Different views may have to be seen as complementary in order to get a better understanding of the object under scrutiny.

Does this reductive excursus into nuclear physics help? Perhaps, it may be that human rights can indeed be used by private power and against private power at the same time. This may seem counterintuitive, or naïve, but it is possible. Perhaps human rights do indeed have this double quality and it is not necessarily misguided to propose greater attention to the possibility of human rights having the necessary qualities to act as a check on private power. At least we should perhaps admit that our appreciation of human rights has been skewed by the jurisdictional filters that have been employed in our experiments to examine them.

Anderson asks us to explain *why* courts have consistently exercised their options against public power as opposed to private power. He points to the case-law of the European Court of Human Rights to back his argument that courts administering the key human rights instruments 'have been in the business of limiting, public, not private power'.[117] This is true, but I suggest here that this is not due to some essential nature of human rights, but simply because human rights lawyers are over-focusing on a handful of jurisdictions. In setting up a particular apparatus to examine human rights we are precluding the chance to observe human rights in action under other experimental conditions. If we set up our monitors in Strasbourg at the European Court of Human Rights, we shall find evidence of human rights being enforced against the state rather than against private power.[118] *Why* is this so? Because, under the jurisdictional treaty establishing the Court, only states can be defendants before the Court. If we examine rights in certain constitutions, we will find human rights as mainly opposable against the government. Again, this is so because the constitutional document limits, or appears to limit, such cases to abuse of public power. But if we look elsewhere, we may find evidence of human rights obligations being opposable to private power. In other words, the results of our investigation depend on where we set up our experiment and the filter we are looking through. With a multiplicity of jurisdictions for human rights claims, we have to accept that human rights obligations may attach to non-state actors in some jurisdictions and not in others. These different jurisdictional appreciations of the nature of human rights need not be contradictory. They can be considered complementary.

[117] Anderson (1997: 123).

[118] R. Lawson, 'Out of Control, State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?' in M. Castermans, F. Van Hoof, and J. Smith (eds) *The Role of the Nation-State in the 21st Century* (The Hague: Kluwer, 1998) 91–116.

In sum, all of the arguments outlined above boil down to two claims: first, that an application of human rights obligations to non-state actors trivializes, dilutes, and distracts from the great concept of human rights. Second, that such an application bestows inappropriate power and legitimacy on such actors. The counter-argument is that we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone. Once we accept that human rights obligations can apply in this way, the idea of legitimizing non-state actors by subjecting them to human rights duties becomes illogical.

The message is that international human rights obligations can fall on states, individuals, and non-state actors. Different jurisdictions may or may not be able to enforce these obligations, but the obligations exist just the same. With more and more national jurisdictions applying international human rights law as the law of the land, we look set to see an increasing acknowledgement of the relevance of human rights norms for judging the conduct of private actors. We may be witnessing a shift in emphasis. In the words of the distinguished British academic lawyer, the late Professor Sir William Wade:

> It is true that the original purpose of the human rights Convention was to prevent the emergence of dictatorial and oppressive governments such as that of Nazi Germany. But in the intervening half century a new culture of human rights has developed in the Western world, and the citizen can legitimately expect that his human rights will be respected by his neighbours as well as his government.[119]

[119] H. W. R. Wade, 'Horizons of Horizontality' 116 *LQR* (2000) 217–224, at 224. See also H. R. W. Wade, 'Paradoxes in Human Rights Act', letter to *The Times*, 1 September 2000. See also, from a comparative law perspective, the comment by B. Markesinis and S. Enchelmaier, 'Nowadays, therefore, the new paradigm of a human right violation may be that of an "individual" (to be understood here as referring to any natural or legal person which is not acting with public authority) encroaching upon the freedom of another individual' in their chapter, 'The Applicability of Human Rights as between Individuals under German Constitutional Law' in B. S. Markesinis (ed) *Protecting Privacy: The Clifford Chance Lectures Volume Four* (Oxford: Oxford University Press, 1999) 191–243, at 192. Cf B. Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany' 115 *LQR* (1999) 45–88; A. Lester and D. Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' 116 *LQR* (2000) 380–385; J. Beatson and S. Grosz 'Horizontality: a Footnote' 116 *LQR* (2000) 385–386; M. Hunt, 'The Horizontal Effect of the Human Rights Act', *Public Law* (1998) 423–443. The issue of private discrimination was already of concern to Hersch Lauterpacht in his early work, *International Law and Human Rights* (London: Stevens and Sons, 1950) at 340–343, where he highlighted the duties of a state to refrain from lending the 'arm of the law' to enforce discrimination by private individuals, such as inn-keepers, performing a public function. He went on, however, to pose (at 343) an 'urgent question whether in modern conditions, the duty of the State ought not to go beyond that and whether there ought not to be a right of protection against organized oppression from whatever source it may originate'.