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# The horizontal effect of international human rights law

Lane, Charlotte Lilian

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# The Horizontal Effect of International Human Rights Law

## Towards a Multi-Level Governance Approach

Lottie Lane

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# The Horizontal Effect of International Human Rights Law

Towards a Multi-Level Governance Approach

**PhD thesis**

to obtain the degree of PhD at the
University of Groningen
on the authority of the
Rector Magnificus Prof. E. Sterken
and in accordance with
the decision by the College of Deans.

This thesis will be defended in public on

Thursday 24 May 2018 at 11.00 hours

by

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To Grandpa Lane and my Old Bean

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## List of abbreviations

| | |
|---|---|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACHR | American Convention on Human Rights |
| ADHR | American Declaration on the Rights and Duties of Man |
| CAT | Convention against Torture |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CoE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| CteeAT | United Nations Committee against Torture |
| CteeEDAW | United Nations Committee on the Elimination of Discrimination Against Women |
| CteeERD | United Nations Committee on the Elimination of Racial Discrimination |
| CteeESCR | United Nations Committee on Economic, Social and Cultural Rights |
| DASR | International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts |
| ECHR | Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | European Court of Human Rights |
| FARC | Revolutionary Armed Forces of Colombia/Fuerzas Armadas Revolucionarias de Colombia |
| FMLN | Frente Farabundo Martí para la Liberación Naçional |
| FPIC | Free, Prior and Informed Consent |

List of abbreviations

| | |
|---|---|
| GRS | World Bank Grievance Redress Service |
| HRA | Human Rights Act 1998 |
| HRBA | Human rights-based approach |
| HRCtee | United Nations Human Rights Committee |
| IACtHR | Inter-American Court of Human Rights |
| IBRD | International Bank for Reconstruction and Development |
| IDA | International Development Association |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ILA | International Law Association |
| IMF | International Monetary Fund |
| JCHR | UK Joint Committee on Human Rights |
| LTTE | Liberation Tigers of Tamil Elam |
| NCP | National Contact Point |
| NGO | Non-governmental organisation |
| NSAG | Non-State armed group |
| OAS | Organisation of American States |
| OECD | Organisation for Economic Cooperation and Development |
| OFWAT | Office of Water Services |
| OHCHR | Office of the United Nations High Commissioner for Human Rights |
| PRSPs | Poverty reduction strategy papers |
| SAPs | Structural Adjustment Programmes |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |

| | |
|---|---|
| UN | United Nations |
| UNDP | United Nations Development Programme |
| UNFPA | United Nations Population Fund |
| UNGPs | UN Guiding Principles on Business and Human Rights |
| UNICEF | United Nations Children's Fund |
| US | United States of America |
| WIPO | World Intellectual Property Organization |

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Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS vol. 1465, 85

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS vol. 1249, 13

Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS vol. 660, 195

Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) UNTS 1, 5 and UNTS 90, 327

Geneva Convention III Relative to the Treatment of Prisoners of War

International Bank of Reconstruction and Development Articles of Agreement (adopted 27 December 1945, amended 16 February 1989) UNTS 2

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS vol. 999, 3

International Convention against the Recruitment, Use, financing and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001)

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000,

entered into force 12 February 2002)

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 63/117 (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) UNTS vol. 1125

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) UNTS vol. 1125

Protocol concerning the entry into force of the Agreement between the United Nations and the International Bank for Reconstruction and Development (15 November 1947) UNTS vol. 16, 341

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002)

United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS vol. 1155, 331

## REGIONAL INSTRUMENTS

### Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November

1950, entered into force 1 January 1990) ETS 5

Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9

**European Union**

Charter of Fundamental Rights of the European Union J C 326, 26.10.2012, 391-407

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31

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European Committee of the Regions, 'Charter for Multilevel Governance in Europe', 20 February 2014

European Union, Regulation 2017/821/EU laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (17 May 2017)

European Union, Universal Service Directive, 2002/22/EC

**Organization of American States**

American Convention on Human Rights, "Pact of San Jose" (adopted 22 November 1969, entered into force 18 July 1978)

American Declaration of the Rights and Duties of Man, 2 May 1948

**Organization of African Unity**

African Charter on Human and Peoples' Rights ("Banjul Charter") (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58

Protocol on the Statute of the African Court of Justice and Human Rights (adopted 1 July 2008)

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2005)

NATIONAL INSTRUMENTS

**France**

French Declaration on the Rights of Man and Citizen 1789

Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (JO du 28$^{eme}$ mars 2017, no.1) (Law No. 2017-399 on the Duty of Care of Parent Companies and Ordering Companies)

**Netherlands**

Constitution of the Kingdom of the Netherlands 2002

**United Kingdom**

Care Act 2008

Human Rights Act 1998 (Meaning Of Public Authority) Bill 2008-09

Human Rights Act 1998: Elizabeth ll. Chapter 42, (1998)

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Modern Slavery Act 2015

The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013

**United States of America**

California Transparency in Supply Chains Act (Civil Code Section 1714.43

Senate Bill 657 (Steinberg) (2009-10)

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# Introduction

## 1. Motivation for the study

According to the prevalent approach in legal science, the responsibility for protecting individuals' human rights lies in the positive obligations of the State. Non-State actors are to be regulated and controlled by the State through its domestic legal system. However, many non-State actors are in a position to greatly affect individuals' enjoyment of their human rights. This is particularly true of non-State entities carrying out public functions or with control over an area of territory (e.g. non-State armed groups), or even being in a position to direct States in the adoption and implementation of certain domestic laws and policies (e.g. international organisations). However, single individuals may also be in a position of relative power over other individuals (whether within in their own home or in society more generally), due perhaps to their gender, their position within a family, or their membership of a certain race or social class. This places them in a position where they can more easily affect another individual's rights. Arguably, some non-State actors are even in a position to protect or fulfil individuals' human rights. Of course, this is not true in every circumstance or for every right. However, at least a 'negative' duty of non-State actors not to infringe international human rights is being increasingly recognised throughout the international community.

The traditional human rights paradigm in the international legal discourse was founded on a relationship of dependence and trust on behalf of individuals towards States as the primary subjects of international law;[1]

[1] Reflected in the fact that States 'possess the totality of international rights and duties recognized by international law'. See International Court of Justice, *Reparations for Injuries*

human rights provided them with 'fundamental guarantees and standards of legal protection' against potential abuses of State power.[2] The focus of international human rights law has therefore been on the actions of States; private actors would normally fall within the remit of domestic criminal laws[3] or private laws,[4] rendering international governance of their actions unnecessary. Nevertheless, the 'new-medievalism' of international relations[5] is steadily replacing the Westphalian, one-dimensional State-centric model of the international legal order with a multi-layered system.[6] As a by-product

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*Suffered in the Service of the United Nations* (Advisory Opinion) 1949 ICJ Rep 174, para 180.

[2] August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 38.

[3] See Nigel Rodley, 'The Evolution of the International Prohibition of Torture' in Amnesty International, 'The Universal Declaration of Human Rights 1948-1988: Human Rights, the UN and Amnesty International' 63, cited in Clare Mcglynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) International and Comparative Law Quarterly 565, 594.

[4] Many limits on the permitted actions of private persons can be found, for example, in the fields of domestic tort law and domestic contract law. The interpretation and application of domestic private law between private parties have for some time also included human rights elements, which has been the subject of much academic discussion, particularly in the context of the European Union. See e.g. Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016); Marek Safjan, 'The Horizontal Effect of Fundamental Rights in Private Law – On Actors, Vectors, and Factors of Influence' in Purnhagen Kai and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer International Publishing 2014); Aurelia Colombi Ciacchi, 'Social Rights, Human Dignity and European Contract Law' in Stefan Grundmann (ed), *Constitutional values and European contract law* (Kluwer Law International 2008); Aurelia Colombi Ciacchi, 'Horizontal Effect of Fundamental Rights, Privacy and Social Justice' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing 2007). See further, Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014); Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Vol. I and II* (Cambridge University Press 2010).

[5] Henry Bull, *The Anarchical Society: A study of order in world politics* (1st edn, Columbia University Press 1977) 281, discussed in Peter Sutch and Juanita Elias, *International Relations: The Basics* (Routledge 2007) 103-104.

[6] For discussion on the fragmentation of international law into different (and conflicting)

of globalisation, this is creating a 'neo-feudal' society in which power and influence are distributed amongst various actors.[7] But States, originally targeted for obligations because of their socio-economic and legal power monopoly over individuals 'in the absence of legal restraints',[8] are continuously losing ground to non-State actors.[9] It is increasingly evident that despite trusting States to protect individuals from interference with their rights by third parties, domestic laws are not (always) sufficient or effective in governing the actions of non-State actors vis-à-vis human rights.[10]

This encroachment of non-State actors is not confined to practical effects; whilst under the current *legal* framework the State remains the primary actor, some non-State actors have now obtained a certain political or even a 'law-making' role.[11] States are no longer the only actors adopting

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regimes, see e.g. Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) Michigan Journal of International Law 999 (translated by Michelle Everson).

[7] Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43(1) Virginia Journal of International Law 1, 2.

[8] Frances Raday, 'Privatising Human Rights and the Abuse of Power' (2000) 13 Canadian Journal of Law and Jurisprudence 103, 108-110, cited in Jan A Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights Law Review 21, 26.

[9] For example, multinational corporations – see e.g. Jilles LJ Hazenberg, 'Transnational Corporations and Human Rights Duties: Perfect and Imperfect' (2016) 17(4) Human Rights Review 479. In addition, and sometimes as a consequence of this, individuals increasingly rely on actors other than States to enjoy their human rights (e.g. the provision of human rights-related services, discussed in Chapters 5 and 6).

[10] This is particularly the case when transnational private actors are concerned. As Gunther Teubner points out, '[i]n the global context, the State influence on private actors is more indirect, more distant', and it becomes harder to hold States responsible for the actions of private parties (under the doctrine of 'indirect horizontal effect' – see Chapter 3 of the present book). Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69(3) The Modern Law Review 327, 329.

[11] This term is used here cautiously, to represent the contributions that many non-State actors make towards the drafting process of both binding and non-binding instruments (i.e. 'hard' and 'soft' international human rights law). For a discussion of the role of private parties in the development of binding and non-binding rules, see Esther van Schagen, 'Source of Concern or Room for Experimentation? Private Autonomy in the Development of Alternative Regulation in German and Dutch Private Law' (2016) 3 European Journal of Comparative Law and Governance 187.

instruments aimed at implementing or developing international law (including aspects of international human rights law).[12] Non-State actors are becoming increasingly involved in global governance, whether through contributions to international law itself or through (self-)regulation by private bodies.[13] As a result, non-State actors are beginning to entrench themselves in the international human rights regime. Non-State actors are also becoming increasingly entrenched in the regime by other actors, including scholars and civil society. For example, there now exist many studies, projects and initiatives examining the ways in which non-State actors could be held accountable for interfering with the enjoyment of human rights.[14] There are also more and more non-legally binding instruments being adopted, including by the United Nations (UN) itself, to encourage non-State actors to respect human rights and States to more rigorously regulate non-State actors (a popular example being the UN Guiding Principles on Business and Human Rights[15]). Furthermore, human rights adjudicatory bodies have found

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[12] See e.g. Jean D'Aspremont, 'International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?' in Math Noortman and Cedric Ryngaert (eds), *Non-State Actors in International Law – From Law-Takers to Law Makers* (Ashgate 2010). For discussion in the context of non-State armed groups, see Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) Yale Journal of International Law 107.

[13] As Yannis Papadopoulos has noted, '[a] plethora of non-state and sector-specific governance arrangements have been established' on a transnational level, emerging particularly since the 1980s. See Yannis Papadopoulos, 'The challenge of transnational private governance: Evaluating authorization, representation, and accountability', Laboratoire interdisciplinaire d'évaluation des politiques publiques Working Paper No. 8 (2013) 1.

[14] See e.g. Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005); University of Antwerp, 'About GLOTHRO' <www.uantwerpen.be/en/projects/glothro/about-us/> accessed 7 November 2017, which involved extensive research on the human rights obligations of non-State actors; and Jean D'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62(1) Netherlands International Law Review 49, which forms part of a collection of articles on 'Organized Non-State Actors'.

[15] See UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business

themselves faced with many cases in which the direct causal responsibility for harm to human rights lies with a non-State actor, rather than a State.[16]

One reason for this is that the emergent doctrines of horizontal effect[17] do allow victims of human rights violations some degree of remedy, but are not always effective in changing the actions of the non-State actors responsible. This is because, just as with the human rights instruments themselves, the doctrines of horizontal effect are predominantly based upon the positive obligations of *States*. The positive obligations require States to protect individuals' enjoyment of human rights from the harmful actions of non-State actors. Some aspects of horizontal effect do, admittedly, require States to effectively regulate the actions and operations of non-State actors in their territory. However, this does not allow for situations in which States are unable to effectively control non-State actors, or where a State is too dependent upon the benefits it obtains by keeping a non-State actor happy to be in a position to impose human rights-related standards upon them. For example, human rights infringements caused by the actions of non-State armed groups are very problematic in terms of horizontal effect. In many situations of non-international armed conflict, the State party to the conflict loses control not only over the non-State armed group it is fighting but also areas of land and the provision of essential services. In such a situation, an individual whose rights have suffered due to the non-State armed group cannot effectively claim redress using current applications of horizontal effect; it would be neither just nor appropriate to hold the State responsible for something so far outside of its control. For this reason, it is desirable to tackle the problem more directly, by addressing the conduct of the non-State armed group itself. It is also desirable to adopt an approach that could, in the absence of legal means, improve the protection of human rights on the ground. The main challenge is therefore seen to be the achievement of the

Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, John Ruggie' (21 March 2011) A/HRC/17/31 (UNGPs).

[16] See Chapters 5, 6 and 7.

[17] A thorough explanation of these doctrines is provided in Chapters 3-8.

practical results of the horizontal effect of human rights standards in the absence of *de jure* horizontal effect.

This is not to say that extra-legal efforts have not yet been taken to achieve human rights protection in relation to non-State actors. Indeed, recent years have seen a boom of such measures being taken to try to encourage or pressure non-State actors to operate in compliance with international human rights law and standards. Measures include, *inter alia*, the adoption of non-legally binding international principles on business and human rights, many attempts to effectively engage with various non-State actors, and allowing non-State actors to self-regulate. Each kind of measure taken has yielded different results. However, no single method has provided a blanket solution to protecting human rights from the harmful actions of non-State actors.[18] Going beyond a purely legal approach to non-State actors and human rights, many of the initiatives taken can be seen as part of a broader, governance approach. Despite reaching towards the same goal and often taking a multi-stakeholder perspective, the initiatives do not currently fit into a coherent governance framework. In addition, a by-product of the fragmented approach is that overlapping actions may be taken in some areas to the detriment of others.[19] It is therefore even more desirable to tackle the problem of non-State actors and human rights in a holistic and structured manner. This requires looking at the interaction between different actors, actions and the mechanisms at our disposal to improve human rights protection.

## 2. Aims and contributions of the study

This book has several goals. Its main aims are, firstly, to critically analyse the horizontality of international human rights law as found in international, regional and national legislation and jurisprudence as well as (to a more

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[18] Measures taken in relation to particular non-State actors will be discussed in Chapter 3, 10 and 11.

[19] This raises an issue of coordination between actors and initiatives, which will be addressed in Chapter 9.

limited degree) scholarly works, and secondly, to suggest a new approach to improving human rights protection vis-à-vis non-State actors: a multi-level governance approach.

First, from a legal perspective, the book aims to contribute to the current debate on the horizontal effect of human rights. On a general level, it aims to set out the scope of the current human rights law framework, provide a critical understanding of what human rights obligations actually entail, and offer some views as to why the limits to the legal framework have been set (and continue to remain) where they are. The book also seeks to bring together international laws, jurisprudence and scholarly works on horizontal effect at the international, regional and national levels and to build on previous studies on the treatment of non-State actors. In particular, it aims to add a new way of conceptualising the types of indirect horizontal effect currently employed by human rights monitoring bodies and courts. These aims pertain to the legal parts of the book (Parts 1-3).

The book also has aims regarding political science, specifically in the field of governance studies (Part 4). Here, it seeks to provide the legal readership with a good understanding of what governance is, and what it means to take a governance approach towards international human rights. Importantly, the study also aspires to contribute to legal and political science literature on multi-level governance and to use the theory in a new context and on a broader scale than it has been to date. Through the explanation and application of multi-level governance to two case studies, the book aims to demonstrate the practical workings of the current legal approach to horizontal effect as well as the suggested multi-level governance approach. In its adoption of a multi-level governance approach to human rights, the study seeks to demonstrate how previous and current initiatives on non-State actors and human rights could form part of a multi-level human rights governance regime that operates in a more structured and cooperative manner. Through the chapters on case studies, the study aims to provide concrete proposals for improving human rights protection in relation to infringements by particular actors, therefore also providing a more practical perspective which complements the more theoretical nature of the book as a whole. Reflecting

the governance approach taken in this study, the suggestions made address the different kinds of actors involved in human rights governance, rather than solely law-makers or policy-makers.

### 3. Key assumptions

The book is built on key assumptions concerning the purpose of human rights. One's opinion on this has a bearing on the perceived necessity of ensuring human rights compliance by non-State actors and on the extent to which it is considered appropriate to mould and extend the scope and content of rights to adapt to societal changes (such as the prevalence of human rights interference by non-State actors). My own understanding of the purpose of human rights will be explained here and should be borne in mind when reading the book.

First, it is important to point out that the purpose, or value, of human rights is closely connected to the basis of human rights itself.[20] For example, those who believe that human rights have a moral basis may see the purpose of human rights as being the furtherance of good moral behaviour. Similarly, those who believe that the basis of human rights is the protection of human dignity may view the purpose of human rights as ensuring a minimum level of dignity for every human being. This study will start from the assumption that human dignity is at the core of human rights.[21]

The idea that human dignity lies at the core of human rights is extremely popular. Evidence of the relationship between the two can be found in the preamble to the Universal Declaration of Human Rights 1948

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[20] A discussion of different philosophical bases of human rights in the sense that they derive from natural or positive law, will not be discussed here. A thorough and extremely interesting discussion of different philosophical approaches to human rights can be found in Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006).

[21] For a discussion of the relationship between dignity and human rights, see Willy Moka-Mubelo, 'Human Rights and Human Dignity' in *Reconciling Law and Morality in Human Rights Discourse. Philosophy and Politics – Critical Explorations Vol. 3* (Springer 2017).

(UDHR).[22] The preamble emphasises that through the preceding Charter of the United Nations 1945,[23] Member States 'reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women'. Furthermore, the preamble of the Vienna Declaration and Programme of Action 1993 explicitly 'recogni[ses] and reaffirm[s] that all human rights derive from the dignity and worth inherent in the human person'.[24] Indeed, the importance of the 'inherent dignity…of all members of the human family' for human rights is reaffirmed in the preamble or in the substantive provisions of all of the core UN human rights treaties.[25] Andrew Clapham has highlighted that 'human dignity as a *raison d'être* of human rights' can be seen in national and international human rights instruments alike, and constitutes a 'key justificatory argument for respecting human rights'.[26] Jack Donnelly also takes a strong stance, arguing that human rights are vital 'for a life of dignity, for a life *worthy* of a human being'.[27] Clapham helpfully explains that if human dignity is accepted as the basis of human rights, the identity of the perpetrator of human rights (i.e. the party responsible for infringing human rights) becomes of little interest.[28]

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[22] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III). For a full discussion of the importance of dignity in international, regional and national human rights instruments, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655.
[23] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[24] UN General Assembly, Vienna Declaration and Programme of Action (12 July 1993)) A/CONF.157/23.
[25] This construction is used, for example, in the preambles to the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Rights of Persons with Disabilities. Another phrasing can be seen in the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS vol. 660, 195.
[26] Andrew Clapham, *Human Rights Obligations of Non-State-Actors* (Oxford University Press 2006) 533.
[27] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 1989) 17, cited in Andrew Heard, 'Human rights - Chimera's in sheep's clothing?' (1997) <www.sfu.ca/~aheard/intro.html> accessed 7 November 2017.
[28] Clapham (n 26) 534.

Following this reasoning, as a basis for human rights, human dignity could also justify (and possibly even legitimise) the imposition of some degree of human rights obligations on non-State actors. Using similar reasoning, Clapham goes on to explain that even if a particular non-State actor were to use their own human dignity as an argument against having to respect that of other individuals, too much attention should not be paid to this – States routinely invoke the protection of other individuals' dignity in response to claims that they are violating someone else's.[29] In such situations, a balancing exercise is carried out to determine whether the State should be held responsible for the violation of dignity/human rights, or whether their actions were indeed justified on the basis of protecting the rights or dignity of others (see Chapters 3 and 6).

The second purpose of human rights taken as a starting point in this study is the protection of individuals from actors that have a degree of authority or power over them. Within international human rights law this is reflected by the fact that individuals (seen as the more vulnerable actors) are protected from abuse of power by sovereign States, the primary (and in theory the most powerful) actors at the international level.[30] As explained above, the abundance of non-State actors now operating nationally or internationally with growing competences, resources and authority (sometimes even over States) has considerably expanded the range of actors now in a position of power or authority over the enjoyment of individuals' rights.

Other purposes of human rights are less convincing, however. In more recent years, human rights have been used for the purpose of lending moral legitimacy to particular points of view or political decisions. In many instances, 'human rights' seems to have replaced 'morality' as the key buzzword.[31] This is evident in the wide use of the human rights rhetoric in

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[29] ibid 534.

[30] The continued validity of this will be discussed in detail below.

[31] Romuald Haule explains that human rights are now the 'fashionable discourse for moral values'. Romuald R Haule, 'Some Reflections on the Foundations of Human Rights – Are

the mass and global media. Whether accurately or not, the media often invokes human rights arguments to strengthen or legitimise arguments. Social media has also taken up the use of human rights terminology in countless cases and has even been praised for contributing to human rights monitoring.[32] While in some cases various media outlets can shed light on potential or previous human rights violations, in others it can be undesirable for true human rights protection. One of the main problems here is a lack of understanding on behalf of the layperson as to the content of international human rights. Indeed, a report by the International Council on Human Rights Policy highlights 'a serious lack of knowledge about what human rights are' as one of the main problems regarding media coverage of human rights-related stories.[33] Such use of human rights in arguments may also reflect a belief or understanding that human rights are to be considered a tool to promote justice. This purpose of human rights is seen not only in the media but also throughout the human rights community. For example, the well-

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Human Rights an Alternative to Moral Values?' (2006) 10 Max Planck Yearbook of United Nations Law Online 367, 368-369.

[32] See Christoph Koettl, 'Twitter to the Rescue? How Social Media is Transforming Human Rights Monitoring', *Amnesty International Human Rights Now Blog*, 20 February 2013 <www.blog.amnestyusa.org/middle-east/twitter-to-the-rescue-how-social-media-is-transforming-human-rights-monitoring/> accessed 7 November 2017.

[33] The fascinating, in-depth report discusses many challenges that are faced by journalists when reporting stories with human rights issues. These range from having to 'dumb-down' media reports, difficulties arising in the editing process, bias, and difficulties in precision. See International Council on Human Rights Policy, 'Journalism, Media and the Challenge of Human Rights Reporting' (2002) 114 <www.ichrp.org/files/reports/14/106_report_en.pdf> accessed 9 November 2017. Importantly, at least some organisations are becoming more aware of this, and are offering tools to journalists to promote and encourage responsible human rights reporting. For example, 'Speak Up, Speak Out' has published a 'A Toolkit for Reporting on Human Rights Issues' (2012) <https://www.internews.org/sites/default/files/resources/Internews_SpeakUpSpeakOut_Full.pdf> accessed 9 November 2017. The toolkit provides information and advice on many issues relating to journalism and human rights, to help journalists and reporters take a nuanced and sensitive approach towards human rights issues. Further efforts include action taken by the International Organization for Migration to train journalists on human rights issues. See International Organization for Migration, 'IOM Trains Puntland Journalists on Human Rights', 23 February 2016 <www.iom.int/news/iom-trains-puntland-journalists-human-rights> accessed 9 November 2017.

known Center for Economic and Social Rights states as its primary mission the promotion of justice through human rights.[34] However, the Center also plays a crucial role in the protection of dignity, illustrating even more clearly that the purpose of human rights can be multifaceted.

## 4. Key definitions

The meaning of the terms 'State' and 'non-State' actors deserves, because of their frequent use in the book, to be clarified here. It is also important to explain the use of certain other terminology throughout the study. This will be done here for the words 'obligations', 'responsibilities' and 'duties', as they are often (particularly across different disciplines) used in different ways, or even interchangeably. This book uses them to refer to distinct kinds of requirements, as explained below.

### *4.1 State actors*

The use of the term 'State actor/s', or 'State' is used frequently throughout this study. In discerning who is considered to be a State actor, the international law (secondary) rules on attribution are extremely useful, as they lay down who is considered to be a State actor, and when the conduct of non-State actors can be considered to be the conduct of the State. The rules, which are introduced in more detail in Chapter 4, are codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (DASR), which were published with commentary on each article.[35] Article 2 DASR provides that there are two elements of an internationally wrongful act by a State, the first being that the conduct 'is attributable to the State under international law'.[36] The DASR frame the discussion in terms of 'State organs' and explain that this term extends not only to the direct State organs forming part of the central

[34] Center for Economic and Social Rights Website <www.cesr.org/> accessed 9 November 2017.
[35] ibid Commentary to Article 4, para 5.
[36] ibid Article 2(a).

government, or the highest officials, but 'to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level'.[37] Following the DASR, the definition of 'State actor' used throughout this study is therefore quite broad.

*4.2 Non-State actors*

This book defines 'non-State actors' more by what they are not than what they *are* – the term 'non-State actor' is used to refer generally to all actors that are not classified as 'State actors'.[38] This is a very broad definition, as it includes, *inter alia*, private actors such as individuals,[39] local communities, civil society (i.e. non-governmental organisations), private corporations (whether national or multinational), as well as international organisations and non-State armed groups.

The term 'private actor' is sometimes used instead of 'non-State actor', as this term is often used by (for example) the adjudicatory bodies whose jurisprudence is examined in Chapters 5, 6 and 7 of this book. Further, although the term 'non-State actor' is used regularly throughout the book, where a discussion relates to a particular non-State actor, the specific actor is identified.

*4.3 'Obligations', 'responsibilities' and 'duties'*

Throughout this study, the term 'obligation/s' will be used in reference to legally binding requirements. It is therefore used predominantly to refer to the conduct required of *States* rather than *non-State* actors, since international human rights law does not typically directly address the obligations of non-State actors in legally binding documents. In case the term 'obligation' is used in reference to a behavioural requirement of non-State actors, this will

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[37] ibid Commentary to Article 4, para 6.

[38] This definition is also followed by scholars such as Andrew Clapham. See Andrew Clapham, 'Non-state Actors' in Vincent Chetail (ed), *Post-conflict Peacebuilding: A Lexicon* (Oxford University Press 2009).

[39] See van Schagen (n 11) 188.

be explained.

The term ‘duty’ will be used as sparingly as possible outside the context of the ‘duty of due diligence’, which will be thoroughly explained and discussed in the study. On those occasions where ‘duty’ is used outside of this context, it will refer to a legally binding requirement, similarly to ‘obligation’.

The term ‘responsibility’ and ‘responsibilities’ are distinguished here from ‘obligation’ and will be used to refer to non-legally binding requirements, predominantly found in soft-law instruments. Responsibilities are mostly discussed vis-à-vis non-State actors. This definition follows the approach of John Ruggie in the UN Guiding Principles on Business and Human Rights.[40] As Ruggie explained in a later publication, the term is used ‘to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies’.[41]

## 5. Research questions

The primary and overarching research question of the study is:

> How are interferences with human rights caused by non-State actors dealt with under international human rights law and practice, and how could a multi-level governance approach apply to better protect individuals’ human rights from the harmful conduct of non-State actors?

In forming an answer to this question, the book examines several sub-

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[40] UNGPs (n 15). For a discussion and critique of a sharp distinction between binding/non-binding requirements for non-State actors, see Florian Wettstein, ‘Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment’ (2015) 142(2) Journal of Human Rights 162, discussed in Marlies Hesselman and Lottie Lane, ‘Disasters and Non-State Actors – Human Rights-Based Approaches’ (2017) 25(2) Disaster Prevention and Management (2017) 526, 527.

[41] John G Ruggie, ‘The construction of the UN “protect, respect and remedy” framework for business and human rights: the true confessions of a principled pragmatist’ (2011) 2 European Human Rights Law Review 127.

questions:

1. What is the nature and scope of international human rights law obligations and do they allow space for non-State actors?
2. What is the 'horizontal effect' of international human rights law, and how is it related to the different types of human rights obligations?
3. To what extent, and how, is the horizontal effect of human rights reflected in international, regional and national legislation, jurisprudence and scholarly works?
4. Moving beyond horizontal effect through human rights *law*, how can a *governance* approach to human rights be envisaged?
5. What kind of measures can be taken under a multi-level governance approach to human rights in order to better protect individuals' rights from non-State actors?

**6. Research design**

This study is designed to take the reader through the logical steps of moving towards a law and governance approach to international human rights (for what concerns horizontal effect). When faced with a particular societal problem, many legal scholars focus solely on the law and how to improve it.[42] A recurring contemporary challenge is how to apply and amend the law in light of today's society, which may be very different from the one in which laws were adopted. This can require legal scholars to stretch the current law to its limits, to push the boundaries of interpretation and legitimacy, and to rely heavily on active and open-minded judges to fill the gaps that the positive law does not always fill. This book takes a 'law and governance' approach which looks for a solution to a societal problem beyond the confines of the law.[43] Such an approach views laws as instruments of governance, as *part* of a governance structure which comprises activities by many different actors,

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[42] Aurelia Colombi Ciacchi, 'Comparative Law and Governance: Towards a New Research Method' in Aurelia Colombi Ciacchi and others (eds), *Law and Governance: Beyond the Public-Private Law Divide* (Eleven International Publishing 2013) 223.
[43] ibid.

both public and private. The study is therefore built on the premise that to solve a societal problem, 'we cannot cleanly separate the search for the best laws on the one hand, and the search for the best modes of governance on the other'.[44]

The law and governance approach of the study has shaped its design. The study was developed in a way that would allow the shortcomings of the international human rights legal regime in solving the relevant societal problem – the prevalence of interference by non-State actors with the enjoyment of human rights – to be demonstrated. In particular, the research questions were developed and answered so as to gain as thorough an insight as possible into the way that international law deals with the societal problem. The prescriptive part of the book was then designed to show how a (multi-level) governance approach could address the problem and build upon governance activities (including legal ones) to better protect the enjoyment of human rights from the harmful conduct of non-State actors.

The study is interdisciplinary, bringing together aspects of legal science and political science and contributing to both fields (as explained in Section 2). In terms of its scope, the general conclusions of the book regarding a multi-level governance approach to international human rights are intended to apply to *all* kinds of non-State actors. The use of case studies was chosen to show how the approach could be applied to specific actors, and the conclusions in this regard are not of general application. The book is also very international in focus – although it does draw upon examples of horizontal effect at the regional and national levels, the focus throughout the study is how *international* human rights law is applied on these levels.[45] It is for this reason (as well as restrictions of space) that theories of horizontal effect in the private law of national legal systems have not been dealt with in

[44] ibid 224.

[45] At the national level, this is often done through domestic legislation, which in turn is interpreted and applied by courts within the domestic legal system (see Chapter 7 on horizontal effect within the United Kingdom).

detail, only being discussed thoroughly in relation to the United Kingdom.[46] The example of the UK was chosen for two reasons. First, the UK was chosen because it has a specific piece of legislation (the Human Rights Act 1998) which was adopted to incorporate a regional human rights treaty into domestic law. This allowed a thorough comparative analysis between the regional and national levels in particular, as it enabled differences in the way in which the same rights – those contained in the European Convention on Human Rights – were applied on different levels in cases concerning human rights interference by non-State actors. A further reason for choosing the UK as an example is because of the large amount of case law and scholarly discussion available on the issue of horizontal effect in UK domestic courts. This allowed a thorough analysis of the way in which horizontal effect is applied within the UK, which in turn contributed to a more thorough comparative analysis between the three levels examined.

A note should also be made here on the choice of case studies, which are: (1) the World Bank; and (2) non-State armed groups. While the actors have each been the subject of research projects in the past, they have not to date been used as concurrent examples to strengthen the same argument (i.e. that international law is insufficient for protecting individuals' rights from interference by non-State actors) or to test the same theory (multi-level governance). Nonetheless, although both actors have very different natures, they can both be said to operate to some degree in the public sphere – while certainly considered to be non-State actors, neither the World Bank nor non-State armed groups could be said to operate privately. The World Bank, for example, plays a large role in the financing of development programmes in many countries and can have a considerable degree of influence over such programmes and their results (including their impact on human rights). Recent focus on the World Bank's relationship with human rights from UN bodies as well as within academia, as well as recent developments in the

[46] In particular, the study does not generally engage with literature from European private law, which discusses the horizontal effect of fundamental rights, often from a comparative perspective. For examples, see footnote (n 4) above.

Bank's policies and infrastructure make the World Bank a very interesting and current case study for the present book. Furthermore, the status of the World Bank as an international organisation raises additional questions regarding both horizontal effect and governance – highlighted by the ongoing and as yet unanswered challenges and criticisms regarding the lack of accountability of international organisations – both of which are central to this study.

In contrast with the World Bank, non-State armed groups usually operate nationally, although their conduct can have international ramifications. It is their position as semi-public entities and the control that they can have over territory and resources that raise the most questions about non-State armed groups' compliance with human rights standards. Naturally, the nature of the groups themselves as well as the context of non-international armed conflicts in which non-State armed groups operate, raise specific challenges in terms of the horizontal effect of international human rights. Additional challenges concerning governance arise, especially due to the fact that non-State armed groups usually operate outside of the control of the State. Non-State armed groups therefore make a particularly interesting choice of case study for the present study, which brings together issues of horizontal effect and governance and suggests ways in which to overcome challenges.

Both the World Bank and non-State armed groups have been the subject of much (academic) scrutiny for what concerns human rights and they are both subject to at least some rules of international law. They have both also been explicitly mentioned by UN human rights bodies as 'actors other than States' that may be subject to some human rights obligations.[47] Nonetheless, their human rights responsibilities (or potential obligations) have not been sufficiently clarified. This makes them very interesting studies for the purposes of the present book. The attention that has been paid to other

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[47] See Chapter 5.

non-State actors' human rights responsibilities (and obligations), namely multinational corporations, has been much more concrete and has led to significant progress within international law (although, as seen in Chapter 3, no binding obligations have yet been placed on business enterprises). While the work towards the horizontal effect of human rights vis-à-vis multinational corporations (and business enterprises more generally) is used where relevant throughout the book, it was decided not to use this type of actor as a case study. There has been a huge amount of literature published on business and human rights from different perspectives, most notably from legal and 'corporate social responsibility' perspectives. In addition, very concrete inroads, both legal and extra-legal, have been made regarding business and human rights at the international, regional and national levels, including negotiations for a binding treaty on business and human rights. While this raises questions of its own regarding horizontal effect, developments concerning the World Bank and non-State armed groups are arguably less advanced, and perhaps more in need of a nudge in the right direction. Furthermore, the amount of studies and initiatives already undertaken in relation to multinational corporations would also make it very difficult to do justice to them as a case study in one chapter. Nonetheless, the general conclusions made in the present study certainly do apply to multinational corporations (as well as other non-State actors), and their role within a multi-level governance approach to human rights could be the focus of a future study.

In relation to the suggestions made in the book of measures that could be taken under a multi-level governance approach to international human rights, it is important to clarify that they are not designed to function as proposals for policy and law-makers *per se*. Although some of the measures could indeed be taken up by policy and law-makers, the measures are suggested with many kinds of governance actors in mind, and many of them can be taken up by actors with a less formal governance role, as explained in the relevant chapters.

## 7. Research methods

The nature and design of this book are such that several research methods have been taken in different parts of the study. The main overarching theory of the study, horizontal effect, was initially researched using a literature study (at the international, regional and national levels, respectively). The literature study was not confined to academic literature, but also included many reports of international organisations as well as UN agencies and subsidiary organs (e.g. the work of Special Rapporteurs and the Human Rights Council). Primary as well as secondary sources were used to gain an overview of the theories and state of the art of horizontal effect in legal science.

Once an overview of the horizontal effect of international human rights law had been formulated, doctrinal legal research, or 'legal systematization'[48] (i.e. a critical conceptual analysis of relevant legislation and case law[49]) was conducted to identify whether and how horizontal effect can be found in international human rights law and in the jurisprudence of (human rights) adjudicatory bodies at the international, regional and national levels. This can be seen in Chapters 4-7, in relation to which a comparative legal method was also used to compare the 'law in action' as well as the 'law-in-the-books'.[50] A comparison between the ways in which horizontal effect has been applied on and within each level was made throughout Chapters 4-7 and the outcome is explained in the critical analysis in Chapter 8. Chapter 5, in particular, provides a comparative analysis of how different UN human rights treaty supervisory bodies apply horizontal effect, while regional human rights systems were compared in Chapter 6. Where necessary, a fuller explanation of the precise research methods used for these analyses is contained within the individual chapters. The comparison in Chapters 4-8 is

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[48] This term is used to describe the systematic analysis conducted in Chapters 4-7. See Jan M. Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 11.

[49] Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era', Law Library Journal 106(4) (2014) 579, 584.

[50] See Colombi Ciacchi (n 42) 229-230.

two-fold; on the one hand, the legislation and the different approaches and practice of the adjudicatory bodies examined on each level are compared; on the other hand, the different theories and types of horizontal effect found across the different levels are compared with one another. The analysis and its conclusions are based on inductive reasoning. As a result, the specific sources analysed and findings made in the previous chapters lead to a more general conclusion regarding the horizontal effect of international human rights law.

The remainder of the book is prescriptive in nature and builds on the findings of the comparative analysis to suggest a multi-level governance approach to international human rights. A literature study was conducted to gain a thorough understanding of theories of governance, and multi-level governance in particular. The findings from this study were then used to suggest a new, governance approach to international human rights. It is at this point that the law and governance approach of the study becomes fully evident. The research for the two case-study chapters was conducted through another literature study as well as further doctrinal research. The case study chapters follow deductive reasoning to make specific conclusions regarding the particular actors' impact on human rights, based on the more general conclusions concerning multi-level governance (in Chapter 9).

## 8. Structure of the study

The present book is divided into four parts. Part 1 provides the theoretical framework for the study. It therefore deals with the 'Nature and Scope of Human Rights Obligations'. Part 2 examines the 'Horizontal Effect of International Human Rights at the International Level', while Part 3 conducts a similar examination of the 'Horizontal Effect of International Human Rights at the Regional and National Levels'. Part 4 suggests a new approach to the 'Horizontal Effect of Human Rights Beyond Law – A Multi-Level Governance Approach'. Finally, 'Conclusions and Recommendations' are made.

Part 1 is composed of three chapters that lay down the theoretical framework of international human rights law. This part of the study answers

the first two research questions: ‘What is the nature and scope of international human rights law and obligations and do they allow space for non-State actors?’; and ‘What is the ‘horizontal effect’ of international human rights law, and how is it related to the different types of human rights obligations?’.

Chapter 1 looks critically at the development of human rights, in particular through the three types of State obligations established by the scholarly concept of the tripartite typology of human rights. Chapter 2 explains why (and how) international human rights law is vertical in nature. It also explains why States and scholars have traditionally shied away from including non-State actors directly in the international human rights law framework. Chapter 3 examines what ‘horizontal effect’ actually is. Within this chapter, examples from academia as well as from practice demonstrate the main different types of horizontal effect of international human rights law and provides examples of how they can be manifested. Chapter 3 also offers examples of how the tripartite typology has been applied to non-State actors. This chapter remains quite general, as the study’s in-depth analysis of horizontal effect takes place in Chapters 4-8.

Having set the parameters of the human rights law framework in Part 1, the study moves on to examine the treatment of non-State actors in law and in practice (Parts 2 and 3). Parts 2 and 3 answer the third research question: ‘To what extent, and how, is the horizontal effect of human rights reflected in international, regional and national legislation, jurisprudence and scholarly works?’.

Part 2 consists of Chapters 4 and 5, which address the horizontal effect of international human rights at the *international* level. First, Chapter 4 considers examples of horizontal effect that can be found in international legislation, particularly in international human rights treaties. Chapter 5 comprises a comparative analysis of the ways in which five UN human rights treaty bodies apply horizontal effect in their general comments and views on individual communications. Both chapters in Part 2 are critical in their analysis, providing critical reflections on the legislation and practice within

international human rights law.

Part 3 moves to the regional and national levels, consisting of two more chapters of critical and comparative analysis. Chapter 6 addresses horizontal effect within the main three regional human rights systems: (1) the European system under the Council of Europe; (2) the African human rights system under the African Union; and (3) the Inter-American human rights system under the Organization of American States. Each system is analysed separately, with three aspects being discussed in relation to each system. First, examples of horizontal effect in scholarly works pertaining to the respective system are examined, demonstrating the state of the art within each systems and clarifying the contribution of the chapter thereto. Second, examples of horizontal effect in the system's human rights legislation are identified and discussed, and third, examples of horizontal effect in the system's jurisprudence are investigated. Chapter 7 conducts an analysis of horizontal effect at the national level. In this chapter, horizontal effect as allowed for by the United Kingdom's (UK) Human Rights Act 1998 is critically examined. The legislation, scholarly works and practice of the UK's judiciary are each critically examined in this chapter.

Part 4 moves from analysis to proposals for a new approach to the horizontal effect of international human rights and answers the fourth and fifth research questions: 'Moving beyond horizontal effect through human rights *law*, how can a *governance* approach to human rights be envisaged?'; and 'What kind of measures can be taken under a multi-level governance approach to human rights in order to better protect individuals' rights from non-State actors?'.

Chapter 8 reflects on the critical analyses conducted in Parts 2 and 3 and identifies the main trends of horizontal effect running through the international, regional and national levels. In doing so, it pinpoints three types of indirect horizontal effect used on the international, regional and national levels. Due to the scarce findings of direct horizontal effect within human rights law, Chapter 8 and its conclusions focus on indirect horizontal effect. The findings of Chapter 8 set the foundations for Chapter 9, which introduces the new multi-level governance approach to human rights. This chapter

provides the reader with an understanding of governance and how it relates to international human rights. Chapter 9 also explains the multi-level governance approach which is applied in the remainder of the book. Chapters 10 and 11 then apply the knowledge gained so far in the study to specific case studies. Chapter 10 concerns the World Bank and Chapter 11 concerns non-State armed groups. The case studies reinforce the claim that the current legal framework fails to adequately protect human rights. Chapters 10 and 11 also explain how the actors would fit within a multi-level governance system of human rights and provide examples of measures that could be taken to move towards such a system.

Finally, 'Conclusions and Recommendations' are offered. This part of the book draws together the findings of each chapter and provides conclusions on: the nature and scope of international human rights obligations; the horizontal effect of human rights; multi-level governance approach to non-State actors and human rights; and conclusions regarding the case studies. The conclusions summarise the answers to the main research question of the book as well as the sub-questions, highlight the contributions of the study, and suggest topics for further research. Final recommendations are offered regarding measures to be taken under a multi-level governance approach to international human rights.

# Part 1

# Theoretical Framework: The Nature and Scope of International Human Rights Obligations

Chapter 1

# The classifications of international human rights

## 1.1 Preliminary remarks

The classifications and nature of international human rights and their obligations has been much discussed. Huge developments have been made since the first, somewhat restrictive rights were legally enshrined in the earliest human rights instruments.[1] These developments are evident in both the range of international human rights currently enshrined in international treaties and the way in which they have been interpreted and applied. This chapter deals primarily with the theoretical development of human rights, particularly through the 'tripartite typology' of human rights. Despite being an academic construct rather than a concrete norm, the concept has proven to be particularly useful in delineating the scope and content of States' human rights obligations.

It must be noted here that much research has already been conducted into the 'horizontal effect' of international human rights law; indeed, an abundance of literature can already be found on 'non-State actors and human rights'.[2] This chapter, along with Chapters 2 and 3, relies heavily on the

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[1] Referring here to (for example) the Magna Carta 1215 and the French Declaration on the Rights of Man and Citizen 1789. For in-depth discussions on the history of human rights and their development, see e.g. Lynne Hunt, *Inventing Human Rights: A History* (Norton 2007); Micheline Ishay, *The history of human rights: from ancient times to the globalization era* (University of California Press 2004); Rhona KM Smith and Christien van den Anker, *The essentials of human rights* (Hodder Arnold 2005).

[2] See, for example, Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*

existing literature to set out the theoretical framework of the study.

### 1.2 A brief overview of the development of the UN human rights treaties

The introduction of human rights into international legal documents is extremely well rehearsed and will not be dealt with in detail here. This section provides a basic overview of the development of human rights in international instruments to show the expansion of the field of international human rights law within the last 60 years.

The term 'international human rights law' is often used synonymously with the 'UN human rights system', so great has been the influence of the United Nations on the development of human rights. Since the adoption of its first international instrument containing specific human rights, the UDHR,[3] the UN has been responsible for the drafting and adoption of ten major international human rights treaties. Two of the UN human rights treaties are regularly referred to as the 'twin' covenants:[4] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[5] and the International Covenant on Civil and Political Rights (ICCPR).[6] Both Covenants were adopted in 1966 in response to the atrocities carried out

(Hart Publishing 2016); Nicolas Carrillo Santarelli, 'Non-State Actor's Human Rights Obligations and Responsibility under International Law' (2008) 15 *Revista Electrònica de estudios internacionales*; Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011); Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

[3] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

[4] The Covenants are generally considered to be the first major human rights treaties laying down the full range of substantive rights, although the International Convention on the Elimination of All Forms of Racial Discrimination was actually adopted a year earlier, on 21 December 1965 and entered into force on 4 January 1969 (UNTS vol. 660, 195).

[5] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS vol. 999, 3. For discussion, see e.g. Ben Saul, David Kinley and Jacqueline Mowbray, *International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014).

[6] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171. For discussion, see e.g. Sarah Joseph and Melissa Castan, *The* International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (3rd edn, Oxford University Press 2013).

during World War II.[7] The rights enshrined in the Covenants were more extensive and arguably more concrete than those contained in the UDHR. As the first generally applicable legally binding human rights documents, the Covenants pushed human rights into a new era. However, this was not accomplished without some reluctance. The notion of including what some States considered to be vaguer and more resource-demanding economic, social and cultural rights in a binding instrument was seen as somewhat revolutionary, and was met with substantial criticism,[8] particularly from Western States. The division between Western States, which favoured civil and political rights, and the Eastern bloc, which favoured economic, social and cultural rights, became increasingly evident during the Cold War[9] and throughout the negotiations on the adoption of the two 1966 Covenants. It was this strong disagreement that resulted in the adoption of two separate Covenants in 1966, rather than one comprehensive agreement containing all of the rights laid down in the UDHR.[10] Nevertheless, the UDHR, incorporated into the two Covenants,[11] has ended up providing a platform

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[7] See Christian Tomuschat, 'International Covenant on Civil and Political Rights' (2008) 1 United Nations Audiovisual Library of International Law <www.un.org/law/avl> accessed 19 August 2017.

[8] For more discussion of the reluctance to give economic, social and cultural rights the status of enforceable rights under international law, see below, Section 1.3.1.

[9] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009) 418.

[10] A full explanation of the reasons for adopting two separate Covenants will not be discussed here, but can be summarised in James Simarian's comments on the drafting procedure of the twin Covenants in 1952:

> Although the term "rights" is used in both the civil and political articles and the economic, social and cultural articles, it is used in two different senses. The civil and political rights are looked upon as "rights" to be given effect promptly. The economic, social and cultural "rights" are looked upon as goals toward which countries ratifying the covenant would undertake to strive, achieving these objectives "progressively" over a much longer period of time.

James Simsarian, 'Progress in Drafting Two Covenants on Human Rights in the United Nations' (1952) 46(4) The American Journal of International Law 710, 711 [footnotes removed].

[11] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (1st edn, Cambridge University Press 2010) 17.

from which human rights could skyrocket.

Fifty years after the adoption of the twin covenants, the United Nations has adopted a plethora of human rights treaties, each with a specific purpose. Specialised treaties now protect vulnerable groups, including women, children, people with disabilities and migrant workers to name a few. The UN has now adopted ten 'core' human rights treaties (including the 1966 Covenants).[12] Such broad protection and apparent support for human rights by the international community is to be commended. However, the system is now facing widespread criticism for the resulting fragmentation of human rights, which some believe could lead to less, rather than more effective human rights protection.[13] An evaluation of this falls outside of the scope of the present study, but it is important to recognise that whether in the correct direction, or whether slightly wayward, the international human rights regime has, and continues to, evolve. Evolution particularly occurs in reaction to international events and new realities not envisaged by the initial human rights regime (as evidenced by the adoption of the two Covenants). This must be borne in mind in the context of the development of the nature of human rights obligations. Some (often incremental and cautious) developments have also begun occurring in relation to the *subject* of international human rights obligations. These progressions will be discussed in subsequent chapters of this book.

The following section will discuss the more theoretical development of international human rights law, demonstrated through the 'tripartite

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[12] See website of the Office of the United Nations High Commissioner for Human Rights, 'Core International Instruments' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 19 August 2017. As De Schutter explains, the reason for referring to the treaties as 'core' is that they have 'certain common characteristics', and that they all seek to 'protect and develop' the values of the UDHR. De Schutter (n 11).

[13] The main reason for this, it is argued, is not conflict within the text of the treaties themselves, but rather inconsistent and conflicting application and interpretation of norms by the human rights treaty bodies established for this purpose. See, e.g. Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflict of Laws' (2014) 32 Nordic Journal of Human Rights 87.

typology of human rights'.[14]

### 1.3 The nature of obligations under international human rights law

The nature of obligations under international human rights law has been a topic of much academic discussion. With the success of the adoption of international human rights treaties from 1966 onwards, attention began turning to questions of how to give effect to the provisions in the treaties, and how they should be implemented by State parties. A major concern regarding international human rights law has always been how to detail the scope of action expected of States, and what exactly individuals can claim under the various treaties. Although a precise delineation of each human right is practically impossible, human rights scholars have developed a very useful tool that can be applied across the board of human rights to outline the action that States must take to fulfil their obligations. The model, known as the 'tripartite typology of human rights obligations', will now be explained.

#### *1.3.1 The tripartite typology of human rights obligations: introduction*

The concept of a typology of human rights obligations was first introduced by Henry Shue in 1980. His construct envisaged State obligations to 'avoid,

[14] The development of human rights is also reflected in the 'generations' of human rights, introduced by Karel Vasak: Karel Vasak, 'A 30-Year Struggle' [1977] The UNESCO Collier 29. The generations refer to different categories of human rights and roughly correspond with the chronological development of human rights. There are currently three generations of human rights (the first referring to civil and political rights; the second to economic, social and cultural rights; and the third to collective rights). Collectively, the generations have been said to 'echo the cry of the French revolution': 'Liberté, Equalité, Fraternité'. See Frans Viljoen, 'International Human Rights Law: A Short History' (2009) UN Chronicle 46 (1&2). However, while the analogy of generations may be helpful in tracking the chronological development of human rights, the terminology risks encouraging the notion that later generations supersede earlier generations, which is incorrect. For criticisms on the use of this terminology, see e.g. Patrick Macklem, 'Human Rights in International Law: Three Generations or One?' (2015) 3 London Review of International Law 61; Carl Wellman, 'Solidarity, the Individual and Human Rights' (2000) 22(3) Human Rights Quarterly 639; and Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29(3) Netherlands International Law Review 307.

protect and aid'[15] human rights, although it was later overtaken by Asbjørn Eide's 'respect, protect and fulfil' typology.[16] The typology attempts to answer the widespread criticism that the obligations enshrined in the International Covenant on Economic, Social and Cultural Rights were 'resource-demanding',[17] and that their nature and scope were 'extremely vague'.[18] This focus on the breakdown of *obligations* rather than *rights* endeavours to dispel the traditional hierarchy that places civil and political rights in a more favourable, superior position over economic, social and cultural rights.[19] The hierarchy stems from the somewhat simplistic (but initially widespread) point of view that civil and political rights involve purely negative, 'cost-free' obligations whereas economic, social and cultural rights involve positive, economically draining obligations.[20] The latter rights were therefore seen as placing a much greater burden upon the State. This led to economic, social and cultural rights being less justiciable than civil and political rights, a detrimental move that was aggravated by the fact that the ICESCR was not initially accompanied by an individual complaints mechanism, whilst the ICCPR was.

More recent trends show that national, regional and international human rights regimes are much more inclusive of justiciable economic, social and cultural rights.[21] Nevertheless, the opinion that economic, social and

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[15] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) 160.

[16] UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Final Report of Asbjørn Eide, Special Rapporteur for the Right to Adequate Food: The Human Right to Adequate Food and Freedom from Hunger' (1987) E/CN.4/Sub.2/1987/23. UN Special Rapporteur for the Right to Food, Asbjørn Eide, 'The Human Right to Adequate Food and Freedom from Hunger' (1987) E/CN.4/Sub.2/1987/23.

[17] Ida E Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) Human Rights Law Review 81, 84.

[18] Philip Alston and Katarina Tomaševski (eds), *The Right to Food Guidelines: Information Papers and Case Studies - Food and Agriculture Organization of the United Nations* (Martinus Nijhoff Publishers 1984) 55.

[19] Koch (n 17) 82.

[20] Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia 2003) 126-127.

[21] This is evidenced by the recently adopted Optional Protocol to ICESCR establishing an

cultural rights demand more positive action from States remains fairly popular. Nonetheless, closer evaluation of the breakdown of each right allows this assertion to be strongly refuted. This is particularly so when assessing rights such as the right to a fair trial, which for States in a post-conflict situation can require large costs to implement, particularly when looking at the establishment of a functioning independent judiciary, for example.[22]

It has now been generally accepted that the typology as such may be applied to *all* human rights, not just economic, social and cultural rights. Magdalena Sepùlveda, for example, has argued that 'even those civil and political rights considered as the most classical negative rights […] are interpreted as imposing a *spectrum of duties* with different levels of State involvement'.[23] This is strengthened by Fons Coomans' statement that this 'variety of obligations' is applicable to 'all human rights, be they civil and political, or economic, social and cultural'.[24] Failure to satisfy *any* of the obligations has been held to constitute a violation.[25]

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individual complaints mechanism and the adoption of the European Social Charter to supplement the European Convention on Human Rights (which contains only civil and political rights). In contrast, the Inter-American human rights system still does not allow for the justiciability of economic, social and cultural rights, despite the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'). However, the Inter-American Court of Human Rights has recognised the importance of these rights by using a broad interpretation of civil and political rights (such as the right to life) to encompass protection of some economic, social and cultural rights (such as the right to health), effectively allowing cases of economic, social and cultural rights to be adjudicated. See Tara Melish, 'Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims' [2002] SUNY Buffalo Legal Studies Research Paper No. 2002-01.

[22] See Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) Human Rights Quarterly 156, 184.

[23] Sepúlveda (n 20) 137 [emphasis added].

[24] Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly 749, 752-753.

[25] International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', 26 January 1997 <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> accessed 19 August 2017, Guideline 6.

*1.3.2 The obligation to respect human rights*

The 'lowest rung' of State obligations is that to respect human rights.[26] Simply speaking, this entails an obligation on the State to refrain from taking any action that would infringe the enjoyment of individuals' human rights.[27] For example, the obligation to respect human rights in relation to the right to housing requires States *inter alia* to refrain from forcibly evicting individuals from their homes.[28]

According to Ida Koch, the 'negative' wording of the obligation to respect may actually be interpreted as giving rise to a much more positive obligation than was originally intended.[29] This is because it now requires respecting *existing* access to human rights enjoyment, refraining from denying or limiting enjoyment of rights. This suggests that the State must already be providing these things to individuals, and therefore a positive aspect is already involved.[30] In practice, the kind of actions actually required of States under the obligation to respect would depend on the standard of human rights enjoyment under a particular right which is already being enjoyed by individuals in the State's territory/under their jurisdiction.

Interestingly, the UN Committee on Economic, Social and Cultural Rights (CteeESCR) has actually spoken of States *protecting* human rights under the obligation to respect. Koch has noted that in its General Comment No. 14 on the right to the highest attainable standard of health, the CteeESCR included positive elements in the obligation to respect the right to health.[31] This blurs the distinction between the obligations to respect and protect, which could cause a problem for State parties. Although in theory this should

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[26] Alston and Quinn (n 22) 184.
[27] International Commission of Jurists (n 25) 81.
[28] ibid Guideline 6.
[29] Koch (n 17).
[30] UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) E/C.12/1999/5; UN CteeESCR, 'General Comment No. 13: The Right to Education (Art. 13)' (8 December 1999) E/C.12/1999/10; UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) E/C.12/2000/4; Koch (n 17) 88.
[31] Koch (n 17) 89.

not have a detrimental effect, since the parties should observe each of the obligations in the typology, it may cause some confusion. In turn, this could perpetuate the claim that economic, social and cultural rights are vague. It may cause particular problems when the obligation to respect is, as shall be seen in Chapter 3, applied to or imposed upon non-State actors. Since non-State actors have not yet been subjected to the obligation to protect human rights, the blurring of lines here between the obligations could be troublesome.

### *1.3.3. The obligation to protect human rights*

This section will analyse the State's positive obligation to protect, and how, when applied correctly, this results in the prevention of such interferences by non-State actors through the implementation of treaty standards in a State's domestic laws and policies. When a State fails in this regard, it could lead to the State being held responsible for the harmful actions of non-State actors.[32] According to Eide, the protective function of human rights is the most important of all.[33] Indeed, the obligation to protect has been afforded a huge amount of attention, by legal scholars and practitioners alike. This is increasingly evident in relation to the protection of individuals' enjoyment of rights from the actions of powerful non-State actors such as multinational corporations.[34]

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[32] This can be considered a form of 'indirect horizontal effect'. For a thorough introduction, see Chapter 3.3.1.

[33] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, social, and cultural rights: A textbook* (Martinus Nijhoff Publishers 2001) 30.

[34] See e.g. Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012); and Andrew Clapham and Mariano Garcia Rubio, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' (2002) Health and Human Rights Working Paper Series No. 3 <http://www.who.int/hhr/Series_3%20Non-State_Actors_Clapham_Rubio.pdf> accessed 14 January 2018. Although they may not focus exclusively on it, the vast majority of scholarly works on the topic of non-State actors and human rights deal at least in part with States' obligation to protect human rights, and others also discuss the responsibility of non-State actors themselves to protect human rights. See e.g. Clapham (n 2); Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-*

In concrete terms, the obligation to protect ideally results in the prevention of interference with rights by non-State actors through the implementation of treaty standards in a State's domestic laws. This has been interpreted to require States to take immediate steps to ensure that violations by the State, its agents, and non-State actors are prevented.[35] It should also include providing access to impartial legal remedies in the case of any violations, regardless of the identity of the perpetrator.[36] As an example, Principle 6 of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights[37] explained the obligation to mean that the failure of States to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work (protected under Article 7 ICESCR).[38] In the context of the economic, social and cultural rights generally, the UN Handbook for National Human Rights Institutions states that the obligation to protect requires States to take 'active measures to protect all persons from racial or other forms of discrimination, harassment and the withdrawal of services'.[39]

The advantage of the obligation to protect (and indeed the tripartite typology in general), is that it appears to work from the premise that proponents of human rights should remain cognisant of the fact that although

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*Governmental Institution* (Stanford University Press 2009).

[35] Office for the United Nations High Commissioner for Human Rights, 'Economic, Social and Cultural Rights Handbook for National Human Rights Institutions' (2005) <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 18 August 2017, 17-18.

[36] ibid.

[37] FIAN International, 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' <http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 19 August 2017.

[38] ibid Principle 6. The Maastricht Principles are not legally binding, however they 'aim to clarify the content' of States' obligations relating to economic, social and cultural rights in an extraterritorial context. That the obligation is delineated as such in this specific context, in which any state obligations are under contestation, supports an argument that they be so delineated within a State's territory and jurisdiction as well. See ibid preamble.

[39] Office of the United Nations High Commissioner for Human Rights (n 35) 18.

rights are framed and given content to in the form of obligations, the ultimate goal is not to place burdens upon States, but rather to provide individuals with the desired conditions/result. This is supported by Manisuli Ssenyonjo's description of the obligation as 'generally entail[ing] the creation and atmosphere or framework by an effective interplay of laws, regulations and other measures' in relation to non-State actors, which enable beneficiaries of human rights to fully benefit from human rights.[40] In this respect, an 'obligation to regulate' can be seen to be emerging through the practice of some of the international and regional human rights treaty monitoring bodies.[41] The obligation to regulate will be discussed in Chapters 5 and 6 during the analysis of the bodies' jurisprudence.

The obligation to protect as part of the tripartite typology has not been explicitly codified in any international treaties. However, it has been substantiated by several bodies. The Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the European Commission on Human Rights and the African Commission on Human and People's Rights have made it evident that the obligation requires States to 'take positive action to control [non-State actors] and prevent and punish' infringements by them.[42] Furthermore, the UN Guiding Principles on Business and Human Rights explain that the obligation requires 'effective policies, legislation, regulations and adjudication', to protect against human rights abuses by non-State actors within their territory and/or jurisdiction.[43] Nevertheless, it is important to acknowledge the nature of the required

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[40] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 24, 111.
[41] This obligation has been discussed by scholars. See e.g. Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011); and Marlies Hesselman and Lottie Lane, 'Disasters and Non-State Actors – Human Rights-Based Approaches' (2017) 26(5) Disaster Prevention and Management 526.
[42] See Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9(2) Human Rights Law Review 225, 251.
[43] Principle 6, UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) A/HRC/17/31.

measures as being *appropriate* – a State is not required to take *all* possible measures.[44] The nature of the measures expected will depend on the situation at hand. Furthermore, according to the ECtHR, a State may not be held to have breached the obligation to protect due to 'mistakes, oversight, or [the fact] that more effective steps may have been taken'.[45] Rather, the omission to protect must have 'considerably increased the risk' of human rights violations by non-State actors.[46] All of these ideas and findings feed into the State duty of due diligence, which will be addressed in detail below. Interpretation and application of the obligation to protect by international and regional human rights monitoring bodies will be seen throughout Chapters 5 and 6.

#### 1.3.3.1 The duty of due diligence of States

The duty of due diligence, as a positive State obligation relating to the prevention of human right abuses, is inextricably linked to and may be derived from the obligation to protect.[47] Due diligence is an obligation of conduct (rather than result), meaning that it is more the tangible effort, and 'progressive' steps made by States which fulfil the obligation, rather than the success of these actions *per se*.[48] In the human rights context due diligence 'requires action reasonably calculated to realize the enjoyment of a particular right',[49] whereas an obligation of result would '[require] States to achieve specific targets to satisfy a detailed substantive standard'.[50] At first sight, this may appear to be a less demanding or effective type of obligation, but in reality it is necessary in situations where the State may not have automatic

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[44] This is suggested by Clapham (n 2) 362.
[45] 'Report of the European Commission on Human Rights in relation to O*sman v. UK*' (1 July 1997) para 92, referred to in Clapham (n 2) 362.
[46] *Osman v United Kingdom*, App No. 23452/94 (28 October 1998), Separate opinion of Mr S Treschel, cited in Clapham (n 2) 362.
[47] For a full discussion of due diligence in international law, see Joanna Kulesza, *Due Diligence in International Law* (Brill\Martinus Nijhoff Publishers 2016).
[48] Office of the United Nations High Commissioner for Human Rights (n 35) 61.
[49] International Commission of Jurists (n 25) para 7.
[50] ibid.

control over private actors, making the actual realisation of rights unrealistic (perhaps a notion connected to the 'minimum core obligation' which recognises the differing capacities of States to fulfil rights immediately, and allowing their progressive realisation).[51]

Joanna Bourke-Martignoni's evaluation of due diligence in the context of violence against women appears to suggest that the duty would also extend to addressing the causes of human rights violations by non-State actors,[52] as well as introducing domestic laws to ensure the effective investigation and redress when they have occurred. This supports the idea that one of the main tenets of the obligation to protect is the *prevention* of interferences by non-State actors; in terms of protection, prevention is better than a cure. In the context of the prohibition on the use of child soldiers, Special Representative for Children and Armed Conflict Radhika Coomaraswamy also formulated, in her capacity as Special Rapporteur on Violence against Women, a 'checklist' of measures which would fulfil the duty of due diligence, including 'appropriate measures in the field of education and the media to raise awareness…',[53] thus entailing quite extensive steps to be fulfilled.

As a principle in international law more generally, due diligence may depend on the foreseeability of a non-State actor's conduct. As Robert Barnidge explains, it could involve particular knowledge of the State (i.e. of some intended harm, which they could have prevented but failed to do so),[54]

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[51] This concept was elaborated upon by the Committee on Economic, Social and Cultural Rights in its explanation of Article 2(1) ICESCR which stipulates this to be the nature of the rights within it. See ibid.

[52] Joanna Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence' in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers 2008) 56.

[53] Radhika Coomaraswamy, 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences' (10 March 1999) E/CN.4/1999/68, para 25, in Carin Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Martinus Nijhoff Publishers 2008) 118.

[54] This was held by the General Claims Commission in *Janes (US v Mex)* 4 RIAA 82 (1926), 87, cited in Robert Barnidge, 'The Due Diligence Principle Under International Law' (2006) 8(1) International Community Law Review 81, 94.

and it also extends to exercising due diligence in relation to the transboundary effects of acts by private individuals within a State's jurisdiction, as was held in the *Trail Smelter* case.[55] The extent of the duty differs according to prevailing circumstances, and according to the resources available to a State. This is because the duty is context-dependent, meaning that the scope of actions required by the State is dependent on the situation on the ground. For example, the usual degree of (host State) police presence required outside an embassy would be low, requiring little State action. However, in the event of a protest or riot aimed at the embassy and taking place in its vicinity, more police action would be required to control the situation and prevent unlawful behaviour.[56] Similar standards can be said to have developed in the context of human rights, in which the duty is also context dependent.

Due diligence has been applied as a principle under international human rights law by several monitoring bodies and human rights courts, examples of which will be discussed in Chapters 5 and 6. While it has been interpreted and applied slightly differently by the various bodies, a very common expression of the duty is that to 'prevent, investigate and punish' human rights violations by private actors.[57]

#### 1.3.3.2. The development of due diligence in international human rights law

It is important to be aware that the changes taking place in relation to globalisation, privatisation and the increased power of non-State actors may affect the way in which due diligence develops. On the one hand, the

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[55] Reports of International Arbitral Awards, *Trail Smelter Case*, (United States, Canada), 16 April 1938 and 11 March 1941, Vol. III, 1905-1982, discussed in Barnidge (n 54) 99-102.
[56] This was seen to some extent in the *United States Diplomatic and Consular Staff in Tehran (Hostages) case* (*United States of America v Iran*) 1980 ICJ Rep 3, in which the International Court of Justice held Iran to have failed in its duty of due diligence to protect the premises of the United States of America's (US) embassy in Tehran, and to act preventively, (despite giving previous assurances) when the embassy was sieged by private actors. See Barnidge (n 54) 110-113.
[57] See e.g. *Velásquez-Rodríguez v Honduras*, IACHR (Ser. C) No. 4 (29 July 1988) paras 79, 172.

changing nature of the relationship between certain non-State actors, the State and individuals, and the taking on of more traditionally State functions by non-State actors (i.e. through the provision of State services), may mean that the scope of the obligation to protect and the duty of due diligence will expand accordingly. As a State secedes more activities to non-State actors, it may be necessary for a wider-ranging duty to emerge. This may be happening in relation to some actors. The UN Guiding Principles on Business and Human Rights, for example, detail the duties that States should observe in relation to businesses.[58] The Principles provide for concrete measures that States should take to protect individuals from the harmful actions of businesses. For example, they require States to ensure that there are effective mechanisms in place for individuals to gain redress for human rights-related harm they have suffered at the hands of multinational corporations.[59] We see similar standards in the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises,[60] which require all adhering States to establish National Contact Points to deal with situations in which a multinational corporation is believed to have negatively affected an individual's human right.[61]

On the other hand, the new levels of influence being reached by some non-State actors could mean that the obligation to protect becomes increasingly difficult to fulfil. For example, in the context of multinational corporations, it may be difficult to obtain information relating to their daily operations. Non-governmental organisations (NGOs) trying to improve the human rights impact of multinational corporations in the coal industry have often found that corporations are unwilling to share information with States, or with the public at large.[62] Short of States obliging corporations to provide

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[58] UN Human Rights Council (n 43).

[59] ibid Principle 25. The Principles will be introduced in more detail in Chapter 3.2.

[60] Organisation for Economic Cooperation and Development, 'OECD Guidelines for Multinational Enterprises' (2000, revised version 2011) <http://www.oecd.org/corporate/mne/48004323.pdf> accessed 25 August 2017.

[61] ibid Guideline 11. The Guidelines and the National Contact Points will be introduced in more detail in Chapter 3.2.

[62] See SOMO and ICN, 'Time for Transparency: The Case of the Tamil Nadu Textile and

information, it may be difficult to determine which measures need to be taken by States under the duty of due diligence in order to ensure that the daily operations of such corporations do not infringe the human rights of (for example) their employees. A worrying trend of political influence of corporations may even mean that the State is unable to take the requisite measures to oblige a corporation to publicise information without the threat of losing the investment of the corporation within its territory.[63]

In addition, the vast range of non-State actors and the circumstances in which they operate may make it impractical to develop concrete standards that States should follow under the duty of due diligence. Indeed, this may not even be desirable given that the contextual nature of the duty suggests a case-by-case analysis of what States must do. The fact that due diligence is a duty of conduct rather than result is also of relevance here. This means that it is not the *outcome* of State action that will render the duty fulfilled, but the fact that the action has actually been taken (provided that it is appropriate).[64] Although reasonable (it must be acknowledged that States have a limited capacity to act, particularly due to restraints on resources), this underlines the major setback of the obligation to protect in achieving its aim of protecting individuals from the harmful actions of non-State actors. A victim who brings a complaint against a State using the obligation to protect will not be able to gain any kind of redress for the violation of their rights if the State has taken all feasible measures and still failed to regulate the actions of the non-State actor to the effect that they respect human rights. The lack of direct obligations for non-State actors precludes the victim from obtaining a remedy

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Garment Industry' (2013) <http://www.indianet.nl/pdf/TimeForTransparency.pdf> accessed 25 August 2017, 1-2.

[63] Daniel Aguirre, 'Multinational Corporations and the Realisation of Economic, Social and Cultural Rights' (2004) 35 California Western International Law Journal 53, 53-54. Worryingly, this extends to influence at the global level, for example over policy-making at the World Trade Organization. See Action Aid Trade Justice Campaign, 'Under the Influence: Exposing Undue Corporate Influence over Policy-Making at the World Trade Organization' (2006) <www.actionaid.org> accessed 25 August 2017.

[64] Nigel D White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs.' (2012) 31 Criminal Justice Ethics 233, 254.

vis-à-vis the direct perpetrator of the harmful acts, and the duty of due diligence precludes them from gaining it indirectly, whereas if the case had been brought against the State that had, itself, committed the same actions as the non-State actor in this scenario, the victim would have been able to gain some kind of redress. This obviously leaves a legal lacuna. Further critique of the obligation to protect will be left to the following chapters' analysis of horizontal effect in practice.

### *1.3.4 The obligation to fulfil human rights*

The CteeESCR has given content to the obligation to fulfil through its General Comments. In particular, the CteeESCR stated in General Comment No. 12 on the right to adequate food that the obligation to fulfil actually requires States to both facilitate and provide this right.[65] To facilitate human rights requires States to 'proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food and security'.[66] The obligation to provide requires direct or indirect State services when individuals or groups are unable, for reasons beyond their control, to realise the right themselves by the means at their disposal.[67]

The obligation to fulfil does not, however, automatically oblige States to provide the means and the enjoyment of the rights themselves – a misunderstanding that is apparently widespread, and perpetuates a very narrow understanding of the nature of (economic social and cultural) rights.[68] On the one hand, the typology envisages individuals being able to secure the enjoyment of their rights themselves as being the ultimate goal of human rights, with States only stepping in (in terms of the provision of resources) as and when individuals do not have the capacity to do this. Indeed, Eide saw

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[65] UN CteeESCR, 'General Comment No. 12' (n 30).
[66] This quotation is also persuasive evidence of the interdependence and interrelatedness of human rights. See ibid, as quoted in Office of the United Nations High Commissioner for Human Rights (n 35) 19.
[67] UN CteeESCR, 'General Comment No. 12' (n 30).
[68] Asbjørn Eide, 'Economic, Social and Cultural Rights as Human Rights' (n 33) 28.

this not only as a possibility, but an expectation to be placed on individuals.[69] On the other hand, States are not expected to directly provide all of the resources necessary for human rights enjoyment. Instead, it is accepted that they delegate tasks such as the provision of essential services concerning human rights to private actors. The State would still remain ultimately responsible for ensuring that these private actors are regulated effectively enough to ensure that the provision of the services complies with human rights standards (whether or not the issue of human rights is actually made explicit in the delegation of tasks). Interestingly, this is also reflected in universal service obligations, for example the EU Universal Service Directive of 2002.[70]

According to the Maastricht Principles, the obligation to fulfil (as a whole) requires 'states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.[71] The obligation could therefore include the provision of public services by the State, the development of targeted plans of action and strategies, and 'comprehensive and immediate legislative and policy reviews'.

In addition to the obligations found in the tripartite typology, the CteeESCR has repeatedly referred to measures to be taken by States in order to *promote* human rights. This is not mentioned as another branch (or sub-branch, as is the case with the obligations to facilitate and provide) of the typology. Rather, it appears to permeate each of the State's obligations under the typology. This could be because Member States of the United Nations are arguably already under a separate, general obligation to promote human rights under Article 55 of the United Nations Charter[72] (and arguably also

[69] ibid 29.
[70] European Union, Universal Service Directive, 2002/22/EC.
[71] Maastricht Principle No. 6, as cited in the Office of the United Nations High Commissioner for Human Rights (n 35) 15.
[72] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. Article 55 states that the UN 'shall promote: […] universal respect for, and observance of, fundamental freedoms for all without distinction as to race, sex, language or religion'. The UDHR refers to the affirmation of States' faith in human rights through the

under the Universal Declaration of Human Rights).[73] The added value of making reference to measures to promote human rights lies in the fact that the obligation, which is interestingly not included in the ICESCR itself, has been given more content by the CteeESCR in relation to specific situations. In General Comment No. 14, for example, the CteeESCR explained that in the context of the right to the highest attainable standard of health, the obligation to promote would require States 'to undertake actions that create, maintain and restore the health of the population'.

### *1.3.5 A critical comment on the tripartite typology of human rights*

A full assessment of the tripartite typology and its various dis/advantages falls outside of the scope of this study, but several aspects must nevertheless be addressed. Firstly, although the typology has been widely applied and expanded upon by the CteeESCR, it remains a non-legally binding construct, which has not been codified in international human rights law instruments themselves. This does not necessarily diminish the effect or advantages of using the typology as a starting point for human rights obligations, and does not take away from the fact that the way in which it has evolved has contributed to a much greater understanding of the concrete measures expected to be taken by States in order to comply with their human rights obligations.

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adoption of the UN Charter, which supports a finding that Article 55 also places obligations upon the Member States, rather than only the UN as a whole. See UDHR preamble.

[73] The preamble of the UDHR reiterates that 'Member States have pledged themselves to achieve…the promotion of universal respect for and observance of human rights and fundamental freedoms'. It further determines that States 'shall strive by teaching and education to promote respect for' human rights. As it involves matters external to the administration of the UN and was adopted via a resolution of the UN General Assembly, the UDHR is not legally binding itself (see Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 1212). There have been, however, a variety of claims as to the binding nature of the rights contained within the UDHR as reflecting norms of customary international law. An assessment of the accuracy of these statements falls outside of the scope of the present chapter, but the widespread claims do demonstrate the influence that the UDHR has had on the development of international human rights law since its adoption. For a fuller discussion on the legal status of the UDHR see Vojin Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (2006) *ISPI Working Papers WP-7* 8-10.

Contrary to remaining a scholarly concept, the typology has also been applied by bodies outside of the United Nations human rights system. For example, as noted by Coomans, the African Commission applied the typology in the case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*.[74] However, it is important to bear in mind (particularly when looking at the typology in the context of potential human rights obligations for non-State actors) that it may not be the *only* way of de-conceptualising human rights and breaking them down into concrete guidance for States. In particular, although the typology has had a very widespread impact on the breakdown of economic, social and cultural rights in particular, it is not immediately obvious how it is intended to work in coordination with the progressive realisation of rights demanded by Article 2(1) ICESCR. There may indeed be no conflict between the two concepts. Nevertheless, the typology and the way in which it has been fleshed out itself does not seem to pay attention to which parts of the typology (or indeed parts of each obligation within it) would be immediately realisable, or would form part of the 'minimum core' of human rights obligations.[75] However, the repeated use of the typology, specifically within the area of economic, social and cultural rights, suggests that both academics and institutions have been able to circumvent potential issues.

### 1.4 Concluding reflections on the classifications of human rights

Based on the foregoing discussions, some general conclusions can be drawn. Interestingly, despite manifest developments in the categories and content of human rights and the boom of human rights treaties dealing with specific vulnerable groups or areas of concern (i.e. indigenous peoples, women,

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[74] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No.155/96 (27 October 2001) paras 45-47. This case will be discussed in detail below, sufficing at this point to note, as Fons Coomans highlighted, that the Commission took an 'obligation approach' in this case. This entailed interpreting the African Charter on Human and Peoples' Rights by reference to the obligations to respect, protect and fulfil human rights. See Coomans (n 24) 749.

[75] As introduced by UN CteeESCR, 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 10.

people with disabilities, torture, capital punishment, etc.), similar progression has not been made in other aspects of human rights law; irrespective of huge societal changes and shifts in the division of power within a societies and States, the sole bearers of international human rights law obligations remain States, to the exclusion of non-State actors. This is for several reasons, which will be discussed in Chapter 2.

The tripartite typology remains a useful tool for several reasons. Firstly, by taking an 'obligations approach' to human rights, the typology focuses attention on the concrete actions that are expected of States by virtue of their commitments to human rights treaties. Further, its application in human rights monitoring helps to determine when there has been a violation in particular cases. The concept is especially advantageous as it transcends undesirable distinctions or hierarchies between different human rights. For these reasons, this study will take the tripartite typology as a starting point for the delineation of human rights obligations.

Chapter 2

# The traditional, State-centric approach to human rights

## 2.1 Preliminary remarks

This chapter explains the traditional, State-centric approach to international human rights law and the widespread reluctance to make non-State actors direct subjects of international human rights obligations. First, some general observations on the vertical effect of international human rights law are made. A brief comparison between the nature of obligations under international humanitarian law and criminal law on the one hand, and international human rights law on the other – spheres of international law which do have some (rather substantial) overlaps in terms of content of norms – is then drawn. This serves to highlight that human rights law has evolved with a strong actor-oriented perspective, whereas the other two fields have evolved with a more results-based approach. Following this, the attitudes of States and of scholars towards changing the nature of human rights obligations to include horizontal application are examined.

## 2.2 General observations on the vertical effect of human rights obligations

It is common knowledge amongst international lawyers that the nature of international human rights obligations is vertical – being owed by the State (as obligation-holder) to the individual (as beneficiary, or right-holder). The term ‘vertical’ is used to demonstrate that the State, as an international actor and regulated by international law, is placed on a ‘higher’ playing field than the individual, who typically operates within a State and is therefore

regulated by national law. The vertical effect of human rights law stems predominantly from the fact that traditionally, only States can become party to human rights treaties and therefore be legally bound by their obligations (although Jan Hessbruegge emphasises that this incapacity does not exclude obligational relationships in the non-State sphere[1]).[2] Furthermore, only States can be the subject of individual complaints or cases before the international human rights treaty monitoring bodies and the regional human rights courts. Despite the increased power and influence of non-State actors, there have been no real correlative developments in international human rights law allowing for obligations to be applied between two actors of the same kind operating on the same legal plane.[3] This is known as the 'horizontal effect' of human rights, and will be examined in Chapter 3.

In other spheres of international law, namely international humanitarian and criminal law, it is possible for non-State actors (even individuals) to be held directly responsible for violations of international norms. This is despite the fact that they do not actually ratify the treaties in which these norms are embodied.[4] Some scholars believe that this is acceptable in these areas of law but that to apply the same concept to human rights law would be inappropriate.[5] This may be because of the 'special'

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[1] Jan A Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights Law Review 21, 31-32.

[2] An exception to this is expected with the accession of the European Union to the European Convention on Human Rights. This was legally mandated by the Lisbon Treaty, but although an accession agreement was negotiated, it was rejected by the European Court of Justice in 2015. Since then, no new agreement has been successfully negotiated, casting doubt as to when (or even whether) the accession will take place. See European Parliament, 'Briefing: EU accession to the European Convention on Human Rights' (July 2017) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf> accessed 6 November 2017.

[3] At the national level, it is sometimes possible for non-State actors to be human rights obligation-holders, if the relevant norms have been included in domestic legislation. Examples of this will be discussed in Chapter 7.

[4] This is reflected in the notion of 'individual criminal responsibility', discussed briefly below.

[5] For example, Cedric Ryngaert, despite supporting the application of human rights law to non-State armed groups to a limited degree, emphasises the distinction between the rationales behind both applications, with that of international human rights law being the vertical nature

nature of international human rights treaties as creating a relationship of trust between the ratifying State and individuals. 'Regular' international treaties, on the other hand, create a 'web of inter-State exchanges'.[6] In the past, this has prompted some to treat human rights treaties differently from other international treaties.[7] Some authors go so far as to assert that this gives human rights treaties superiority over other treaties,[8] despite the lack of any rule in international law allowing for such a hierarchical notion.

Just as this difference in the nature of the treaties (i.e. the lack of reciprocal obligations within human rights treaties) may be to blame for this attitude, it could similarly be down to the differing natures and philosophies behind the regimes, which have been reflected through the (separate) development of each field of international law.[9] Taking the example of humanitarian law and human rights law, while some norms within each system may require similar conduct or outcomes,[10] the 'realities that each

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of the relationship between rights and obligation-holders, and that of international humanitarian law being the necessity of civilising armed conflicts. Cedric Ryngaert, 'Non-State Actors and International Humanitarian Law' (2008) Katholieke Universiteit Leuven Institute for International Law, *Working Paper No. 146*, 5.

[6] UN HRCtee, 'General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant' (4 November 1994) CCPR/C/21/Rev.1/Add.6, para 17.

[7] E.g. *The Effects of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* Advisory Opinion OC-2/82, IACHR (Ser. A) No. 2 (24 September 1982) para 29.

[8] See e.g. Menno T Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 European Journal of International Law 469.

[9] For a more substantive discussion and comparison of these philosophies see Louise Doswald-Beck and Sylvain Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 International Review of the Red Cross.

[10] For example, both regimes prohibit torture and cruel treatment. See Article 75(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) UNTS vol. 1125, 3 and Article 4(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) UNTS vol. 1125, 609; and Articles 1 and 16 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered

was primarily crafted to regulate' are different.[11] The rationale behind international humanitarian law, which applies only during armed conflicts, is to 'diminish the devastating human cost of conflicts',[12] seeking to avoid unnecessary and superfluous suffering. In particular, international humanitarian law focuses on protecting individuals that are not directly taking part in hostilities (i.e. civilians and those *hors de combat*). International human rights law, on the other hand, seeks to protect *all persons* within a State's jurisdiction at *all times*, and does not distinguish between categories of people to be protected.[13] The different aims of the regimes are reflected in their rules on the taking of life – while both in essence allow non-arbitrary killing, the understanding of 'arbitrariness' is different within each regime. Humanitarian law 'accepts the killing of combatants and fighters and tolerates the killing of civilians in certain limited circumstances'.[14] This is significantly broader than the scope of killing allowed under international human rights law. Although killing by the State (as obligation-holder) is allowed in some situations, this is generally considered to be limited to instances of law enforcement officials acting in self-defence or through the implementation of the death penalty (the imposition of which is also subject to strict conditions).[15]

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into force 26 June 1987) UNTS vol. 1465, 85.

[11] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 131.

[12] This is evidenced by the rule of distinction, allowing only the targeting of 'military objectives', and outlawing any targeting of civilians. See International Committee of the Red Cross, 'Customary International Humanitarian Law, Rule 1', as discussed in Lottie Lane, 'Mitigating Humanitarian Crises during Non-International Armed Conflicts – the Role of Human Rights and Ceasefire Agreements' (2016) 1(2) Journal of International Humanitarian Action, 3.

[13] International Committee of the Red Cross, 'What is the difference between IHL and human rights law?' (22 January 2015) <https://www.icrc.org/en/document/what-difference-between-ihl-and-human-rights-law> accessed 6 November 2017.

[14] ibid.

[15] For an explanation of 'arbitrary' killing under international human rights law, see Icelandic Human Rights Centre, 'The right not to be arbitrarily killed by the State' <http://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-life/the-right-not-to-be-arbitrarily-killed-

International criminal law developed in part as an enforcement mechanism for international humanitarian law (and to the extent that the norms overlap, international human rights law).[16] Although there are now multiple international criminal tribunals, the majority are not permanent and are restricted in their scope to hear cases related to specific conflicts.[17] The exception is the permanent International Criminal Court which began operating in 2002, nearly 50 years after the (respective) great international developments of human rights and humanitarian law.[18] The treaty-based system allows State as well as non-State individuals accused of grave violations of humanitarian law to be held internationally and individually responsible for their actions.[19] The notion of individual criminal responsibility is found in Article 25 Rome Statute.[20] The provision allows

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by-the-state> accessed 6 November 2017.

[16] For an informative discussion of the history and development of international criminal law, see Beth Van Schaak and Ron Slye, *International Criminal Law: The Essentials* (Aspen Publishers 2009).

[17] This refers, for example, to the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, the latter having closed in 2015. For an overview of the tribunals' work, see respectively United Nations, 'International Criminal Tribunal for the former Yugoslavia' <http://www.icty.org/> accessed 6 November 2017; and United Nations, 'Mechanism for International Criminal Tribunals' <http://unictr.unmict.org/> accessed 6 November 2017.

[18] The International Criminal Court (ICC) began operating when the Rome Statute entered into force on 1 July 2002. See International Criminal Court, 'Understanding the International Criminal Court' <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> accessed 29 August 2017. The European Court of Human Rights began operating in 1959. See Council of Europe, European Court of Human Rights, 'The Court in Brief' <http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> accessed 29 August 2017.

[19] Unlike the more local international tribunals (for the Former Yugoslavia and Rwanda), the ICC was established through treaty rather than through a UN Security Council Resolution. While this may seem to lend the system more legitimacy as States can actively decide whether to be bound by the Rome Statute and comply with the ICC (as opposed to being obliged to comply with the hybrid courts due to Article 25 UN Charter), its dependency on the willingness of States to cooperate with the Court has (and will continue to) hampered its effect in practice. See e.g. Catherine Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace' (2013) 34(5) Third World Quarterly 800.

[20] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

individuals to be held 'individually responsible and liable for punishment' at the international level for committing war crimes, crimes against humanity, genocide, or crimes of aggression.[21]

Unfortunately, the laudable initial rationale that prompted the growth of international human rights law (the protection of individuals from abuse of authority by the State) has become outdated due to the amount of authority (and potential for its abuse) wielded by non-State actors. Methods of achieving the rationale were (necessarily) developed within the confines of the international legal order, which, as already stated, is strongly focused on the nation-State. Nonetheless, a change of focus for the rationale (for example, to the protection of human rights *per se*) is now evident in much of the literature. Regrettably, the views have yet to be transposed into effective mechanisms, whether legal or not, to protect individuals from abuse of authority by non-State actors. Instead, the legal framework has remained a blinkered system.

The different rationales behind international human rights and humanitarian law have led to different relationships between the obligation-holder and the beneficiary in both regimes. Under international humanitarian law, obligations are owed not only by the State but also by any non-State individuals that are party to the conflict. As all parties owe each other and benefit from the same obligations (at least when obligations are abided by),[22] obligation-holders and beneficiaries are placed on a more level playing field and the obligations become more horizontal in nature. As Daniel Helle has noted, international humanitarian law is based on an equality of obligations for all parties to the conflict.[23] This corresponds much more closely to the usual nature of obligations in international treaties, which apply horizontally and reciprocally between ratifying States (again, based on the concept of

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[21] See generally Edoardo Greppi, 'The Evolution of Individual Criminal Responsibility under International Law' (1999) No. 835 International Review of the Red Cross.
[22] Lane (n 12) 3.
[23] Daniel Helle, 'Optional Protocol on the Involment of Children in Armed Conflict to the Convention on the Rights of the Child' (2000) International Review of the Red Cross No. 389.

State sovereignty).

Given the particularities of international humanitarian, criminal and human rights law, it is understandable that the latter has developed in a different way from other areas of international law. The following sections will explore some central reasons for the reluctance of States and scholars to accept a development of the international human rights law framework in favour of direct human rights obligations for non-State actors.

### *2.2.1. Attitudes of States*

One of the most prevalent reasons for States to reject the extension of human rights obligations to bind non-State actors is their concern that doing so would lend the non-State actors legitimacy,[24] almost endorsing their often atrocious behaviour.[25] Reluctance on the grounds of legitimacy also stems from the fact that States are bound by human rights obligations because they have ratified the relevant treaties, consenting to be bound by the norms. The capacity for doing this goes hand in hand with international legal personality,[26] which allows an entity to have rights and duties at the international level and be viewed as a legitimate player in the international field.[27] Allowing non-State actors that have limited capacity and personality

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[24] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) Yale Journal of International Law, 108.

[25] The limitations of the obligations on non-State actors within the Optional Protocol must also be addressed here. The Convention places only 'negative' obligations on non-State actors, involving a lack of action, as opposed to 'positive' obligations which require action specifically designed to fulfil human rights (see below).

[26] This link was made by the International Court of Justice in the Reparations for Injuries case, in which it confirmed the international legal personality of the United Nations on the basis of several factors, including its capacity to conclude treaties: *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 ICJ Rep 174, 179, as noted in Philippe Sands, Pierre Klein and DW Bowett, *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009) 475.

[27] See Icelandic Human Rights Centre, 'International Legal Personality' <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/international-legal-personality> accessed 29 August 2017.

and have not ratified the relevant human rights treaties to be bound by their obligations could undermine the primary principle of State sovereignty.[28]

The Optional Protocol to the Convention on the Rights of the Child relating to the treatment of children in armed conflicts implicitly has the effect of dispelling the legitimacy concern.[29] As will be discussed in more depth in Chapter 4, Article 4 of the Protocol refers to the obligation of non-State armed groups to refrain from using and recruiting child soldiers. This would perhaps seem to raise, rather than quell concerns, were it not for the fact that Article 4 explicitly states that the obligation of the groups 'in no way alters the status of any parties' to which it applies. In addition, in a guide to the Optional Protocol, the United Nations Children's Fund (UNICEF) points out that the language of Article 4 also reflects the fact that no legal status is conferred upon non-State groups through the provision.[30] It can be inferred from this that the drafters of the provision were aware of, and wished to render obsolete, the concerns that States may have had (or even of the inference that the non-State groups may make themselves) relating to the effect that including obligations for non-State actors in an international treaty

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[28] There is currently some debate around whether particular non-State actors have a degree of international legal personality and can therefore have rights and duties at the international level (outside the context of individuals as beneficiaries of international human rights). See e.g. William Thomas Worster, 'Relative International Legal Personality of Non-State Actors' (2016) 42(1) Brooklyn Journal of International Law 207. It may be questioned how international humanitarian and criminal law can impose obligations on non-State actors in the absence of their ratification of treaties. Indeed, in the context of the equality of obligations mentioned above, 'any idea that an armed group…could be equal to a sovereign state in any respect is heresy for governments obsessed by their Westphalian concept of state sovereignty.' Marco Sassòli, 'Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?' (2011) 93(882) International Review of the Red Cross 426, 427. Yuval Shany suggests that it is the very principle of belligerent equality that 'symbolizes…professionalism, "fair play", and justice, which serve as part of the historic building blocks of [international humanitarian law]'s legitimacy'. Yuval Shany, 'A rebuttal to Marco Sassòli' (2011) 93(882) International Review of the Red Cross 432, 434.

[29] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002).

[30] UNICEF, 'Guide to the Optional Protocol on the Involvement of Children in Armed Conflict' (2003) <https://www.unicef.org/publications/index_19025.html> accessed 29 August 2017.

may arguably have.

It may be difficult for States to accept and to adopt this approach on a bigger scale, however. As suggested above, the widespread use of such provisions would also raise concerns of procedural legitimacy of the treaties themselves in imposing obligations on entities without their consent.[31] Furthermore, such provisions would require at the outset a certain swallowing of pride by States in recognising that a non-State actor has enough power and capacity to be able to take on equal (or at least similar) international obligations as the State.

This is also an issue in relation to the recognition of States of the validity of voluntary undertakings of non-State actors for what concerns human rights. We can see from State practice that the extent to which States are willing to do this differs according to what kind of non-State actor is involved. In the context of multinational corporations, States have been less hesitant to accept promises of observing some human rights obligations. This is evidenced in the widespread support that the UN Guiding Principles on Business and Human Rights[32] obtained from States, as well as the fact that a group of States successfully lobbied the Human Rights Council for official discussions to open regarding a binding international treaty on business and human rights.[33] In relation to non-State armed groups, however, the situation

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[31] Procedural legitimacy mandates that 'international norms that affect non-state actors […] are in need of the latter's participation in order to be legitimate'. A full discussion of this falls outside the scope of this chapter, it sufficing to note at this point that some academics believe procedural legitimacy to be unnecessary if the implementation of the norm is of paramount importance. See Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noormann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 71-72, 73.

[32] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) A/HRC/17/31.

[33] In 2014 an Open-ended intergovernmental working group regarding transnational corporations and other business enterprises in relation to human rights was established by the UN Human Rights Council to elaborate a binding international treaty on business and human rights. See UN Human Rights Council, Resolution 26/9 (14 July 2014) A/HRC/RES/26/9. The UN Guiding Principles on Business and Human Rights and other developments

is somewhat different. Many such groups have adopted declarations or agreements (usually with non-governmental organisations such as Geneva Call) voluntarily committing themselves to international obligations, including some human rights obligations.[34] However, these have not garnered much State support. States are reluctant to recognise the capacity of non-State armed groups to enter into international agreements or to fulfil human rights obligations. Therefore, they have often rejected the validity of such agreements.

While interesting, it is also understandable from a political perspective. Unlike non-State armed groups, multinational corporations do not *usually* have a political agenda, such as taking control over an area of a State's territory, and/or usurping the sovereign role of the State to some extent. Although their intentions may not always be honourable, multinational corporations do not therefore pose a direct threat to the very existence of a nation-State. Furthermore, giving these entities some kind of international obligations would not consequently aid a corporation in its aim, whereas it could with regards to non-State armed groups.

It may be concluded that the attitude of States towards treating non-State actors as subjects-proper of international human rights law are in some cases still largely relevant. However, the practice of (some) States in some situations (for example with the Guiding Principles) shows that there has been some development in States' attitudes, with a more nuanced approach being taken towards their various concerns in imposing direct human rights obligations on non-State actors.

### *2.2.2. Attitudes of scholars*

The reluctance of scholars to accept the direct application of human rights treaties to non-State actors could be due to the perception that non-State actors are incapable of ensuring obligations themselves due to their lack of resources and influence.[35] The credit of this argument must be recognised,

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concerning business and human rights are further discussed in Chapter 3.2.

[34] For an in-depth discussion, see Chapter 11.

[35] This is implied by Chris Jochnick's assertion that States were given full responsibility for

but to state this in such a blanket way is to both simplify the situation and underestimate non-State actors to quite a large extent. The degree to which the argument is contestable is very context-dependent and will depend upon the kind of actor involved. For example, one could not reasonably expect an individual to secure the civil and political right to a fair trial, or the right to vote.[36] One may, however, reasonably expect a multinational corporation not to forcibly evict individuals from their homes so that they may use the area for their business operations. It may even be reasonable to expect such a corporation to provide individuals within a community with resettlement, should they require the community to relocate.[37] Although discussed in more detail in Chapter 3, it is relevant to note here that since the breakdown of obligations into the tripartite typology of 'respect', 'protect' and 'fulfil',[38] it could be argued that all non-State actors have the means to at least *respect* the human rights of other individuals by refraining from interfering with them through their own conduct.[39]

An additional objection of scholars to the imposition of human rights obligations on non-State actors is that it could allow States to hide behind the non-State actors' obligations and try to elude their own responsibility.[40]

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guaranteeing human rights as 'they, and they alone, were capable of doing so'. Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 Human Rights Quarterly 56, 59.

[36] Although States may impose certain standards of behaviour on individuals through their domestic laws requiring them to refrain from interfering with the enjoyment of these rights.

[37] See for discussion, Lidewij van der Ploeg and Frank Vanclay, 'A Human Rights Based Approach to project-induced displacement and resettlement (2017) 35(1) Impact Assessment and Project Appraisal 34.

[38] Introduced by Eide in the 1980s and revised extensively by the UN CteeESCR in its General Comments. See UN Special Rapporteur for the Right to Food, Asbjørn Eide, 'The Human Right to Adequate Food and Freedom from Hunger' (1987) E/CN.4/Sub.2/1987/23; UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (12 May 1999) E/C.12/1999/5. See also Chapters 1 and 3.

[39] A detailed application of this framework to non-State actors will take place in Chapter 3.

[40] Nirmalan Wigneswaran, 'Judicial Leadership in International Human Rights: Developments in the Law of State Responsibility In Human Rights' Tokyo Foundation 2009 <http://www.tokyofoundation.org/sylff/wp-content/uploads/2009/03/sylff_p147-172.pdf> accessed 29 August 2017.

States could potentially argue that the fulfilment of a particular right was the responsibility of a non-State actor, not themselves, and therefore preclude them from having to fulfil the right themselves. As John Knox points out, the negotiators of the UDHR acknowledged the danger of including duties in the document and the fact that States could use the duties of non-State actors to shield themselves from their own obligations.[41]

Similarly, it would be possible for governments to rely on the duties of non-State actors to limit individuals' rights as they wished.[42] This could be by imposing converse duties on individuals (i.e. those owed to the State or to society, which 'run conversely to the vertical duties of the government to promote and protect' human rights[43]) as opposed to the correlative duties ('private duties to respect the rights of others') that would be preferable.[44] John Knox has noted that during the negotiations of the UDHR,[45] John Humphrey (the first director of the UN Human Rights Division)[46] had suggested including private duties to 'contribute to the common good' of society and the State.[47] This was rejected out of fear of abuse by States.[48]

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[41] John H Knox, 'The Universal Declaration of Human Rights [and Duties]' (*Opinio Juris*, 6 November 2007) <http://opiniojuris.org/2007/11/06/the-universal-declaration-of-human-rights-and-duties/> accessed 29 August 2017.

[42] John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) The American Journal of International Law 1, 34.

[43] ibid 1-2.

[44] ibid 2.

[45] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

[46] See Knox, 'The Universal Declaration of Human Rights [and Duties]' (n 41).

[47] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 239-240, 248, cited in John H Knox, 'Horizontal Human Rights Law' (2008) 102 The American Journal of International Law 1, 5.

[48] See Knox, 'The Universal Declaration of Human Rights [and Duties]' (n 41). Roger Alford believes this to be incorrect, citing a passage by Cassin (the principal drafter of the UDHR) to argue that duties were excluded to avoid implying a 'metaphysical and religious statement about the nature of man'. Cassin had found the challenge to be finding 'a formula that did not require the Commission to take sides on the nature of man and society, or to become immured in metaphysical controversies, notably the conflict among spiritual, rationalist, and materialist doctrines on the origin of human rights'. See his response to Knox's post, submitted on 6 November 2007.

However, the inclusion of 'duties to the community' in Article 29(1) of the UDHR may be interpreted as leaving the elucidation of these duties the prerogative of the State. The safeguard of Article 29(2), the language of which has been adopted and developed in the core international human rights treaties (the so-called 'legitimate limitations' clauses to be discussed in Chapter 3 of the present book)[49] should provide adequate protection against abuse by States, as it essentially confines limitations to those necessary to protect society or the rights of others.[50] However, given the context of the adoption of the UDHR as the first major human rights document, it is understandable that such caution was taken. It is due to this potential abuse of private obligations that the transparency and extent of obligations owed by non-State actors, if introduced, would have to be made explicit, and international regulation would be necessary, limiting the power of States in this context.

## 2.3 Concluding reflections on the State-centric approach to human rights

The above discussion demonstrates that placing direct human rights obligations on non-State actors faces many different challenges, routed both in the international human rights legal framework as well as in the attitudes of States and scholars. The way in which the regime has developed legally has not allowed space for application to non-State actors, primarily due to concerns of State sovereignty. Although some of the beliefs or concerns arising from the possible application of human rights law to non-State actors remain real and relevant in today's society, there are some ways of circumventing undesirable outcomes (as seen with Article 4 Optional

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[49] E.g. Article 4 of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS vol. 993, 3 allows for limitations of the rights it contains, but 'only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

[50] Article 29(2) reads: '[...] everyone shall be subject only to such restrictions 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.*' [emphasis added].

Protocol to the Convention on the Rights of the Child). The attitudes are important to bear in mind when deciding how to move forwards with encouraging the compliance of non-State actors with international human rights law standards. Despite widespread pressure to do so, the international community has not yet given in to calls for international obligations for non-State actors.

## Chapter 3

# Horizontal effect of international human rights in the current legal framework[1]

### 3.1 Preliminary remarks

As explained in Chapter 2, international human rights obligations are vertical in nature and do not apply between non-State actors. Nevertheless, there is a huge volume of literature and research trying to identify the best way to protect human rights from non-State actors and hold them responsible for violations. Human rights scholars tend to divide the application of human rights obligations to non-State actors into two strands; (1) 'direct horizontal effect'; and (2) 'indirect horizontal effect', which will both be examined in this chapter. The terms are very often used in the fields of constitutional law and private law, particularly within the European context.[2] Much of the

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[1] Parts of this chapter have been published in: Lottie Lane, 'The horizontal effect of international human rights law in practice: A comparative analysis of the general comments and jurisprudence of selected United Nations human rights treaty monitoring bodies' (2018) 5(1) European Journal of Comparative Law and Governance 5.

[2] In the context of fundamental rights within the European Union, see, e.g., Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016); Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014); Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Vol.*Marek Safjan, 'The Horizontal Effect of Fundamental Rights in Private Law – On Actors, Vectors, and Factors of Influence' in Purnhagen Kai and Peter Rott (eds), *Varieties of European Economic Law and Regulation* (Springer International Publishing 2014); Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014); Gert Brüggemeier, Aurelia Colombi Ciacchi

debate surrounding horizontal effect comes from, in particular, Germany and the United Kingdom.[3] However, the terms are also used at the international level, with scholars such as John H Knox discussing the 'horizontality' of international human rights law, and Thomas Gammeltoft-Hansen considering the 'direct' and 'indirect' responsibilities and obligations of non-State actors.[4] Although rarely, the term 'direct horizontal effect' has also been used by one of the UN human rights treaty monitoring bodies (see Chapter 5).

The aim of this chapter is to explain the concept of the horizontal effect of international human rights law. It therefore explains some of the ways in which it can be manifested and applies the tripartite typology of human rights obligations to non-State actors. The work of various scholars and examples from the practice of different adjudicatory bodies are used to illustrate horizontal effect. The examples of practice provided here are illustrative and do not necessarily coincide with those examined in the much more comprehensive analysis of horizontal effect in human rights jurisprudence conducted in Chapters 5, 6 and 7.

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and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Vol. I and II* (Cambridge University Press 2010); Aurelia Colombi Ciacchi, 'Social Rights, Human Dignity and European Contract Law' in Stefan Grundmann (ed), *Constitutional values and European contract law* (Kluwer Law International 2008); and Aurelia Colombi Ciacchi, 'Horizontal Effect of Fundamental Rights, Privacy and Social Justice' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing 2007).

[3] See e.g. Justin Friedrich Krahé, 'The Impact of Public Law Norms on Private Law Relationships' (2015) 2(2) European Journal of Comparative Law and Governance 124; Alison L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing 2007); Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 Modern Law Review 824. For discussion of horizontal effect in the German context, see for example, Kara Preedy, 'Fundamental Rights and Private Acts - Horizontal Direct or Indirect Effect? – A Comment' (2000) 1 European Review of Private Law 125.

[4] Thomas Gammeltoft-Hansen, 'The Practice of Shared Responsibility in Relation to Private Actor Involvement in Migration Management' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2016).

### 3.2 Direct horizontal effect of international human rights

The direct horizontal effect of human rights treaties 'lays duties directly upon a private body to abide by its provisions and makes breach of these duties directly actionable at the instance of an aggrieved party'.[5] In other words, it places non-State actors under direct and explicit obligations to respect, protect or fulfil human rights. Direct horizontal effect would allow individuals to gain redress directly against the perpetrator of their human rights, and to hold non-State actors directly responsible.

Direct horizontal effect is sometimes discussed from the perspective of a victim of a human rights violation, in which case it is considered to have two components – substantive and procedural. Substantive horizontal effect would enable individuals to claim violations of rights owed to them by non-State actors, whilst procedural horizontal effect would allow an individual to '*enforce* his fundamental rights against another individual'.[6] At the international level, this would challenge the existing rule that complaints of human rights violations may only be brought before human rights monitoring bodies (and for the most part, human rights courts) by individuals against States.[7] In today's international human rights framework, this is not possible. As it stands, neither substantive nor procedural direct horizontal effect can be found in international human rights law. This has been reiterated many times, for example by the UN Human Rights Committee (HRCtee) in General Comment 31: 'obligations are binding on States and do not, as such, have

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[5] Phillipson (n 3) 826.

[6] Pieter van Dijk and Godefridus JH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998) 23 [emphasis added].

[7] See, for example, Article 1 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171. Some human rights bodies allow complaints to be brought by other actors, such as non-governmental organisations, on behalf of an individual. However, the object of the complaint is always the individual concerned. As mentioned in Chapter 2.2, the European Union will be acceding to the European Convention on Human Rights, although it is not known precisely when this will happen. See European Parliament, 'Briefing: EU accession to the European Convention on Human Rights' (July 2017) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf> accessed 6 November 2017.

direct horizontal effect as a matter of international law' (see Chapter 5.3.1).[8]

Although this is the current state of play, there have been significant strides towards direct horizontal effect for business enterprises. Most notably, in July 2014 the UN Human Rights Council adopted Resolution 26/9, through which it established an open-ended, intergovernmental working group with the mandate 'to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'.[9] The working group has made considerable progress, with its latest report showing that a detailed framework and overview of the contents of a treaty on business and human rights has been developed.[10] However, it is it likely to be quite some time before a final version of the treaty has been adopted and gained enough State ratifications to enter into force.[11]

Slightly earlier developments towards direct human rights obligations for businesses occurred through the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs).[12] The UNGPs were drafted by

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[8] UN Human Rights Committee (HRCtee), 'General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 8.

[9] UN Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) A/HRC/RES/26/9. See also Lottie Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' in Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge 2017) 152-153.

[10] Chairmanship of the open-ended intergovernmental working group, 'Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> accessed 6 November 2017.

[11] For discussion of the development of a treaty on business and human rights, see e.g. Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1 Business and Human Rights Journal 203.

[12] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations

John Ruggie in his capacity as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and were unanimously endorsed by the UN Human Rights Council in 2011.[13] Significantly, the UNGPs contain a direct *responsibility* (as opposed to an obligation) for businesses to respect human rights, as well as a responsibility to conduct human rights due diligence (see Section 3.4.2.2).[14] Although the UNGPs are not legally binding, they have had a tremendous impact; both States and businesses have taken concrete action towards the implementation of the UNGPs. This includes, for example, the adoption of 'National Action Plans'[15] and national legislation by States (see below) and measures such as human rights impact assessments, human rights policy statements, reporting and training by businesses.[16]

The Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines)[17] have also helped to pave the way to direct horizontal effect for businesses. The OECD Guidelines were first adopted in 1976 and have been reviewed several times. The most recent review took place in 2011 and resulted in the addition of a

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"Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (UNGPs).

[13] UN Human Rights Council, Resolution 17/4, 'Human rights and transnational corporations and other business enterprises' (16 June 2011) A/HRC/RES/17/4.

[14] UN Human Rights Council, UNGPs (n 12) Principles 11 and 17.

[15] National Action Plans detail the government's activities and plans on how to help businesses improve their respect of human rights. For more information, see Office of the United Nations High Commissioner for Human Rights, 'State national action plans' <www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> accessed 6 November 2017. For a scholarly discussion of national action plans, see Claire Methven O'Brien and others, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' (2015) 1 Business and Human Rights Journal 117.

[16] For an extensive database detailing the action that has been taken by businesses and States to implement the UNGPs, see the Business and Human Rights Resource Centre, 'Type of Steps Taken' <www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-companies/type-of-step-taken> accessed 6 November 2017.

[17] Organisation for Economic Cooperation and Development (OECD), 'OECD Guidelines for Multinational Enterprises', 27 June 2000 (revised version 2011) <www.oecd.org/corporate/mne/> accessed 6 November 2017 (OECD Guidelines).

new chapter on human rights which is consistent with the UNGPs, strengthening the commitment to human rights already included in the OECD Guidelines.[18] As with the UNGPs, the OECD Guidelines are not legally binding. However, they require adhering States to establish a 'National Contact Point' (NCP), making it the only instrument on the responsibility of businesses that has a 'built-in grievance mechanism.'[19] NCPs are mandated to 'provide a mediation and conciliation platform for helping to resolve cases' of non-compliance with the OECD Guidelines.[20] Since the 2011 revision, the number of NCP cases dealing with human rights has increased dramatically.[21] However, even before this, some NCPs referred to international human rights treaties in their 'Final Statement' on a case.[22] While important, this is not altogether surprising, since the previous version of the Guidelines (adopted

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[18] Although the OECD Guidelines do include specific recommendations on human rights, they focus on responsible business conduct more generally. For an explanation of the Guidelines' content, aims and implementation, see OECD, 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (2014) 2 <http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf> accessed 6 November 2017.

[19] ibid.

[20] OECD, 'Cases handled by the National Contact Points for the OECD Guidelines for Multinational Enterprises' 1 <http://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf> accessed 6 November 2017.

[21] ibid.

[22] See, for example, UK National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Final Statement of 25 September 2009 (Survival International vs Vedanta Resources plc.', No. 58-62. The case concerned a British mining company called Vedanta Resources operating in India, which was found to have failed to conduct adequate impact assessments regarding in indigenous and human rights. Ultimately, the NCP found that the company 'did not respect rights and freedoms…consistent with India's commitments under various international human rights instruments.' See Amnesty International UK, 'Briefing for UK National Contact Point on Human Rights Implementation of OECD Guidelines for Multinational Enterprises' (February 2013) 9-10 <www.oecdwatch.org/publications-en/Publication_3966> accessed 6 November 2017. See also OECD Watch, 'Survival International vs Vedanta Resources plc' <www.oecdwatch.org/cases/Case_165> accessed 6 November 2017; and Ibrahim Kanalan, 'Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016* (Springer International Publishing 2016) 423.

in 2000) provided that companies should 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments',[23] and explicitly referred to the human rights legal framework.

Perhaps the UNGPs' and OECD Guidelines' most significant contribution to (binding) direct horizontal effect has been their influence on legislation adopted at the national and European level. Notable examples can be found in the United Kingdom. For example, both The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 and the Modern Slavery Act 2015 contain provisions requiring certain businesses to disclose information related to human rights.[24] In the Modern Slavery Act in particular, this extends, for businesses over a certain size, to information as to 'what action they have taken to ensure there is no modern slavery in their business or supply chains'.[25] Further examples of legislation influenced by the UNGPs can be found in France and the US.[26] A recent law passed in

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[23] OECD, 'OECD Guidelines for Multinational Enterprises', 27 June 2000, General Policies Chapter, para 2. <www.oecd.org/corporate/mne/2000oecdguidelinesformultinationalenterprises.htm> accessed 6 November 2017. See for discussion, Amnesty International UK (n 22) 4.

[24] Section 414C (7)(b) The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 No. 1970 requires quoted companies to prepare a 'strategic report' which must contain a review of the company's business 'to the extent necessary for an understanding of the development, performance or position of the company's business, include [...] social, community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies.' Examples of regional legislation influenced by the UNGPs include: European Union, Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (22 October 2014); and European Union, Regulation 2017/821/EU laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (17 May 2017). See also CLT Envirolaw, 'Overview of key Business & Human Rights Legislation for companies' <www.business-humanrights.org/sites/default/files/media/documents/clt_human_rights_legislation-1.pdf> accessed 6 November 2017.

[25] UK Government website, 'Modern Slavery Act 2015' <www.gov.uk/government/collections/modern-slavery-bill> accessed 6 November 2017; Part 6, Section 54(4) Modern Slavery Act 2015.

[26] An example from the US includes the California Transparency in Supply Chains Act (Civil

France requires certain companies to make 'vigilance plans' that must, *inter alia*, include 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms'.[27]

Further developments towards direct horizontal effect have been made through the jurisprudence of several national legal systems. A full discussion falls outside the scope of the present book due to its international focus, but it is interesting to see that some courts have held private owners of publicly accessible spaces to be directly bound by the fundamental rights to freedom of expression and freedom of assembly.[28] In effect, the private owners' enjoyment of their property rights have been limited in order to allow individual/s to exercise their right to freedom of expression/assembly.[29]

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Code Section 1714.43; Senate Bill 657 (Steinberg) (2009-10)). The legislation requires that certain private companies disclose 'efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale'. For discussion, see Kamala D Harris, 'The California Transparency in Supply Chains Act: A Resource Guide' (2015) <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf> accessed 6 November 2017.

[27] Loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (JO du 28eme mars 2017, no.1) (Law No. 2017-399 on the Duty of Care of Parent Companies and Ordering Companies). See for discussion Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317.

[28] The cases have been decided at the provincial and state level as well as the national level. See e.g. Supreme Court of California, *Robbins v Pruneyard Shopping Center* [1979] 23 Cal. 3rd 899. A similar example is a decision of the Federal Constitutional Court of Germany in which a private and publicly owned airport was held to be directly bound by fundamental rights. However, the airport in question was 52% State-owned, giving the State a 'controlling influence', which enabled the Court to avoid discussing the property rights of the airport owners and reduces the significance of the outcome for what concerns direct horizontal effect. See BVerfG, 1 BvR 699/06 vom 22.2.2011, Absatz-Nr. (1-128) <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/02/rs20110222_1bvr069906en.htm> accessed 6 November 2017. For discussion, see Livia Fenga and Helena Lindemann, 'The FRAPORT Case of the First Senate of the German Federal Constitutional Court and its Public Forum Doctrine: Case Note' (2014) 15(6) German Law Journal 1105; and Orsolya Salát, 'From the Mass Mind to Content Neutrality: Freedom of Assembly in a Comparative Perspective' (2012) <www.etd.ceu.hu/2012/salat_orsolya.pdf> accessed 6 November 2017.

[29] In the case of *Robbins v Pruneyard Shopping Center* (n 28) for example, the privately-

Other courts, though not going this far, have engaged in discussions concerning how much discretion private property owners have for what concerns the enjoyment of freedom of expression/assembly on their property and whether public property owners enjoy the same level of discretion.[30] Similar case law can also be found at the regional level, although in these proceedings the State has remained the ultimate obligation-holder rather than the relevant private actor, thereby ruling out direct horizontal effect.[31]

At the international level, although not within the realm of international human rights law, there have also been cases in which human rights obligations have been upheld against private actors. For example, in a significant case in 2014 the European Court of Justice balanced the rights and interests of an internet search engine operator (Google) against those of a 'data subject' (an individual).[32] In applying the relevant law (the Data Protection Directive[33]) it considered the Charter of Fundamental Rights of the European Union.[34] It found that unless interference with the data subject's rights to privacy and data protection could be justified, they would 'as a rule' take preference over the rights and interests of the internet search engine

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owned shopping centre that had refused to allow a group of high school students to solicit signatures for a petition to the government were obliged to allow the solicitation on the basis that 'sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.' A similar finding had been made by the United States Supreme Court in the case of *Marsh v Alabama* 326 U.S.501 [1946], although such outcomes appear to be relatively rare. See for discussion Salát (n 28) 370.

[30] Supreme Court of Canada, *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139; Ontario Provincial Court Criminal Division, *R v Jack Layton* [1986] CarswellOnt 792, 38 C.C.C. (3 d) 550; Supreme Court of the United States, *International Society for Krishna Consciousness v Lee* [1992] 505 US 672.

[31] An example of this is the case of *Appleby v United Kingdom* App No. 44306/98 (6 May 2003) at the European Court of Human Rights, which will be discussed in Chapter 6.

[32] ECJ Case C-131/12 *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos* (13 May 2014) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131> accessed 6 November 2017.

[33] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

[34] OJ C 326, 26.10.2012, 391-407.

operator and the general public.[35]

Similar cases have also been decided by private dispute arbitrations. For example, the World Intellectual Property Organization (WIPO) has upheld the right to freedom of expression against a private corporation and has interpreted the Uniform Dispute Resolution Policy, which codifies the law applicable in WIPO disputes, to be applied with reference to international human rights law standards that are not included in the policy.[36] The International Centre for the Settlement of Investment Disputes, which hears investment disputes between States (acting as private actors) and private actors, has also considered human rights law in some decisions.[37] However, this remains an exception rather than the rule, and scholars have pushed for further consideration of human rights in investment arbitration,[38] warning against 'considering international investment law in a vacuum'.[39] For example, arguing for greater harmonisation between international human rights and international investment law, Bruno Simma and Theodor Kill suggest using international human rights law as 'external rules' when

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[35] *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos* (n 32) para 97. An interference could be justified by the 'preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.'

[36] WIPO Arbitration and Mediation Center, *Bridgestone Firestone, Inc., Bridgestone/Firestone Research, Inc., and Bridgestone Corporation v Jack Myers*, Case No. D2000-0190, discussed in Kanalan (n 22) 453-454.

[37] As Kanalan notes, this has even been true in cases where the parties, who determine the applicable law in a given dispute, have not agreed that human rights law will be applicable. Kanalan (n 22) 454-455.

[38] For a very detailed discussion of the relationship between international human rights and investment law, the ways in which human rights are brought into investment disputes and suggestions as to how human rights could be better integrated into investment arbitration, see Pierre-Marie Dupuy, Ernst Ulrich and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2010); Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2012).

[39] Bruno Simma and Theodor Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder and others (eds), *International investment law for the 21st century. Essays in honour of Christoph Schreuer* (Oxford University Press 2009) 678, 679.

interpreting investment treaties.[40]

Finally, in recent years there have been several instances of international bodies holding non-State actors (in particular non-State armed groups) to be bound by some *jus cogens* norms. For example, in 2012 the Commission of Inquiry on the Syrian Arab Republic (the body established by the UN Human Rights Council to investigate alleged violations of international human rights law in the country since March 2011[41]) stated that 'at a minimum, human rights obligations constituting peremptory international law (jus cogens) bind States, individuals and non-State collective entities, including armed groups.'[42] This has been reiterated by the UN Mission in the Republic of South Sudan, which found the same obligations to bind non-State armed opposition groups as well as States.[43] These claims are strengthened by international criminal law, which enables members of non-State armed groups to be held individually responsible at the international level for violations of some *jus cogens* obligations.[44] However,

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[40] See ibid. The use of external rules is consistent with the rules of interpretation found in the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS vol. 1155, 331. A similar argument has been made by Pierre-Marie Dupuy, in Pierre-Marie Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in Pierre-Marie Dupuy, Ernst Ulrich and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2010) 45.

[41] UN Human Rights Council, Resolution S-17/1, 'Situation of human rights in the Syrian Arab Republic', A/HRC/RES/S-17/1.

[42] 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', A/HRC/19/69, para 106, cited in Geneva Academy, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN human Rights Council' (2016) Academy In-Brief No. 7, 22 <www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf> accessed 6 November 2017.

[43] 'Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt', A/HCR/28/66, 29 December 2014, paras 54 and 56, cited in Geneva Academy (n 42) 29.

[44] Article 25 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) allows individuals to be held 'individually responsible and liable for punishment' at the international level for committing war crimes, crimes against humanity, genocide or crimes of aggression. Although not all of these can also be said to be human rights standards, according to M. Cherif Bassiouni, they all have the status of *jus cogens*. M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) Law and Contemporary Problems 63, 68.

in this context the obligations are not framed as part of human rights, but criminal law, and therefore cannot be considered to be true examples of direct horizontal effect of international human rights law.

Further developments towards direct horizontal effect are buttressed by scholars via the suggestion of new theories or bases for direct horizontal effect.[45] Specifically, some literature suggests focusing on our understanding of human rights themselves, as opposed to human rights *law*, in order to justify placing direct human rights obligations on non-State actors.[46] Ibrahim Kanalan is one proponent of this approach, arguing that many previous theories of direct horizontal effect fall short because of their focus on staying within the confines of the international legal framework.[47] He suggests a new concept based on the 'normative power of human rights and the consideration of the functional differentiation of society'.[48] Scholars such as Dennis Arnold also rely on a particular conceptualisation of human rights and favour direct horizontal effect in relation to multinational corporations in particular. Arnold has repeatedly argued that 'agentic accounts of human rights provide an appropriately deep foundation for corporate human rights obligations'.[49]

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[45] See e.g. Nicolás Carillo-Santarelli, *Direct International Human Rights Obligations of Non-State Actors: A Legal and Ethical Necessity* (Wolf Legal Publishers 2017). For an overview of theories of direct horizontal effect (within the European context), see Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children* (Routledge 2011).

[46] See e.g. Manfred Nowak and Karolina Miriam Januszewski, 'Non-State Actors and Human Rights' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 118; Kanalan (n 22); and Jean Thomas, 'Our rights, but whose duties? Re-conceptualizing rights in the era of globalization' in Anat Scolnicov and Tsvi Kahana (eds), *Boundaries of state, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016) 6.

[47] Kanalan (n 22).

[48] ibid 456. Within his work, Kanalan relies on 'systems theory' and in part on the work of Gunther Teubner, who has also addressed new theories of direct horizontal effect. See e.g. Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69(3) The Modern Law Review 327; and Gunther Teubner, 'Transnational Fundamental Rights: Horizontal effect?" (2011) 40 Rechtsfilosofie & Rechtstheorie 191.

[49] Dennis G Arnold, 'Corporations and Human Rights Obligations' (2016) 1(2) Business and Human Rights Journal 255, 264. See also Denis G Arnold, 'Transnational Corporations and

Other scholars have taken a broader perspective, developing theories of shared responsibility between State and non-State actors,[50] as well as 'multi-duty bearer regimes'.[51] A discussion of the projects falls outside the scope of this book, but they are extremely interesting and show that scholars are working to fill the 'accountability gap' arising from the lack of direct horizontal effect in new ways.[52]

All of these examples show that at the national, regional and international levels, real developments have been made in various contexts towards the direct horizontal effect of human rights. Nonetheless, most of the concrete, binding developments have taken place outside of international human rights law, the direct application of which between non-State actors remains extremely limited.

### *3.2.1 The legitimacy of direct horizontal effect of international human rights law*

The legitimacy of imposing direct human rights obligations on non-State

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the Duty to Respect Basic Human Rights' (2010) 20(3) Business Ethics Quarterly 371; Denis G Arnold, 'Global Justice and International Business' (2013) 32(1) Business Ethics Quarterly 125; Denis G Arnold and Andrew Valentin, 'CSR at the Base of the Pyramid: Exploitation, Empowerment, and Poverty Alleviation' (2013) 66(10) Journal of Business Research 1904.

[50] The 'SHARES' Research Project on Shared Responsibility in International Law has been steadily growing in its reach and output, and offers 'new concepts, principles and perspectives for understanding how the international legal order may deal with shared responsibility' between State and non-State actors. It specifically focuses on allocating responsibility to multiple actors that have contributed to the same violation of international law, and has dealt with the issue of the lack of direct, binding human rights obligations for non-State actors. See e.g. SHARES website <www.sharesproject.nl/> accessed 6 November 2017; D'Aspremont J and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62(1) Netherlands International Law Review 49.

[51] See e.g. Wouter Vandenhole and Willem van Genugten, 'Introduction: An emerging multi-duty-bearer human rights regime?' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building blocks for a plural and diverse duty-bearer regime* (Routledge 2015) 1.

[52] Wouter Vandenhole and Willem van Genugten, for example, suggest a 'fundamental rethinking of [the] basic tenet of human rights law', that 'human rights obligations are primarily incumbent on the territorial State'. See ibid. See also Lottie Lane and Marlies Hesselman, 'Governing Disasters: Embracing Human Rights in a Multi-Level, Multi-Duty Bearer, Disaster Governance Landscape' (2017) 5(2) Politics and Governance 93, 101.

actors is a matter of much debate in the academic community. Authors such as Gunther Teubner are of the opinion that the validity of fundamental rights obligations for some non-State actors (namely multinational corporations) cannot be questioned.[53] As explained above, current international human rights law mandates that States are the primary subjects of international human rights law. Simply speaking, as elected representatives of their citizens, States have the legitimacy to make decisions as to which laws should apply within their own jurisdiction. At the international level, in the absence of an elected world government, the legitimacy of State obligations could be said to stem from the sovereign equality of States and the fact that they bind only themselves through the creation and adoption of international norms. The source of legitimacy for the imposition of direct obligations on *non-State actor*s at the international level therefore raises some questions. This section will discuss the potential legitimacy of direct international human rights obligations for non-State actors.

The concept of legitimacy can be examined from several perspectives. For the purposes of the present book, it is viewed in relation to the creation and content of legal norms.[54] Legitimacy is generally defined as having two components, the first procedural and the second substantive (also referred to as input and output legitimacy[55]).[56] Procedural legitimacy means

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[53] See Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40(3) Netherlands Journal of Legal Philosophy 191, 198.

[54] For discussion on different perspectives towards legal legitimacy, see A Javier Treviño, *The Sociology of Law: Classical and Contemporary Perspectives* (Routledge 2017).

[55] In recent years, a third perspective, 'throughput' legitimacy, has been recognised. Throughput legitimacy 'connects input legitimacy and output legitimacy by through emphasis on the procedural quality of the law-making process. Throughput legitimacy refers to a process that allows input to feed into output through transparency, procedures that ensure wide representation, and options for deliberation'. Karin Buhmann, 'The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012) 90.

[56] Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noormann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 71-73.

that the way that obligations/norms were created was legitimate, in that they were made with the consent or participation of those affected by them. Many scholars are of the opinion that for any international human rights obligations to be placed directly on non-State actors, they must be procedurally legitimate following the premise that 'international norms that affect non-state actors [...] are in need of the latter's participation in order to be legitimate'.[57] However, there are some scholars who believe that procedural legitimacy in the case of some fields of international law (human rights included) may not actually require the consent or participation of non-State actors. The reasoning behind the assertion is that if the expected result of an obligation's implementation is of paramount importance, it may negate the necessity of the norms being adopted with the consent of affected parties.[58] Cedric Ryngaert argues that in the absence of participation by non-State actors, if a 'legal norm or its implementation has in itself an important substantive value', participation is not necessary.[59] He highlighted the fact that international criminal law obligations are imposed upon non-State actors without their consent, nevertheless remaining legitimate because of the 'heinous character' of their violation.[60] More broadly, this could also be because of the character of international criminal law obligations.

However, the argument appears to suggest a hierarchy of human rights norms – that violations of some rights are more serious than others. This goes against one of the fundamental tenets of human rights that all human rights are equal and are based on the dignity of the person.[61] Jamie Mayerfeld actually uses this tenet to his advantage in reaching a similar conclusion to Ryngaert. He states that in the context of human rights, procedural legitimacy does not require the consent of those bound by the norms because the nature of human rights 'allow[s] us to take certain actions

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[57] ibid 76.
[58] ibid 71-72.
[59] ibid 71.
[60] ibid 72.
[61] See e.g. UN General Assembly, Vienna Declaration and Programme of Action 12 July 1993, A/CONF.157/23.

regardless of other people's opinions' and 'place[s] obligations on other people whether or not the other people agree'.[62] To argue otherwise would 'make [one's] dignity hostage to other people's opinions'.[63] Following Mayerfeld's reasoning, one could even argue that international human rights law is not essentially based on consent at all. This perspective, however, remains that of a minority, although States may be reluctant to give non-State actors a significant participatory role when it comes to law-making. As Anthea Roberts and Sandesh Sivakumaran note, 'States jealously guard their lawmaking powers as a key attribute of statehood, making them generally resistant to the idea of sharing such powers with any nonstate actors'.[64]

However, rhetoric and actual commitment may fail if there is not sufficient organisational commitment to the norms. Demanding non-State actors to conform to human rights norms without having been included in their development and adoption may result in more challenges to their implementation and respect. It has been repeatedly found that non-State actors are more likely to conform to a rule or norm when they have participated in the adoption of it.[65] This risk is especially pertinent in light of the fact that the expertise and knowledge of many non-State actors who would have human rights obligations lies in different fields – including them in the norm creation process would also, in effect, provide the non-State actors directly involved with knowledge of their impact on human rights, and would also act as awareness-raising for non-State actors more generally.

Overall, at the international level, direct, binding human rights

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[62] Jamie Mayerfeld, *The Promise of Human Rights: Constitutional Government, Democratic Legitimacy, and International Law* (University of Pennsylvania Press 2016) 201; and Jamie Mayerfeld, 'The Democratic Legitimacy of International Human Rights Law' (2009) 19(1) Indiana International and Comparative Law Review 49, 76.

[63] Mayerfeld, *The Promise of Human Rights* (n 62); Mayerfeld, 'The Democratic Legitimacy of International Human Rights Law' (n 62) 77.

[64] Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37(1) Yale Journal of International Law 108.

[65] As Ryngaert explains, '"[o]wnership" of rules indeed furthers the effectiveness of the rules, because non-state actors, having made the law (or at least having been involved in the making of the law), can be considered to have internalised that law.' Ryngaert (n 56) 76.

obligations for non-State actors may be legitimate but should include the actors' participation in the development of the rules. A possible exception will be raised in Chapter 11 concerning non-State armed groups, but the importance of participation will be highlighted throughout Chapters 9-11 in the context of good governance. In these chapters, it will be seen that consent/participation is not only important regarding the legitimacy of legal, binding obligations for non-State actors, but also as a general principle to be followed throughout a governance system.

### 3.3 Indirect horizontal effect of international human rights

Due to the lack of direct horizontal effect of international human rights law, the concept of *indirect* horizontal effect gains relevance. In a situation of indirect horizontal effect, it is the State, not the responsible non-State actor, against whom the victim claims an interference with their human rights. The State is therefore also the entity that is (if the claim succeeds) legally recognised as being responsible for the harm suffered by the victim. This is regardless of the fact that the act violating the human right was done by a non-State actor. Essentially, this results in a diagonal application of human rights, often through a State's direct obligation to protect individuals from the harmful actions of other non-State actors. Under this construct, while the State remains directly responsible, *indirect* obligations, which derive from international law, are imposed on non-State actors; it may well be that through the State's fulfilment of its obligation to protect, a non-State actor is under an obligation to adhere to certain human rights standards imposed by national law (thereby receiving *direct* obligations at the national level as well).[66]

Because the focus here is on the international level, the definition of

[66] Indeed, this activity is expected of States under international human rights law – as Manfred Nowak and Karolina Januzewski state, 'international law confines itself to regulate non-state actor behavior through indirect horizontal obligations requiring the state to intervene, through domestic legislation and other appropriate measures'. See Manfred Nowak and Karolina M Januzewski, 'Non-State Actors and Human Rights' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds) *Non-State Actors in International Law* (Hart Publishing 2015) 141.

indirect horizontal effect adopted differs somewhat from popular definitions in the national or European (Union) context – Gavin Phillipson, for instance, defines indirect horizontal effect as meaning that 'whilst the rights cannot be applied directly to the law governing private relations and are not actionable *per se* in such a context, they may be relied upon indirectly, to influence the interpretation and application of pre-existing law'.[67] This understanding of indirect horizontal effect is more relevant at the national level, where it is possible to have cases in which both parties are non-State actors. Under this definition, it would fall to the national judiciary to apply international human rights standards when giving judgments, even when they are dealing with a case that only involves non-State actors.[68] Phillipson's position will be discussed at length in Chapter 7 regarding horizontal effect at the national level (within the United Kingdom).

Alison Young explains that there are two ways in which to distinguish between direct and indirect horizontal effect. The first depends on whether the claim is brought regarding a Convention right directly, or whether it relies on alternative legislation which is then *interpreted* in a way that gives effect to the Convention right; the legislation includes an obligation which mirrors or reflects the right protected by the Convention.[69] This distinction is not as relevant at the regional and international levels because the relevant judicial bodies on these levels only have jurisdiction to hear cases regarding human rights instruments. Indeed, at the international level each UN human rights treaty body only has the jurisdiction to hear individual complaints regarding a single treaty. The second way Young identifies to distinguish direct and indirect horizontal effect is more relevant to the regional and international levels and is adopted (with the exception of Chapter 7 on horizontal effect at the national level) throughout this book. The method looks at the nature of the subject of the human rights complaint – the horizontal effect is direct

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[67] Phillipson (n 3) 826.
[68] Conor Gearty, 'The Human Rights Act and the Common Law' (JUSTICE Seminar), as cited in Phillipson (n 3) 826-827.
[69] Alison L Young, 'Mapping Horizontal Effect' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011).

when a private actor is subjected to the human right obligation, whereas it is indirect when the *law* is made subject to the human right at stake.[70] This is clearly so in a case where a State is under a positive obligation to protect individuals' rights from the harmful actions of other private actors.

Although some academics may believe that the distinctions between direct and indirect horizontal effect are simply a matter of semantics, there is quite a large practical difference between them,[71] particularly for the victims of the violations. There is a crucial ideological distinction between seeing the actual perpetrators of the violations as 'real' subjects of international law as opposed to holding the State indirectly responsible. At some point, we have to let go of the habit of seeing the State as some kind of 'parental' figure, responsible for the guaranteeing the welfare of its citizens,[72] and allow the non-State actors – often more akin to adolescents (torn somewhere between the dependent individual, and the autonomous, independent nation-State) – to take on responsibility for their own actions. The perpetual obstacle here is determining at which point this line should be drawn, and how. Should there be a method akin to the 'Gillick competence' test developed in UK common law[73] to determine this by applying established criteria? Should standards be generally applicable to all non-State actors, or should there be differentiated norms according to different types of actor? Is it legitimate to establish international norms to force non-State actors to operate in a certain way? A discussion of all of the possibilities falls outside of the scope of the present study, but the questions were borne in mind during the analysis in Chapters 4-8 of this book and the suggestion of a new, interdisciplinary approach in Chapter 9.

The following sections will provide examples of the way in which

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[70] ibid.

[71] John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) The American Journal of International Law 1, 29.

[72] Chris Jochnick, 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights' (1999) 21 Human Rights Quarterly 56, 59.

[73] This test is used to determine whether or not a child has the competence to either consent to medical treatment without the consent of her legal guardian. See *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 ALL ER 402.

non-State actors can have human rights standards imposed upon them under international human rights law. The analysis is not exhaustive but rather illustrative, since indirect horizontal effect is thoroughly analysed in Chapters 5-8.

*3.3.1 State obligations to protect human rights*

At the international level, the most apparent form of indirect horizontal effect is explainable by way of a diagonal trajectory, or perhaps a triangular relationship between two non-State actors and the State. The two non-State actors are legally on an equal footing (regardless of their equality of position in practice) and the State maintains its vertically superior position, remaining the sole human rights obligation-holder. As such, the line of responsibility must pass to the State as the human rights obligation-holder. This is normally achieved by holding the State responsible for not protecting the individual from the harmful actions of the other non-State actor, although it may also be through holding the conduct of the non-State actor to be attributable to the State (and therefore being able to treat it as State conduct). This is possible because of States' duty to protect the enjoyment of individuals' rights from harmful actions by third parties, as explained in detail in Chapter 1. As John Knox explains, in fulfilling their obligation to protect human rights, States are required to impose duties on individuals through the implementation of their own domestic laws.[74] Because of this, the incapacity of holding the non-State actor directly responsible for the human rights interference does not automatically exclude obligational relationships in the non-State sphere.[75] This relates back to Sir Nigel Rodley's point that, in theory, States deal with

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[74] See Knox (n 71) 28. This statement was made in the context of international obligations prohibiting slavery, but is also appropriate in relation to many norms of international law. The importance of using the obligation to protect human rights to fill the lacuna in human rights protection caused by the lack of direct horizontal effect has been emphasised by the Human Rights Committee. UN HRCtee, 'General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13, para 8.

[75] Jan A Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights Law Review 21, 31-32.

the behaviour and punishment of non-State actors through their domestic law.[76] Indeed, adopting and enforcing such laws form part of the State's obligation to protect individuals from interference with the enjoyment of their rights by third parties, as explained in Chapter 1.

*3.3.2 Balancing individual rights against one another*

Within the State's positive obligation to protect human rights, it is possible for non-State actors to be implicitly burdened with obligations through the State imposing legitimate limitations on their human rights. Legitimate limitations involve action being taken by a State and can involve the rights of two individuals being balanced against each other, with one being given precedence over the other. Unlike the overarching obligation to protect human rights, legitimate limitations leading to the balancing of rights are specifically laid out in particular provisions in relation to only *some* rights. The obligation to protect more generally, on the other hand, requires State action in relation to *all* human rights.

Few human rights are absolute and cannot be subject to limitations, which are generally allowed by human rights treaties to a certain extent. For example, the International Covenant on Civil and Political Rights allows certain rights (i.e. Article 19 providing the right to freedom of expression) to be restricted, if it is necessary for one of the specific reasons of respecting the rights or reputations of others, the protection of national security or public order, or the protection of public health or morals.[77] Further, restrictions of the right must be 'provided for by law'.[78] This may result in States

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[76] See Nigel Rodley, 'The Evolution of the International Prohibition of Torture' in Amnesty International, *The Universal Declaration of Human Rights 1948-1988: Human Rights, the UN and Amnesty International*, 63 in Clare Mcglynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) International and Comparative Law Quarterly 565, 594. See also Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' (n 9).

[77] See Article 19, para 3, ICCPR.

[78] Article 19, para 3, ICCPR. A similar criterion in the European Convention of Human Rights has been clarified by the European Court as including unwritten as well as written law, which must be adequately accessible and of sufficient precision. The law must also be of a certain quality. See *The Sunday Times v United Kingdom*, App No. 6538/74 (26 April 1979) paras 47

introducing national laws requiring private actors to conduct themselves in a particular way, restricting their own rights for the protection of others. The test that human rights bodies must conduct in order to determine whether a limitation was indeed legitimate is one of proportionality. When the reason for the limitation being invoked is the protection of the rights of others, this test essentially requires the adjudicating body to balance the enjoyment of one right against another. An example of such a limitation would be when a State adopts legislation prohibiting religion-based hate speech, which naturally limits one actor's right to freedom of expression in favour of protecting another individual's right to freedom of religion. This occurred in the case of *Ross v Canada* before the Human Rights Committee,[79] in which it was held that the suspension of a schoolteacher from his post at a school in a very Jewish community due to his offensive remarks against Judaism was not a violation of his right to freedom of expression. The court emphasised the provision in Article 19(2) ICCPR that 'the exercise of [this] right [...] carries with it special duties and responsibilities', which were particularly important in the present case given the position of authority in which the claimant was placed.[80] The limitation of the applicant's right in this case clearly allowed the State to require him to act in a particular way, which implicitly placed an obligation on him to respect the rights of others. Further practice concerning the balancing of rights will be briefly discussed in Chapter 6 with reference to examples of case law from the European Court of Human Rights.

### *3.3.3 Prohibition on the abuse of human rights*

As well as allowing for balancing exercises and legitimate limitations to be placed on rights, the international human rights framework also contains a

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and 49; and *Rotaru v Romania*, App No. 28341/95 (4 May 2000) para 52, discussed in Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (1st edn, Cambridge University Press 2010) 287-364, which includes a very thorough examination of legitimate limitations on human rights.

[79] *Ross v Canada* (736/1997) UN Doc. CPPR/C/70/D/736/1997 (18 October 2000).

[80] ibid para 11.6.

prohibition on the abuse of individual rights. While it is not framed as a legal obligation for non-State actors, the doctrine prohibits (taking the example of Article 17 ECHR) 'any activity or [...] any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention'. Significantly, this prohibition is aimed at 'any State, group or *person*', thereby including individuals within its remit.[81] As Antoine Buyse explains, '[t]he provision's main aim was to prevent totalitarian and extremist groups from justifying their actions by invoking the ECHR.'[82]

While the restrictions allowed by Article 17 go to the substance (or scope) of human rights, which will be examined in more detail below, there are also provisions in various human rights treaties that prohibit the admissibility of cases that take advantage of the right to make a human rights complaint in a way that goes against the purpose of human rights.[83] This can be seen, for example, in Article 3 of the First Optional Protocol to the ICCPR,[84] which prohibits the admissibility of cases 'which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant'. A similar clause can be found in Article 35(3)(a) ECHR, which allows the ECtHR to declare inadmissible any claim that it considers to be 'an abuse of the right of individual application'. From these two provisions, the link between an abuse of the right of submission and human rights obligations for non-State actors may not seem to be immediately clear. Indeed, it is not possible to say that

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[81] Emphasis added.

[82] Antoine Buyse, 'Dangerous Expressions: The ECHR, Violence and Free Speech' (2014) 63(2) International and Comparative Law Quarterly 491, 484, citing *Ždanoka v Latvia*, App No. 58278/00 (17 June 2004) para 109.

[83] This is notwithstanding the fact that the majority of decisions by the ECtHR regarding Article 17 have occurred during the admissibility stage rather than on consideration of the merits. The term 'substantive' and 'admissibility' are used in the present Chapter to demonstrate that Article 17 ECHR concerns the concrete scope of certain rights, whereas Article 35(3)(a) ECHR and Article 3 Optional Protocol to the ICCPR operate more as procedural bars to prevent certain claims from being brought.

[84] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171.

there is a direct obligation arising from the provisions, but rather that they place a restriction on the exercise of individuals' rights. The provisions prevent frivolous and potentially damaging claims from being brought, preventing individuals from using the precious resources of the human rights complaints mechanisms for selfish and/or illegitimate ends.[85]

The more 'substantive' prohibition of abuse of rights is more akin to a legitimate limitation of human rights, as will now be explained. In the context of the right to freedom of expression, the European Court of Human Rights has explained that

> [T]here is no doubt that any remark directed against the Convention's underlying values would be removed from the protection of Article 10 [freedom of expression] by Article 17 [prohibition of abuse of rights].[86]

This suggests that Article 17 could have a similar effect to legitimate limitations of human rights; Article 17 essentially restricts certain manifestations of enjoying human rights in order to protect the rights of others, by excluding them from the Convention's protection. The difference is, however, that with Article 17 there are no clear-cut criteria stipulating when the prohibition is to be applied. Rather, whole areas of (for example) speech are 'categorically' excluded from protection by the Convention using the prohibition on the abuse of rights.[87] The ECtHR's jurisprudence has been criticised for the unclear way in which it chooses which categories should be excluded from protection.[88] Moreover, in theory, the prohibition could be

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[85] The extent to which human rights claims can be said to be inherently selfish in nature falls outside the scope of the present book. For an interesting introduction to this issue, see Marie-Bénenicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006).

[86] *Seurot v France*, App No. 57383/00, decision on the admissibility of 18 May 2004, as cited in European Court of Human Rights Press Unit, 'Factsheet – Hate Speech' (2017) <http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf> accessed 30 August 2017.

[87] For a critique of Article 17 in light of this, see Cannie Hannes and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?' (2011) 29(1) Netherlands Quarterly of Human Rights 54, 55.

[88] Buyse (n 82) 495-496.

invoked against abuses of every right in the Convention, whereas legitimate limitations of human rights may only be invoked regarding those rights containing a specific provision to allow this (e.g. Article 10(2) ECHR). The difference between Article 10(2) and Article 17 may allow restrictions to be placed on individuals in a broader range of circumstances through the prohibition of abuse of right. In practice, the Court appears to treat abuse of rights and legitimate limitations of rights as two alternative approaches for restricting the enjoyment of individuals' rights.[89] The way in which the Court seems to have treated Article 10(2) (allowing for legitimate limitations to be placed on freedom of expression) and Article 17 interchangeably has also been met with criticism,[90] blurring the role of the two different provisions. While concerns regarding the application and use of Article 17 by the Court are well-founded, the provision may still have an important role in placing implicit duties on individuals and groups to respect human rights, which will now be discussed.

Much of the Court's jurisprudence regarding Article 17 has been in the context of the freedom of expression. In this setting, the prohibition on the abuse of rights relates mostly to 'hate speech'. The term 'hate speech' covers the expression of views that reflect religious hate, racial hate, ethnic hate and negationism and revisionism (e.g. denial of the Holocaust during World War II).[91] When applied to cases involving an alleged use of hate speech, Article 17 essentially has the effect of placing indirect duties on individuals or groups to refrain from expressing themselves in a way that interferes with the rights of others (e.g. with their freedom of religion or non-discrimination). These duties are much clearer in the ICCPR. Instead of having an 'abuse of rights' clause like the ECHR, the ICCPR includes a specific provision curtailing the freedom of speech, to the same end as Article 17 ECHR. Article 20(2) ICCPR provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination,

[89] European Court of Human Rights Press Unit (n 86).
[90] Buyse (n 82) 495-496.
[91] See European Court of Human Rights Press Unit (n 86).

hostility or violence shall be prohibited by law'. This is comparable to the exclusion of hate speech through Article 17 ECHR, and is notably contained in a separate provision from the legitimate limitations of freedom of expression under Article 19(2) ICCPR. The wording of the provision suggests that the scope of prohibited expression under the two regimes is very similar (see scope of ECHR-prohibited speech above). The crucial phrase within Article 20(2), however, makes the duties involved more explicit. Unlike Article 17 ECHR, Article 20(2) ICCPR contains the words 'shall be prohibited by law'. This places direct obligations on State parties to take positive measures to adopt particular laws to protect individuals from speech that amounts to advocating 'national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Logically, such legislation would necessarily include provisions placing obligations on individuals and groups to refrain from such speech/expression, indirectly placing obligations on non-State actors to respect human rights.[92] It can thus be argued that the ECHR and the ICCPR both place indirect obligations on non-State actors, relying again (as with the most common form of indirect horizontal effect) on States' obligations to protect human rights.

## 3.4 The tripartite typology of human rights and non-State actors

When examining the scope of human rights obligations of non-State actors, it is useful to borrow from the delineation of human rights obligations for States. Chapter 1 conducted an analysis of the most common tool for determining the extent and scope of human rights obligations – the tripartite typology of obligations to respect, protect and fulfil human rights. The relationship between non-State actors and each branch of the tripartite typology will be briefly assessed in this section. The aim is to sketch how the typology may apply to non-State actors despite not being the subject of obligations under international human rights law.

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[92] A more detailed analysis of non-State actors' obligations to respect human rights will take place below, Section 3.4.1.

### *3.4.1 The obligation to respect human rights and non-State actors*

The obligation to respect human rights is a negative obligation that requires States to refrain from interfering with the enjoyment of individuals' human rights. In theory, there is nothing inherent in the nature or characteristics of non-State actors that would prevent them from being able to respect human rights. Indeed, if States are properly fulfilling their obligation to protect human rights, they will ensure (through the laws and policies) that non-State actors respect human rights (once again going back to the reasoning of John Knox and Nigel Rodley explained in Chapter 2). Whether this is sufficient enough to avoid obligations to respect human rights at the international level is a complicated issue, however. As will be demonstrated in Part 4 of this book during the discussion of the case studies, some non-State actors operate outside of the control of the State. Others are able to manipulate the laws applicable to them due to the non-extraterritoriality of human rights obligations (e.g. multinational corporations operating in States that are not party to or have not implemented certain international human rights treaties can take advantage of this within their operations even though they may be subject to strict domestic laws when operating within their headquarter State).

Ultimately, whatever the rationale behind it, more and more discussions of the obligation to respect are taking place in relation to non-State actors. For example, a Handbook developed by the United Nations for National Human Rights Institutions recognises that not only States, but '*all* actors' who have an official bearing on the fulfilment of rights must consider this in their actions, and make sure that they do not impinge upon their fulfilment.[93] Although again in the context of economic, social and cultural rights, this implies that certain private actors, who have been recognised as being in a position to affect the realisation of rights, must abide by an obligation to respect human rights. This could include, for example, private

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[93] Office for the United Nations High Commissioner for Human Rights, 'Economic, Social and Cultural Rights Handbook for National Human Rights Institutions' (2005) <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 18 August 2017, 16 [emphasis added].

providers of essential public services such as healthcare.[94]

Although the Handbook only speaks of actors with an 'official bearing' on human rights, developments (particularly in soft-law instruments and in the various documents of several UN human rights treaty monitoring bodies) provide us with more examples of such actors than may initially be expected. For example, the UN Guiding Principles on Business and Human Rights hold corporations to have a duty to respect international human rights.[95] Significantly, the Guiding Principles envisage concurrent but separate obligations to respect human rights for State and non-State actors (i.e. businesses). Rather than seeing the obligation to respect human rights purely through the lens of the State obligation to protect human rights, the Principles detail specific duties for business enterprises to respect human rights throughout their operations.[96] Other actors with a duty to respect human rights could include non-State armed groups, given the fact that Article 4 of the Optional Protocol to the Convention on the Rights of the Child (discussed in Chapter 5)[97] explicitly requires such groups to refrain from recruiting and using child soldiers (i.e. to respect the prohibition). Finally, individuals could have limited duties to respect human rights, as imposed through States' domestic laws (for example pursuant to the prohibition on the abuse of rights and Article 20(2) ICCPR discussed above).

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[94] For a discussion on the relationship between private essential public service providers and human rights see Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' (n 99); and more broadly Antenor Hallo de Wolf, 'Human Rights and the Regulation of Privatized Essential Services' (2013) 60(2) Netherlands International Law Review 165. For discussion of private providers of healthcare specifically, see Antenor Hallo de Wolf and Brigit Toebes, 'Assessing Private Sector Involvement in Health Care and Universal Health Coverage in Light of the Right to Health' (2016) 18(2) Health and Human Rights 79.

[95] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights, John Ruggie: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31, Principle 11.

[96] See ibid Principles 11-15.

[97] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002).

A more general obligation to respect human rights for non-State actors (although still geared towards businesses) can be found in the UN's 'Guiding Principles on Extreme Poverty and Human Rights' drafted by Magdalena Sepúlveda Carmona, former Special Rapporteur on extreme poverty and human rights. The principles emphasise that

> [n]on-State actors [...] have, at the very minimum, the responsibility to respect human rights, which means to avoid causing or contributing to adverse human rights impacts through their activities, products or services, and to deal with such impacts when they occur.[98]

The Principles are again a soft-law instrument and remain quite vague in terms of content, but they do demonstrate that the notion of non-State actors' respect for human rights as an international standard is gaining traction. Adopted one year after the UN Guiding Principles on Business and Human Rights, Sepúlveda Carmona seems to have taken the opportunity, as evidenced in the quotation above, to ensure the assertion of responsibility to respect for non-State actors in a broader context through the Guiding Principles on Extreme Poverty and Human Rights.[99]

The above are only a few examples of initiatives taken as part of the UN-promoted drive to make non-State actors more aware of the negative impact they may have on the human rights of individuals, and to operate in a way that does not interfere with individuals' rights. More initiatives will be dealt with in detail in Part 4 of this book, where previous efforts to impose

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[98] Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Extreme Poverty and Human Rights' (2012), adopted by the UN Human Rights Council, 'Final draft of the guiding principles on extreme poverty and human rights', submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' (18 July 2012) A/HRC/21/39, para 100.

[99] For a breakdown of the Guiding Principles on Extreme Poverty and Human Rights and guidance on their implementation, see International Movement ATD Fourth World and Fransiscans International, 'Making Human Rights Work for People Living in Poverty: A handbook for implementing the UN Guiding Principles on Extreme Poverty and Human Rights' (2015) <http://www.atd-fourthworld.org/wp-content/uploads/sites/5/2015/05/2015-09-01-GuidingPrinplsEPHR-HANDBOOK-EN-ATD_FI_Handbook_English_WEB-1.pdf> accessed 21 January 2018.

obligations to respect human rights upon non-State actors are discussed.

*3.4.2 The obligation to protect human rights and non-State actors*

The obligation to protect human rights is simultaneously the most inherently connected to the actions of non-State actors, yet may be the hardest to apply directly to non-State actors. Chapter 1 explained that the obligation to protect human rights requires States to take positive action to protect the enjoyment of individuals' rights from interference by non-State actors. On the face of it, this requires States to ensure that non-State actors respect human rights. Nonetheless, it may also be possible and desirable to place obligations to protect human rights on some non-State actors. It may be difficult to do this in relation to individuals, as they do not generally have the capacity or the resources to ensure that other actors do not infringe upon human rights. Extending the obligation to protect human rights to individuals may also place too much authority in the hands of individuals. Therefore, if this obligation is applied to non-State actors, it must be done so carefully and in a nuanced manner. It may be possible, for example, to argue that the allowance of citizens' arrests may help to ensure human rights protection in some situations (e.g. to prevent a murder or theft from taking place).

3.4.2.1 International humanitarian and criminal law

Until now, references to non-State actors' obligations to protect human rights have been much fewer than those to respect human rights. A notable (albeit brief) exception is the discussion by Yaël Ronen regarding the implicit imposition of the obligation to protect human rights through international humanitarian and international criminal law.[100] As the application of these fields of law to non-State actors are discussed in detail elsewhere in the present study, this section will contain only a brief explanation of how the two regimes could be considered to include human rights obligations for non-State actors.

The reason for looking at human rights obligations through the lens

[100] Yaël Ronen, 'Human Rights Obligations of Territorial Non-State Actors' (2013) 46 Cornell International Law Journal 21, 23.

of humanitarian and criminal law is the fact that international humanitarian law and criminal law impose direct obligations on non-State actors. As Ronen argues,

> some types of [non-State actors] – and individuals within them – are already directly bound by certain international legal norms that essentially protect human rights, albeit under a different legal classification and in narrowly-circumscribed contexts.[101]

The legal norms referred to by Ronen may not mention human rights explicitly. However, they sometimes have the effect, in practice, of protecting human rights due to considerable overlaps in the content of norms across the regimes. An example of this is the prohibition of torture. There exists an absolute prohibition of torture in international human rights law (under Article 7 ICCPR and the Convention against Torture)[102] and in international humanitarian law.[103] Violating this norm under humanitarian law can lead to individual criminal responsibility under international criminal law.[104]

The 'narrowly-circumscribed contexts' referred to by Ronen concern the extent to which international humanitarian and international criminal law actually apply to a particular non-State actor (which depends on a determination that a given situation amounts to an 'armed conflict' and, for some norms, that the non-State actor has a certain level of organisation and control)[105] and the extent to which human rights standards are actually

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[101] ibid 23

[102] Article 7 ICCPR states that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation', made absolute through the prohibition on derogating from Article 7 under Article 4(2) ICCPR. Article 2(2) of the Convention against Torture similarly gives the prohibition an absolute nature: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

[103] Torture is 'prohibited at any time and in any place whatsoever' by Article 4(2)(a) Additional Protocol II.

[104] In certain situations, the commission of torture can be considered a crime against humanity under Article 7(1)(f) of the Rome Statute, falling within the substantive jurisdiction of the International Criminal Court.

[105] See Article 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and

encompassed by those norms. It will be argued in Chapter 11 that some human rights norms are much more detailed than corresponding international humanitarian and criminal law norms. In these cases, the non-State actors' obligation to protect human rights will be of a different (most likely lower) standard than would be expected under a direct application of international human rights law. It could be said, however, that certain norms of humanitarian and criminal law should be interpreted in light of the corresponding obligations under international human rights law, which may constitute the *lex specialis* in some situations during times of armed conflict. This argument will be dealt with in detail in Chapter 11 of this book. At this point, it suffices to say that non-State actors' obligations to protect human rights during armed conflicts may be broader than originally expected.

#### 3.4.2.2 Due diligence of non-State actors

Even more evidence of an obligation to protect human rights owed by non-State actors can be found in the many documents and initiatives pushing for human rights due diligence to be conducted by non-State actors. The due diligence of States explained in Chapter 1 has become one of the main ways in which States have been held to their obligation to protect human rights. The (non-legally binding) standards for non-State actors have been developed on several levels and vary according to the actor involved, although most research in this area pertains to businesses.

As explained by the International Law Association (ILA) Study Group on Due Diligence, the UNGPs drafted by John Ruggie focus on the due diligence of businesses.[106] Curiously, due diligence is dealt with under the pillar of the corporate responsibility to respect human rights, whereas it is dealt with under States' obligation to *protect* human rights. This may be due to the lack of a pillar based on a corporate obligation to protect human rights, or the fact that the due diligence is in relation to a company's own

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relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977, entry into force 7 December 1978) 1125 UNTS 609.

[106] International Law Association Study Group on Due Diligence, First Report (March 2014) <http://www.ila-hq.org/index.php/study-groups> accessed 29 August 2017, 19.

activities rather than third actors'. However, this use of the terminology seems to blur the distinction between obligations to respect and protect human rights, as States' due diligence obligations fall under the obligation to protect human rights despite seeming to have been broken down into similar obligations as the corporate due diligence responsibility.[107] The UNGPs note that to fulfil due diligence responsibilities, corporations should 'identify, prevent, mitigate and account for how they address their impacts on human rights'.[108] This is extremely reminiscent of States' due diligence obligations to 'prevent, investigate and punish' human rights violations caused by the actions of non-State actors.[109] Significantly though, according to the UNGPs, the due diligence responsibilities of corporations also consists of a clear obligation to carry out human rights impact assessments. The ILA Study Group on Due Diligence pointed out that Principle 17 requires that a corporation's due diligence process 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[110] Business enterprises are further expected to 'integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action', under Principle 19. This appears to be quite a significant obligation and has been developed and built upon by many researchers and organisations in an attempt to help businesses across different sectors understand their role better.[111] It is submitted that the elaboration of positive

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[107] A similar blurring of the line between respect and protect was discussed in Chapter 1.
[108] UN Human Right Council, UNGPs (n 12) Principle 15(b).
[109] *Velásquez-Rodríguez v Honduras*, IACHR (Ser. C) No. 4 (29 July 1988) para 166.
[110] International Law Association Study Group on Due Diligence, First Report (March 2014) <http://www.ila-hq.org/index.php/study-groups> accessed 29 August 2017.
[111] See, for example, Sandra Roling and Thomas Koenen, CSR Europe, 'Human Rights Impact Assessments: A Tool towards Better Business Accountability' (*Business and Human Rights Research Centre*) <https://business-humanrights.org/sites/default/files/reports-and-materials/Impact-assessments-CSR-Europe-June-2010.pdf> accessed 29 August 2017; Office of the United Nations High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' (2012) <http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 29 August 2017.

obligations under the typically negative obligation to respect human rights confuses the use of the terminology. Using different terms to describe very similar obligations in the context firstly of States and secondly of non-State actors does not demonstrate a transparent and clear delineation of non-State actors' responsibilities. In order to properly clarify the obligations and the differences between State and non-State actors for what concerns human rights, it may be better to disregard the terminology typically used for States in favour of new terminology for non-State actor obligations. Although using well-known and well-used terms can usually help clarify meaning, in the current context the use of 'respect' in the UNGPs appears to do more to blur the distinction between types of obligation. Giving 'respect' a different meaning in the context of non-State actors may be necessary (as non-State actors' respect for human rights may require different action to be taken), but to avoid confusion it would be better to either use the same definition as is used for States, or to find new terminology to typify the obligations of non-State actors (perhaps along the lines of a broader responsibility of 'consideration').

Despite the confusion and the due diligence responsibilities of businesses under the UNGPs, it cannot be concluded that non-State actors appear to have an 'obligation to protect' human rights in the same manner as States. Perhaps the nature of non-State actors as the very actors that States protect human rights from under their obligations makes this impossible. Nonetheless, it can be argued that under the guise of a corporate responsibility to respect human rights, various positive obligations are placed upon this category of non-State actor to ensure that human rights are not negatively impacted.

### *3.4.3 The obligation to fulfil and non-State actors*

The positive obligation to fulfil human rights requires States to facilitate individuals to realise their rights themselves. Where individuals are incapable of doing this, the obligation to fulfil requires States to directly provide individuals with the resources to realise the rights. Generally seen as the most burdensome obligation of the tripartite typology, there has been very little

push to impose obligations to fulfil on non-State actors. The argument discussed in Chapter 2 that non-State actors may not have the capacity or resources to realise human rights is particularly pertinent in this context. It must be remembered however, that bar a full extension of the current international human rights law framework to non-State actors, any change in the current regime would allow for differentiated and nuanced obligations to be placed on different non-State actors. The fact remains that at present, many non-State actors do actually play a large role in the fulfilment of human rights. This is due, in part, to the fact that many public services have been privatised. A classic example of this is the provision of water. In many countries, private companies are responsible for the provision of water, subject to governmental regulation (as part of States' obligation to protect human rights). For example, water provision in the United Kingdom was privatised in 1989[112] as part of a 'privatisation boom' under the Thatcher government.[113] The change delegated the responsibility to provide water to consumers to various private water companies. Regulatory authority, however, remains with the State, primarily conducted through the Office of Water Services (OFWAT). OFWAT is a national non-ministerial governmental body that is mandated with the responsibility to ensure that 'the companies [it] regulate[s] provide consumers with a good quality and efficient service at a fair price'.[114] In other words, OFWAT is responsible for

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[112] The privatisation occurred through the Water Act 1989. For an explanation of the history and developments of water privatisation in the UK, including the Water Act 1989, see OFWAT, 'The Development of the Water Industry in England and Wales' (2006) <http://www.ofwat.gov.uk/wp-content/uploads/2015/11/rpt_com_devwatindust270106.pdf> accessed 29 August 2017.

[113] Alistair Osborne, 'Margaret Thatcher: One Policy That Led to More than 50 Companies Being Sold or Privatised' *The Telegraph* (8 April 2013) <http://www.telegraph.co.uk/finance/comment/alistair-osborne/9980292/Margaret-Thatcher-one-policy-that-led-to-more-than-50-companies-being-sold-or-privatised.html> accessed 29 August 2017.

[114] See the UK Governmental Organisations website <https://www.gov.uk/government/organisations/the-water-services-regulation-authority> accessed 29 August 2017. See also the official OFWAT website, <http://www.ofwat.gov.uk/> accessed 29 August 2017.

making sure that private companies provide water in such a way as to fulfil consumers' right to water.[115] In this example, the UK government maintains legal responsibility of its international human rights obligation to fulfil the right to water, the factual realisation of which is the responsibility of the private water companies.[116] This disparity in responsibility is possible because although States can delegate factual tasks for the implementation of human rights, it is not possible for them to delegate legal responsibility. This conclusion is implied from the fact that '[s]tate cannot by delegation (even if this be genuine) avoid responsibility for breaches of its duties under international law'.[117] In a situation where the State has delegated certain activities in relation to which human rights violations have occurred, the relevant customary international law rules mandate that the actions of the private actors be attributed to the State, making the State the relevant actor for the purposes of the violation.[118] This means that even though private water

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[115] This conclusion is based on the 'AAAQ' framework for the right to water, requiring States to provide water of adequate availability, accessibility, acceptability and quality. For more information on the framework see UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, para 12; The Danish Institute for Human Rights, 'The AAAQ Framework and the Right to Water - International Indicators' <https://www.humanrights.dk/publications/aaaq-framework-right-water-international-indicators> accessed 29 August 2017. For more explanation of how private service providers' responsibilities and operations correlate with human rights standards and the AAAQ framework, see Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' (n 9).

[116] It may be possible for the water providers to be seen as carrying out a 'public function', which under the Human Rights Act 1998 would allow individuals to bring cases against the companies themselves for violations of various rights found in the European Convention on Human Rights under Section 6(3)(b). This possibility will be discussed in detail in Chapter 7.

[117] Ian Brownlie, 'State Responsibility: The Problem of Delegation' in Konrad Ginther and others (eds), 'Völkerrecht Zwischen Normativem Anspruch und Politischer Realität' (1994) 300-301; see also International Law Association Committee on Accountability of International Organizations, 'Final Conference Report Berlin 2004' <http://www.ila-hq.org/index.php/committees> accessed 29 August 2017; Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' (n 9). For discussions of practice, see Chapters 5 and 6.

[118] A full explanation of the law of State responsibility falls outside the scope of this Chapter. However, it is important to note that the International Law Commission's Draft Articles on

companies can (for example) be held responsible at the national level for failing to comply with the relevant regulations (including those laid down in legislation), they can never be held to have violated international human rights, or be said to have an obligation to fulfil human rights at the international level.

There have been some moves towards suggesting that non-State actors may have a *role*, if not a *responsibility* in the fulfilment of human rights. It has been recognised, for example, that although States are obliged to fulfil human rights, they are not expected to provide every resource themselves; Marlies Hesselman and others note that a State is rather expected 'to *mobilize* resources, not to provide them all directly from its own coffers' and to 'employ' or 'redirect' the private sector's resources to help realise human rights.[119] As will be seen in Chapter 5, a recent general comment of the UN CteeESCR discusses the obligation to fulfil in the context of business enterprises.[120] Generally speaking, though, there remains little evidence that (binding or non-binding) international human rights standards for non-State actors should extend to obligations to fulfil human rights.

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Responsibility of States for Internationally Wrongful Acts stipulate two criteria that must be fulfilled for a State to be held responsible for a violation of an international obligation: (1) the existence of an obligation owed by that State; and (2) attribution to the State of the conduct violating the obligation. Article 5 of the Draft Articles states that 'the conduct of a person or entity which is not an organ of the State [...] but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State'. See for discussion, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013).

[119] Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge 2017) [emphasis added]; discussed in Marlies Hesselman and Lottie Lane, 'Disasters and Non-State Actors – Human Rights-Based Approaches' (2017) 25(2) Disaster Prevention and Management (2017) 526. See also Anastasia Telesetsky, 'Beyond voluntary corporate social responsibility: corporate human rights obligations to prevent disasters and to provide temporary emergency relief' (2015) 48 Vanderbilt Journal of Transnational Law 1003.

[120] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', 10 August 2017, E/C.12/GC/24.

## 3.5 Concluding reflections on the horizontal effect of international human rights in the current legal framework

The above discussions demonstrate that in spite of the lack of direct human rights obligations for non-State actors at the international level, there are several examples of indirect obligations and even limited direct 'responsibilities'.[121] As well as using the 'traditional' way of achieving indirect horizontal effect through States' obligation to protect human rights, there are various other methods that can be used to determine the conduct of non-State actors vis-à-vis human rights. Balancing individual rights against each other through using the legitimate limitations available in some human rights provisions can essentially control the extent to which non-State actors can interfere with other's human rights. The same argument can be made for the prohibition on the abuse of individual rights, which also has the effect of imposing an indirect obligation to respect human rights upon non-State actors.

The tripartite typology of human rights does not currently apply in full to non-State actors. However, on a soft-law basis it is possible to say that a non-State actor responsibility to respect human rights has been upheld and supported by many different institutions, including various UN bodies. The obligation to protect has also been applied to non-State actors to some extent, through the guise of the duty of due diligence. The way in which this has occurred to date has unfortunately blurred the obligations to respect and protect human rights somewhat, but the standards are being gradually carved out in a coherent and informative way (in the context of businesses). The obligation to fulfil is harder to apply on a legal level to non-State actors. However, it is obvious from many of the operations and mandates of (particularly privatised) companies that non-State actors have a large role to

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[121] As explained in the Introduction to this book, generally speaking, 'duties' and 'responsibilities' refer to non-binding standards, whereas 'obligation' refers to legally binding standards placed upon an entity. For a discussion of the distinction between such terminology, see Florian Wettstein, 'Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 142(2) Journal of Human Rights 162, discussed in Hesselman and Lane (n 119).

play in practice in the fulfilment of human rights. The current international legal framework could, in theory, inform the potential legal obligations for non-State actors vis-à-vis human rights, but its current application to them remains indirect, and responsibility for human rights for what concerns the private actors' mandates remains with the State itself. To gain a better understanding of the application of international human rights to non-State actors, the jurisprudence and interpretations of international, regional and national human rights bodies will be examined in the following chapters.

# Part 2

# The Horizontal Effect of International Human Rights at the International Level

Chapter 4

# Horizontal effect of international human rights in international legislation

## 4.1 Preliminary remarks

Albeit scarce, there are some limited examples of the horizontal effect of human rights that can be found in international legislation. This chapter examines several examples, which although not numerous, differ in their degree of directness. The legislation considered for this chapter was the 'core' United Nations international human rights treaties (as explained in Chapter 1) and two instruments that are not legally binding in themselves, but are very authoritative texts that are generally considered as having, at least in part, customary international law status:[1] the UDHR[2] and the International Law Commission's International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[3] The

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[1] A norm may be considered to be customary in nature when there is widespread, representative and consistent practice of that particular norm (state practice), and a belief by the states practicing the norm that they do so because they are legally bound to (*opinio juris*). These elements are derived from Article 38 Statute of the International Court of Justice (1946), but were given more content in the jurisprudence of the International Court of Justice, particularly in *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Merits) 1969 ICJ Rep 3 paras 60-83. See generally Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2016).

[2] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

[3] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Yearbook of the International Law Commission II Part Two (as corrected) (DASR).

analysis in this chapter is limited to examples that could be construed as direct horizontal effect within the documents. This is because those provisions that give rise to indirect horizontal effect are analysed through the practice of the relevant human rights body in Chapter 5.[4]

## 4.2 Universal Declaration of Human Rights 1948

The UDHR was adopted in 1948 through United Nations General Assembly Resolution 217A.[5] The document was born out of the need to avoid repetition of the horrific consequences of World War II[6] and became the foundation upon which international human rights law would be built.[7]

Despite the fact that the document is not legally binding, it is considered by many scholars to have the status of customary international law and now ‘exerts a moral, political, and legal influence far beyond the hopes of many of its drafters’.[8] Even so, because of its nature, the main authority of the UDHR comes as a helping hand for human rights treaty bodies and courts when interpreting other (binding) human rights obligations. The document may only really be cited as providing one of few examples of ‘potential’ horizontal effect of international human rights – ‘potential’ used here to demonstrate that whether the UDHR would actually lead to horizontal effect would depend upon the interpretation given to various rights, as the drafters of the UDHR ultimately decided not to include substantive private duties in the document’s main provisions.[9] This was due to a fear of the

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[4] This includes, for example, Article 2(e) of the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNTS vol. 1249, 13.

[5] UDHR (n 2).

[6] United Nations, ‘Universal Declaration of Human Rights: History of the Document’ <http://www.un.org/en/sections/universal-declaration/history-document/> accessed 29 August 2017.

[7] United Nations, ‘The Foundation of International Human Rights Law’ <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> accessed 29 August 2017.

[8] Hannum Hurst, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 Georgia Journal of International and Comparative Law 287, 289.

[9] John H Knox, ‘Horizontal Human Rights Law’ (2008) 102(1) The American Journal of

UDHR's drafters that including duties for individuals could allow States to take advantage of this to limit the application or enjoyment of individuals' rights (as mentioned in Chapter 2).[10] Ultimately, the reference to private duties may be found in the Preamble and Article 29(1) of the UDHR. The Preamble states that

> every *individual* and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to *promote respect* for these rights and freedoms and by progressive measures, national and international, to *secure* their universal and effective recognition and observance.[11]

Taken at face value, the Preamble seems to place quite extensive responsibility on a variety of non-State actors to promote and secure international human rights. Indeed, many scholars rely on the Preamble as a basis upon which to claim that non-State actors should, or even do, have international human rights obligations.[12] However, upon closer inspection, the Preamble may simply be pointing to the shared responsibility of members of society to try to embed the idea of human rights in teaching and education. This would mean that rather than having substantive obligations themselves (except perhaps for the right to education), their duties are more related to ensuring understanding and awareness of international human rights. As Lindsey Cameron and Vincent Chetail declare, even if it is generally acknowledged that the Preamble of the UDHR amounts to customary international law, the question still remains as to the scope of the obligations that could be imposed upon non-State actors as a result[13] (the same question arising from Article 29(1)). For example, which non-State actors could the obligations apply to? Would the obligations for non-State actors be the same as those of the State? Is it legitimate to place human rights obligations on

International Law 1, 3.

[10] ibid.

[11] Emphasis added.

[12] Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press 2013) 318.

[13] ibid 318-319.

non-State actors through customary international law (which traditionally applies only to States)? These questions remain at the forefront of academic research.

Article 29(1) UDHR simply states that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible', without specifying what kind of duties these could be. Concerns that duties could result in undue limitations of human rights were counteracted by Article 29(2), which delimitates the extent to which limitations could be placed on the rights in the UDHR.[14] This seems to have formed the basis for human rights treaties allowing for the 'legitimate limitation' of human rights (for example Article 8(2) European Convention on Human Rights).[15] Unfortunately, because of the wording of Article 29(1), it is not really possible to infer concrete human rights obligations for non-State actors, or to determine the extent to which non-State actors could be held responsible for the realisation of human rights. The influence of the UDHR in imposing human rights obligations on non-State actors must therefore not be overstated.

## 4.3 International Law Commission Draft Articles on State Responsibility

The second example of a possible application of obligations to non-State actors in a non-legally binding international instrument is more tenuous and is found in the DASR.[16] The DASR were adopted in 2001, since which time they have been commended twice by the United Nations General Assembly.[17]

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[14] Article 29(2) states that

> [i]n 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.

[15] See Chapter 3 for a brief discussion of legitimate limitations of human rights.

[16] DASR (n 3).

[17] The General Assembly commended the DASR to the attention of Governments in 2001 and 2004 (via Resolutions 59/35 and 62/61 respectively). See James Crawford, 'Articles on Responsibility of States for Internationally Wrongful Acts' (*United Nations Audiovisual Library of International Law* 2012) <www.un.org/law/avl> accessed 29 August 2017.

The DASR, although never becoming a binding treaty, are now widely considered to constitute (although not in their entirety) customary international law and have been widely applied in practice.[18]

Manisuli Ssenyonjo comments that the DASR 'indicat[e] that responsibility for human rights violations "may accrue directly to any person or entity other than a State"',[19] quoting Article 33(2) DASR as part of an analysis of the extent to which non-State actors are bound by international human rights law. However, this must not be interpreted too deeply, nor taken out of context; the full text of Article 33(2) reads: '[t]his Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State', thereby referring to *rights*, rather than responsibilities, that may accrue to non-State actors.[20] Article 33(2) is found within Part II of the DASR, which deals with secondary obligations owed to other States or to the international community as a whole.[21] The DASR do not deal with primary rules of international law (e.g. those found within the international human rights law framework), which allow non-State actors to hold States responsible for violations of norms. Indeed, the Commentary to Article 33(2) emphasises that non-State actors were mentioned because in general 'the articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States';[22] Article 33(2) merely points out that it is for primary norms of international law 'to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.'[23]

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[18] See United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts*, ST/LEG/SER B/25 (United Nations 2012); James Crawford, 'State Responsibility' [2006] MPEPIL 1093 para 65.
[19] Manisuli Ssenyonjo, 'The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?' (2008) 12 The International Journal of Human Rights 725, 736.
[20] The full text of Article 33(2) states: 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.'
[21] DASR (n 3) 95.
[22] ibid.
[23]ibid 95.

It therefore seems a rather considerable jump to infer from Article 33(2) that non-State actors may accrue some kind of *responsibility* under international law.

The DASR do deal with the actions of non-State actors to some extent, but do not allow for the actors to be held responsible on their own account. Instead, any actions of non-State actors falling within particular categories are treated as actions of the State, therefore leading to *indirect* horizontal effect at most. The conduct and actors falling within the categories include: (1) those 'exercising elements of governmental authority' as delegated by a State;[24] (2) those 'directed or controlled by a state';[25] (3) those exercising elements of governmental authority 'in the absence or default of o the official [State] authorities';[26] and (4) those whose conduct is 'acknowledged and adopted by a State as its own'.[27]

It may be said that while the DASR do indicate certain openness to the idea that the conduct of non-State actors can have the effect of violating an international norm, the instrument does not envisage direct obligations for non-State actors. To over-interpret the Articles or to read something into their provisions for the purpose of achieving a particular result could risk the integrity of the interpretation and/or the body interpreting the Articles.

## 4.4 International Convention on the Elimination of All Forms of Racial Discrimination

The first convincing evidence of horizontal effect in international legislation may be found in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[28] As with the two examples above, the CERD does not contain an explicit reference to concrete human rights obligations of non-State actors. Nonetheless, it is more readily interpretable

[24] See ibid Article 5.
[25] See ibid Article 8.
[26] See ibid Article 9.
[27] See ibid Article 11.
[28] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS vol. 660, 195.

as concerning such obligations, particularly in relation to one substantive provision – Article 5 CERD.

It is possible to interpret Article 5 as placing obligations on individuals and/or companies. Paragraph (e) of the provision includes the obligation of States to guarantee the right of everyone to: '(i) The right to work, free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration'. These rights are arguably the prerogative of employers to realise, albeit in conformity with the State's domestic legislation, which must itself specify the behaviour expected of employers in this context. This recognises and emphasises the ability of employers as private actors to ensure that their employees are afforded, for example, just and favourable conditions of work and remuneration (of course this remains a vertical obligation in relation to public employers).[29] Thus, although not explicitly mentioning non-State actors, through the logical application of this provision there are concrete standards for employers to meet. The same could be said regarding other rights included in Article 5(e) when the actual provision of a rights-related service is provided by non-State actors (i.e. through privatised services). This would include the rights to health, housing, education[30] and 'right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks', which are all listed in Article 5 CERD.[31] The elaboration of standards to be placed on non-State actors through the General Comments and jurisprudence of the Committee on the Elimination of Racial Discrimination will be assessed in Chapter 5.

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[29] Extensive standards for multinational enterprises regarding conditions of employment have been developed by the International Labour Organization in its 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (5th edn, 2017) <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> accessed 7 November 2017.

[30] Article 5(e)(iii)-(v) CERD.

[31] Article 5(f) CERD.

## 4.5 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

An even more convincing example of horizontal effect of international human rights law within international legislation can be found in the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[32] As mentioned in Chapter 2, Article 4 of the Protocol explicitly subjects non-State armed groups to certain standards. The provision reads:

> 1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
>
> 2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
>
> 3. The application of the present article shall not affect the legal status of any party to an armed conflict.

Article 4(1) thus refines the prohibition on the use and recruitment of child soldiers in Article 38 of the International Convention on the Rights of the Child (CRC) by changing the admissible age of recruitment into armed forces to 18 (rather than the 15 stipulated in Article 38(3) of the CRC itself).[33] Significantly, Article 4(1) also extends the application of the prohibition to 'armed groups that are distinct from the armed forces of a State' thereby removing the limits of the prohibition found in Article 38 CRC (which applied to States Parties' armed forces only). This bolsters the protection to

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[32] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002).

[33] This was heavily negotiated during the drafting stages of the CRC, which was adopted on the basis of consensus. This meant that when the US repeatedly rejected the proposed threshold of 18 years rather than 15, the other drafters had to accept the younger age. See Cynthia Price Cohen, 'The Role of the United States in the Drafting of the Convention on the Rights of the Child' (2006) 20 Emory International Law Review 185, 191. This adamant refusal by the US may seem somewhat unnecessary in view of their ultimate failure to ratify the CRC.

be afforded to children during times of armed conflicts. The extension could also reflect the recognition that during the gap between the drafting of the CRC in 1989 and the Protocol in 2000, the number of non-international (or internal) armed conflicts began to account for the vast majority of all armed conflicts worldwide[34] and involved the widespread use of child soldiers.

However, there has been much skepticism as to the actual effect and practical import of Article 4. As non-signatories to the Protocol, the provisions within it cannot technically bind non-State armed groups. In addition, the wording of Article 4(1), that non-State armed groups '*should* not', as opposed to '*shall* not' recruit or use child soldiers is rather more suggestive and persuasive than the more obliging language found in Article 1 of the Protocol. Article 1 states that the armed forces of States '*shall* take all feasible measures to ensure' that they do not allow children to directly participate in hostilities.[35] Article 4 could therefore be seen as placing more of a moral, rather than a strictly legal obligation on non-State armed groups and may not be intended to be legally binding on them, although it could be of relevance to support a finding of a violation of international criminal law.[36] An analogy with the wording of the Security Council in their resolutions supports the idea that the obligation in Article 4 may be moral rather than legal. The International Court of Justice has held that 'the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect'[37] (i.e. whether or not a

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[34] This can be seen in the International Institute for Strategic Studies 'Armed Conflict Database' <http://acd.iiss.org/en/conflicts?tags=CF582C41FE1847CF828694D51DE80C08> accessed 29 August 2017.

[35] Emphasis added. It is very interesting to note at this point that Article 1 of the Protocol does not seem to prohibit States from *recruiting* children (perhaps since the CRC allows for the recruitment of children of 15 years or older), imposing a stricter standard on armed groups than States.

[36] The recruitment or use of child soldiers is considered to be a war crime under international criminal law, and could lead to the (international) individual criminal responsibility of a member of a non-State armed group. See Article (8)(2)(b)(xxvi) Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002).

[37] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

resolution should be considered as an instance of the Security Council exercising its power under Article 25 of the UN Charter to adopt decisions legally binding on all UN Member States).[38] Another reason for viewing these obligations as not necessarily intended to be legally binding on armed groups directly is the fact that Article 4(2) explicitly requires States to criminalise the recruitment and use of child soldiers by these groups. This goes back to the opinion of Nigel Rodley that obligations would not need to be imposed on the groups directly since their actions could be effectively governed through domestic criminal law.[39] Article 4(2) also reflects a State obligation to protect human rights and could be seen as an example of legislative indirect horizontal effect.

Even if Article 4(1) of the Protocol may not impose direct, legal obligations for non-State armed groups, Article 4(2) of the Protocol does impose direct obligations on States to take the necessary measures to prevent and punish the recruitment and use of child soldiers by non-State armed groups. Article 4(2) can therefore be considered an example of indirect horizontal effect. The State is directly required to take positive measures to

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*West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) 1971 ICJ Rep 16 [53], cited in Michael C Wood, 'The Interpretation of Security Council Resolutions' (1998) 2 Max Planck Yearbook of United Nations Law 73, 75.

[38] This power may even extend to obliging States to treat Security Council resolutions as hierarchically higher than other international norms. Michael Wood explains that this consequence comes not from Article 25 UN Charter taken on its own, but from a combination of Articles 25 and 103. Article 103 provides that when a Member State's obligations under the Charter conflict with their obligations under other sources of international law, 'their obligations under the Charter shall prevail'. As the Security Council power to bind Member States arises from the Charter (Article 25), Article 103 implicitly awards binding Security Council Resolutions precedence over other international obligations. See Michael Wood, 'The UN Security Council and International Law: The Legal Framework of the Security Council', *Hersch Lauterpacht Memorial Lectures* (7 November 2006) <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/lectures/2006_hersch_lecture_1.pdf> accessed 29 August 2017.

[39] Nigel Rodley, 'The Evolution of the International Prohibition of Torture' in Amnesty International, *The Universal Declaration of Human Rights 1948-1988: Human Rights, the UN and Amnesty International*, 63 in Clare McGlynn, 'Rape, Torture and the European Convention on Human Rights' (2009) 58(3) International and Comparative Law Quarterly 565, 594.

protect individuals' human rights from the harmful conduct of non-State armed groups, thus placing an indirect obligation on the groups themselves.

Ultimately, whichever view is taken on the nature of Article 4, the inclusion of the provision does constitute a promising move towards the explicit recognition of the responsibility of non-State armed groups for human rights violations, and towards an implicit suggestion that they are capable of fulfilling this obligation. Whether this capacity is restricted to negative obligations or extends to taking 'positive' obligations is unfortunately not dealt with by Article 4, as the nature of the obligation in question is inherently negative, merely prohibiting armed groups from acting in a particular way. The capacity of non-State actors, as mentioned in Chapter 2, may be a contributing factor to the fact that non-State actors have not been so explicitly mentioned in other international instruments in relation to rights requiring the full scope of obligations (i.e. to respect, protect and fulfil rights) to be secured.

### 4.6 Concluding reflections on the horizontal effect of international human rights in international legislation

The analysis of 'potential' examples of horizontal effect of human rights found in international legislation has shown that for the most part, assertions that the various provisions amount to human rights obligations for non-State actors should be taken lightly. There does seem to be an interesting, albeit limited, (chronological) shift towards including non-State actors more explicitly in international human rights legislation. Nonetheless, we are still far away from seeing direct, binding obligations for non-State actors in international human rights treaties. Interestingly, the most promising example comes from a treaty containing provisions strongly (and traditionally) rooted in international humanitarian law, rather than human rights law – Article 4 of the Optional Protocol to the Convention on the Rights of the Child. As explained in Chapter 2, the nature of obligations owed in international humanitarian law (at least those pertaining to non-international armed conflicts) is horizontal, treating non-State and State parties to conflicts equally for what concerns their legal obligations. Perhaps in the future, using

similar obligations relating to other specific human rights concerns (e.g. the treatment of women during armed conflict) could be an avenue for including more human rights obligations for non-State actors in international legislation.

Chapter 5

# Horizontal effect of international human rights in international jurisprudence[1]

## 5.1. Preliminary remarks

This chapter conducts a comparative analysis of the ways in which the United Nations human rights treaty monitoring bodies established in connection to five 'core' United Nations human rights treaties, have interpreted and applied human rights obligations in relation to non-State actors. Generally speaking, the bodies express their authoritative interpretations of various provisions of the respective human rights treaties through General Comments,[2] and apply the provisions through their respective individual complaints procedures, in the form of 'views' (see below). General comments are one of the most well-known outputs of human rights treaty bodies. While the source of Committees' mandates may differ,[3] the adoption of general comments is a

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[1] An earlier version of most parts of this chapter has been published in Lottie Lane, 'The horizontal effect of international human rights law in practice: A comparative analysis of the general comments and jurisprudence of selected United Nations human rights treaty monitoring bodies' (2018) 5(1) European Journal of Comparative Law and Governance 5.

[2] Sometimes known as General Recommendations.

[3] Most treaty bodies are given the mandate to provide 'General Comments', or 'General Recommendations' through the 'core' human rights treaty itself (see, for example, Article 40(4) ICCPR, which allows the Human Rights Committee to 'transmit … such general comments as it may consider appropriate, to the States Parties'. (See Office of the United Nations High Commissioner for Human Rights, 'Civil and Political Rights: The Human Rights Committee', Fact Sheet No. 15 (Rev 1) (2005) <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> accessed 30 August 2017, 24. An exception to this is the Committee on Economic, Social and Cultural

common practice of each of the bodies examined.[4] General comments and views of the treaty bodies are not legally binding,[5] but have been repeatedly found to be of high interpretative value.[6] Not every State Party to the treaties takes this approach towards general comments and views.[7] This does not negate their importance for the task at hand, however; the outputs of the bodies remain very important for determining how, at the international level (as opposed to the national level, at which the Committees' views are sometimes rejected), the horizontal effect of human rights is (whether implicitly or explicitly) discussed and applied.

Views of the Committees regarding individual complaints are adopted by virtue of the individual complaints/communications procedures for each of the bodies examined. For the most part, the authority to hear

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Rights (discussed below), which was not established until after the entry into force of the Covenant on Economic, Social and Cultural Rights (see UN CteeESCR, 'Rules of Procedure of the Committee' (1 September 1993) E/C.12/1990/Rev.1, Rule 65).

[4] The UN OHCHR provides documents compiling the majority of general comments of all treaty bodies, the individual general comments of which may be found on the website of each body. See Office of the United Nations High Commissioner for Human Rights, 'Human Rights Treaty Bodies - General Comments' <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> accessed 30 August 2017.

[5] This view has been upheld, for example, by the Spanish Constitutional Court and the Irish Supreme Court. The latter Court found that although the decisions of treaty bodies are authoritative, their non-binding nature was supported by the fact that 'neither the Covenant nor the Committee at any point purports to give any binding effect to the views expressed by the Committee' (referring to the Human Rights Committee). See STC 70/2002, 3 April 2002, para 7; and *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 11 (1 March 2002), respectively, both cited in the International Law Association Committee on Accountability of International Organizations, 'Final Conference Report Berlin 2004' <http://www.ila-hq.org/index.php/committees> accessed 29 August 2017. For a discussion of the legal status of general comments and views on individual communications, see Geir Ulfstein, 'Law-Making by Human Rights Treaty Bodies' in Rain Liivoja and Jarna Petman (eds) *International Law-making. Essays in Honour of Jan Klabbers* (Routledge 2014).

[6] See for examples, Wayne Martin and others, 'The Essex Autonomy Project Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK' (2016) <https://autonomy.essex.ac.uk/wp-content/uploads/2017/01/EAP-3J-Final-Report-2016.pdf> accessed 30 August 2017, 55.

[7] ibid.

individual complaints derives not from the main human rights treaty itself, but from an additional (and optional) protocol.[8] There is no system of precedence within the jurisprudence of the treaty bodies, which means that the scope and application of rights may change over time and the impact of the decisions could be affected.[9] As with general comments, the Committees' views are not legally binding, although they have been said to be of 'great weight' because the bodies are 'established specifically to supervise the application' of the relevant treaties.[10]

The analysis in this chapter considers general comments from the establishment of the treaty bodies until 15 January 2018, and views on individual complaints from the time of activation of the individual complaints procedures until 15 January 2018.

The monitoring bodies chosen for the analysis are: (1) the Human Rights Committee; (2) the Committee on Economic, Social and Cultural Rights; (3) the Committee on the Elimination of Discrimination against Women; (4) the Committee against Torture; and (5) the Committee on the Elimination of all Forms of Racial Discrimination. Although by now there are nine 'core' human rights treaties,[11] the five monitoring bodies examined

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[8] For example, the authority for the Committee on the Elimination of Discrimination against Women to hear individual communications comes from the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) UNTS vol. 2131, 83.

[9] While the use of the term 'jurisprudence' may be controversial when referring to the views of the monitoring bodies (as they are indeed neither courts, nor bodies with legally binding authority), this is the term used by the UN OHCHR itself, and is sometimes used in this chapter.

[10] These comments were made by the International Court of Justice in relation to the Human Rights Committee (HRCtee) in the case of *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* 2010-II ICJ Rep 692. See Ulfstein, 'Law-Making by Human Rights Treaty Bodies' (n 5) 249. The comments can be extended by analogy to relate to the jurisprudence of each of the treaty bodies, which some scholars maintain are binding 'in effect' regardless of their formal status. See for discussion Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 92-94.

[11] See Office of the United Nations High Commissioner for Human Rights, 'The Core International Human Rights Instruments and their Monitoring Bodies' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> accessed 30

were chosen for analysis due to their substantive contributions in the context of non-State actors and human rights obligations and on the nature of human rights obligations more generally (see, e.g. the CteeESCR[12]). Further, the HRCtee and the CteeESCR were chosen for the reason that they supervise the implementation of the 'twin' human rights Covenants – the ICCPR and the ICESCR Rights. As explained in Chapter 1, the Covenants were adopted at the same time, in 1966, and laid down what was then the full range of international human rights. The Committee on the Elimination of Discrimination against Women (CteeEDAW) was chosen as a good example of bodies that monitor human rights treaties drafted and adopted for the protection of a particular vulnerable group – in this case, women.[13] Finally, the Committee against Torture (CteeAT) and the Committee on the Elimination of all Forms of Racial Discrimination (CteeERD) were chosen as examples of bodies that monitor the implementation of subject-specific human rights treaties – the subjects here being torture and racial discrimination. Including this range of bodies in the analysis should allow for a broad understanding of how horizontal effect is applied in practice within the international human rights system. For reasons of space, the output of the monitoring bodies in relation to State reporting procedures (i.e. concluding observations) have been excluded from the analysis in this chapter. The sheer volume of concluding observations makes it impractical to analyse them within the framework of this chapter, and the results obtained from the general comments and views of the Committees are considered to be substantive enough without the analysis of additional documents.

The examples analysed in the following sections were found using

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August 2017.

[12] UN Committee on Economic, Social and Cultural Rights (CteeESCR), 'General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant)' (14 December 1990) E/1991/23.

[13] Another vulnerable group protected by a UN human rights treaty is children. An analysis of the Convention on the Rights of the Child (as well as a discussion of several other international human rights instruments), in light of theories on the horizontal effect of human rights has been conducted by Nuno Ferreira. See Nuno Ferreira, *Fundamental Rights and Private Law in Europe: The Case of Tort Law and Children* (Routledge 2011) 121-130.

two different methods. First, a database compiled by scholars, 'Bayefsky', was relied upon, which aims to 'enhanc[e] the implementation of the human rights legal standards of the United Nations'.[14] The database includes a large collection of documents containing references to particular subject-matters in the supervisory bodies' application of human rights treaties. The document relied upon for this chapter lists (and contains extracts of) which general comments and views of the bodies include reference to 'Public and Private Actors'.[15] The document was used as a starting point to identify which general comments and individual communications would be relevant for the analysis. Each general comment or communication identified in the Bayefsky document was then searched manually, using the terms 'non-State actor', 'private actor', and 'positive obligations'. Where this led to information regarding how the relevant monitoring body viewed or applied human rights obligations vis-à-vis non-State actors, the general comment or individual communication was used in the analysis. In some cases, however, the reference was cursory and was not substantive or informative enough to contribute to the analysis, and was therefore excluded from the analysis. The database is not exhaustive, however, as it does not include general comments and views after 2005. For this reason, the individual general comments and jurisprudence of the relevant bodies from 2005-2018 were manually searched using the three terms above, to identify any new references to non-State actors. This search was conducted using the Office of the United Nations High Commissioner for Human Rights' treaty body database.[16] Given the nature of this method, it is possible that some views or general comments that

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[14] Bayefsky, 'The United Nations Human Rights Treaties' <http://www.bayefsky.com/> accessed 30 August 2017.

[15] Bayefsky database, 'Public and Private Actors - General' <http://www.bayefsky.com//themes/public_general_general-comments.pdf> accessed 30 August 2017.

[16] The UN OHCHR's database regarding general comments can be found at Office of the United Nations High Commissioner for Human Rights, 'Human Rights Treaty Bodies - General Comments'. The OHCHR's database for searching jurisprudence of the bodies can be found at Office of the United Nations High Commissioner for Human Rights, 'Jurisprudence' <http://juris.ohchr.org/> accessed 30 August 2017.

have a less explicit (but perhaps still substantive) reference to non-State actors may have been missed. Nevertheless, it is believed that the documents discussed provide enough material to gain an overview of the way in which each of the five bodies deal with the horizontal effect of human rights.

The analysis itself was conducted from the viewpoint of 'horizontal effect', and due to the findings, turned out to be exclusively focused on indirect horizontal effect. In particular, the State obligation to protect human rights (and the encompassed duty of due diligence) are frequently referred to in the analysis as a starting point (see Chapter 1.3.3). Other than this, the analysis has been made as 'clean' as possible, referring as much as possible to the language of the monitoring body itself and refraining from any categorisation of the type of approach used, which will be discussed in Chapter 8.

The analysis also deals to some extent with State responsibility, in particular the International Law Commission's 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', discussed in Chapter 4.[17] Published together with commentary on each article, the DASR specify under what circumstances a State can be held responsible for a violation of international law (that there is an act or omission that '(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State').[18] Chapter II DASR specifically details how/when conduct can be attributed to the State. The commentary to Chapter II DASR explains that although as a general rule, only the actions of State agents can be attributed to the State, it may also be 'responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects.'[19] In particular, the following conduct may be attributed to the State: (i) the conduct of 'persons or entities exercising elements of governmental authority' (e.g. privatised corporations that retain

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[17] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) Vol. II Part Two Yearbook of the International Law Commission (as corrected) A/56/10, 30-143 (DASR).
[18] ibid Article 2.
[19] ibid Chapter II, paras 2 and 4.

public or regulatory functions);[20] (ii) conduct 'directed or controlled by a State';[21] (iii) conduct 'carried out in the absence or default of the official authorities';[22] (iv) conduct of insurrectional or other movements;[23] and (v) conduct 'acknowledged and adopted by a State as its own'.[24] While the analysis in this chapter does not focus on the DASR, it is certainly interesting to bear them in mind; some parallels can be drawn between the DASR and the reasoning of the human rights treaty monitoring bodies, which sometimes refer to the 'attribution' of non-State actor conduct to the State in their application of indirect horizontal effect. However, as will be shown below, the bodies rarely mention the DASR explicitly.

A quick note must be made regarding the place of this chapter in academic literature. Some scholars, most notably Andrew Clapham, have published analyses of horizontal effect at the international level.[25] This chapter seeks to both draw and build upon such literature, conducting a more thorough analysis in the *practice* of international human rights monitoring bodies. Clapham's seminal book on 'Human Rights Obligations of Non-State Actors', published in 2006, includes a chapter on 'Selected human rights treaties'.[26] Clapham's study takes the treaties themselves as a starting point, looking into several pertinent examples of general comments and individual complaints that deal with the interpretation and application of the six treaties he analyses. However, a more comprehensive and up-to-date analysis of the general comments and cases from human rights monitoring bodies has yet to be carried out. The present chapter seeks to fill this gap.

The chapter's analysis is structured by monitoring body. First, a Committee's general comments are examined, before moving on to the Committee's 'views'. Brief critical reflections on the practice of each body

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[20] ibid Article 5 and commentary thereto, para 1.
[21] ibid Article 8.
[22] ibid Article 9.
[23] ibid Article 10.
[24] ibid Article 11.
[25] Andrew Clapham, *Human Rights Obligations of Non-State-Actors* (Oxford University Press 2006).
[26] ibid 317-346.

are made before moving on to the next monitoring body. Final conclusions are drawn in Section 5.8. The analysis itself was conducted from the viewpoint of 'indirect horizontal effect. In particular, the State obligation to protect human rights (and the encompassed duty of due diligence) are frequently referred to in the analysis as a starting point (see Chapter 1).

## 5.2 Human Rights Committee

The UN HRCtee is the designated treaty monitoring body for the ICCPR.[27] The next sections will analyse first the Committee's general comments, and then its views on individual complaints, to see whether and how it has dealt with situations in which non-State actors have interfered with the enjoyment of human rights (i.e. whether and how it engages with the horizontal effect of human rights).

### *5.2.1 General Comments of the Human Rights Committee*

The HRCtee 'takes its authority…from article 40, paragraph 4, of the Covenant, which provides that it may transmit "such general comments as it may consider appropriate" to all States parties'.[28] The general comments of the HRCtee apply to all State Parties to the ICCPR. The HRCtee has referred to various types of horizontal effect in its general comments, the most pertinent examples of which will now be discussed. It should be mentioned at the outset that the HRCtee's interpretations of the ICCPR have often been heavily criticised for its forthcoming and at times overreaching nature,[29] which 'preclude[s] any claim that the assertions made […] represent an

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[27] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) United Nations Treaty Series vol. 999, 171.

[28] Office of the United Nations High Commissioner for Human Rights, 'Civil and Political Rights: The Human Rights Committee', Fact Sheet No. 15 (Rev 1) (2005) <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> accessed 30 August 2017, 24.

[29] See, for example, the observations of the US and the UK to General Comment No. 24. 'Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations' in UN General Assembly, 'Report of the Human Rights Committee Volume 1' (1996) A/50/40, 126-134.

international consensus of any kind'.[30] Although the Committee may at times appear to overstep the mark, its interpretations related to non-State actors and horizontal effect do not go beyond the scope of interpretation allowed by Article 31 of the Vienna Convention on the Law of Treaties.[31]

The most explicit discussion of horizontal effect in relation to the ICCPR by the HRCtee can be found in General Comment No. 31.[32] The general comment focuses on the definition and scope of obligations found within the ICCPR. In the context of obligations for non-State actors, the Committee acknowledged that 'as a matter of international law', the obligations within the ICCPR 'do not, as such, have direct horizontal effect'.[33] However, it did go on to elaborate how indirect horizontal effect can be applied to obligations contained in the Covenant. Commenting upon Article 2(1) ICCPR (declaring the nature of State obligations), the HRCtee held that States do indeed have positive obligations which require them to protect individuals 'against acts committed by private persons or entities that would impair the enjoyment of Covenant rights'.[34] Specifically, the Committee determined the positive obligations to mean that 'State Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by

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[30] US Department of State, 'Observations of the United States of America on the Human Rights Committee's General Comment 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights', 22 December 2008 <https://www.state.gov/documents/organization/138852.pdf> accessed 30 August 2017, para 2. This statement was made in the context of assertions of the Committee as to their legal authority, but the principal notion (that disagreement by State Parties affects the influence of the general comments) may be applied to other general comments by the Committee.

[31] In particular, the HRCtee seems to rely on Article 31(3)(b), which allows 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' to be considered when interpreting a treaty, along with the context of the provision (stipulated in paragraph 2 of Article 31).

[32] UN HRCtee, 'General Comment No. 31: General Legal Obligations Imposed on States Parties to the Covenant' (26 May 2004) CPR/C/21/Rev.1/Add.13.

[33] ibid para 8.

[34] ibid.

private persons or entities' could result in a violation of a Covenant right.[35] This clearly reflects States' obligations to protect human rights from interference by third parties, in particular the standard of due diligence introduced above.

However, the statements in General Comment No. 31 were not positively received by some States. The Unites States of America (US), for example, published observations on the comment condemning the Committee's assertions as 'sweep[ing] too broadly and categorically'.[36] Rejecting the idea put forward by the Committee that all human rights within the Covenant contain positive obligations (drawn from the Committee's use of Article 2(1) as the basis for positive obligations), the US believed that each right must be considered separately in order to determine whether, and to what extent, the State could be expected to take positive action to ensure its protected enjoyment.[37] This more restrictive view of the US does not correspond very well with the views of other human rights bodies as to the positive obligations and the extent of the duty of due diligence under international human rights law (see below). The argument appears to value distinguishing rights from one another on the basis of rights, rather than obligations. This seems to clash with the tripartite typology of human rights (which by now has been widely accepted as applying equally to *all* human rights).[38] The reluctance could stem from a (now outdated) belief that only

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[35] ibid.

[36] US Department of State, 'Observations by the United States of America on Human Rights Committee General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', 27 December 2007 <http://2001-2009.state.gov/s/l/2007/112674.htm> accessed 23 April 2017, para 11.

[37] ibid paras 11 and 13.

[38] See Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (Intersentia 2003) (also for a discussion of the advantages of distinguishing between obligations, rather than rights); Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly 749, 752-753; International Commission of Jurists, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights', 26 January 1997 <http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html> accessed 19 August 2017, Guideline 6.

economic, social and cultural rights require positive action by States, while civil and political rights should be equated with negative obligations only (i.e. an obligation to refrain from interfering with the enjoyment of rights). The US objected, in particular, to the consequence of the general comment that States would have a positive obligation to protect individuals from torture by private actors (this does not preclude, however, that they would be willing to accept a positive obligation to protect individuals from torture by *public* actors).[39] The US found it paradoxical that such an effect could be read into the prohibition of torture provided in Article 7 ICCPR, without the Convention against Torture (which was subsequently specifically adopted for combatting torture) explicitly including a positive obligation. The argument here referred to the requirement in Article 1 of the UN Convention against Torture (CAT) that torturous acts be done 'by, at the instigation of or with the consent or acquiescence of a *public* official', with no mention of non-State actors.[40] As will be explained in detail below, the Committee against Torture has itself interpreted Article 1 CAT in the same way as the HRCtee, allowing for some degree of indirect horizontal effect.

Although at first sight the statement in General Comment No. 31 seems to be quite far-reaching, the HRCtee may have curtailed its effect. The Committee restricted the extent of due diligence by stating that States' positive obligations only apply to rights 'so far as they are amenable to application between private persons or entities'.[41] The lack of explanation of what is meant by this, however, dims the potential of this caveat to mollify States like the US. Because the HRCtee's general comments are not legally binding, for the time being States may be able to evade (binding) legal responsibility[42] for positive obligations under the ICCPR, especially for those

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[39] See US Department of State, 'Observations by the United States of America on Human Rights Committee General Comment 31' (n 36) paras 15-17.

[40] Emphasis added. See ibid para 17. The European Court of Human Rights has also interpreted the prohibition of torture in this way.

[41] UN HRCtee, 'General Comment No. 31' (n 32) para 8.

[42] The US did openly acknowledge a *moral* and *political* responsibility of States to protect individuals from 'private acts of extreme physical abuse by private individuals', for example. See US Department of State, 'Observations by the United States of America on Human Rights

rights in relation to which the text of the Covenant does not expressly place such an obligation on States (unless and until such time as this interpretation becomes a matter of customary international law).[43]

General Comment No. 31 does give an important overview of the HRCtee's interpretation of human rights obligations within the ICCPR as a whole. However, the Committee has also published general comments pertaining to specific rights, which also involve horizontal effect and actually pre-date General Comment No. 31. It may be possible, therefore, for the earlier comments of the Committee to clarify the meaning of its more general observations on Article 2. The following discussion will shed light on which rights the Committee seems to view as being 'amenable to application between private persons or entities'.

The rights-specific General Comments referring to horizontal effect of ICCPR rights include General Comment Nos. 7, 16, 18, 20, 27 and 28.[44] The comments in these documents range from direction as to what standards States are expected to meet in relation to the relevant rights in the Covenant, to how States should fulfil their obligation to protect individuals, or calls for States to improve and provide evidence of the measures they take to protect individuals.

For example, General Comment No. 7 explicitly mentioned the State obligation to protect individuals from torturous acts, stating that 'the scope

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Committee General Comment 31' (n 36) para 18.

[43] The obligations may be even less persuasive against the US as they have not ratified the Optional Protocol to the ICCPR, which would allow individuals to bring complaints against them before the Human Rights Committee.

[44] See respectively, UN HRCtee, 'General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)' (30 May 1982); UN HRCtee, 'General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988); UN HRCtee, 'General Comment No. 18: Non-discrimination' (10 November 1989); UN HRCtee, 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 March 1992); UN HRCtee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (2 November 1999) CCPR/C/21/Rev.1/Add.9; and UN HRCtee, 'General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (29 March 2000) CCPR/C/21/Rev.1/Add.10.

of protection required goes far beyond torture as normally understood', and, significantly, that 'it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting *outside or without any official authority*'.[45] This strong proclamation was superseded by more tempered wording by General Comment No. 20 which replaced No. 7. Nevertheless, General Comment No. 20 still requests that in their periodic reports to the Committee, State Parties provide information on the 'criminal law which penalize[s] torture and cruel, inhuman and degrading treatment or punishment' by any actor, including by private persons.[46] It further requires that complaints of torture 'must be investigated promptly and impartially by competent authorities'.[47] While there is no specific mention of this relating to complaints against private persons, it can be assumed from the previous quotation that this would be expected, since the Committee sees the State as being responsible for protecting individuals from torture by private actors.

Regarding the right to privacy, the HRCtee stated in General Comment No. 16 that the 'right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons'[48] – an implicit reference to the obligation to protect. The Committee went on to explain what kind of measures this required. In particular, it mentioned that States must regulate by law the 'gathering and holding of personal information on computers, data banks and other devices' by public and private actors, ensure that individuals can 'ascertain which public authorities or private individuals or bodies control or may control their files' and 'have the right to request rectification or elimination' of files collected or processed unlawfully or that contain incorrect personal data.[49] Here, the HRCtee has gone quite far, compared to its comments regarding other rights, in detailing how the right to privacy should be safeguarded

[45] Emphasis added. UN HRCtee, 'General Comment No. 7' (n 44) para 2.
[46] UN HRCtee, 'General Comment No. 20' (n 44) para 13.
[47] ibid para 14.
[48] UN HRCtee, 'General Comment No. 16' (n 44) para 10. See also Clapham (n 25) 331.
[49] ibid.

against interference by private actors.

The HRCtee also mentions specific measures to be taken vis-à-vis non-State actors in General Comment No. 18 on the subject of non-discrimination. The HRCtee required States to provide evidence of their 'legal provisions and administrative measures directed at diminishing or eliminating' discrimination carried out by private actors.[50] General Comment No. 28 on the equality of rights between men and women requests States to 'report on any laws and *public or private actions that interfere with the equal enjoyment* by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference'.[51] These comments clearly impose the obligation to protect upon States, requiring due diligence to be taken by implementing laws to prevent and punish interference with the enjoyment of (particularly women's) rights by private actors.

It is very interesting that the majority of the instances in which the Committee has spoken of or implicitly applied indirect horizontal effect of rights within the ICCPR have been in relation to groups that are generally considered to be 'vulnerable'. In particular, the Committee has upheld the obligation to protect with regards to women and individuals deprived of their liberty or freedom of movement. Another example is General Comment No. 27 on freedom of movement, which demonstrates the importance that the HRCtee places on the obligation to protect to women as a vulnerable group. In this comment, the Committee opined that individuals must be 'protected not only from public but also from private interference', the 'obligation to protect [being] particularly pertinent' in relation to women.[52]

It could be argued that General Comment No. 31 attempts to take this obligation out of the realm of the enjoyment of specific rights by particular groups by upholding indirect horizontal effect more generally. To identify

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[50] UN HRCtee, 'General Comment No. 18' (n 44).
[51] Emphasis added. UN HRCtee, 'General Comment No. 28' (n 44) para 20.
[52] UN HRCtee, 'General Comment No. 27: Article 12 (Freedom of Movement)' (2 November 1999) CCPR/C/21/Rev.1/Add.9, para 6.

the Committee's approach to horizontal effect in a more holistic manner, the jurisprudence resulting from its individual complaints procedure under Article 1 of the Optional Protocol to the ICCPR will also be briefly assessed, in so far as it adds value to the findings of the General Comments.

*5.2.2 Views of the Human Rights Committee*

Pursuant to Article 1 of the Optional Protocol to the ICCPR, the HRCtee can hear individual communications 'from individuals subject to [a State Party's] jurisdiction who claim to be victims of a violation by that State Party'.[53] The Optional Protocol entered into force in 1976, and has resulted in almost 3,000 communications being brought before the Committee.[54] Of those cases in which a 'view' was adopted, it is possible to see evidence of indirect horizontal effect.

For example, the case of *B. d. B. v The Netherlands* concerned non-discrimination under Article 26 ICCPR.[55] The communication was actually declared inadmissible by the Human Rights Committee, but remains interesting due to the Committee's comments regarding the author of the alleged human rights violation. The claimants alleged that a non-State actor, the Industrial Insurance Board for Health and for Mental and Social Interests, had discriminated against them in relation to social security contributions.[56] The Netherlands wished to rely on the fact that the Board is a non-State actor as one of its arguments against admissibility of the complaint. The main argument was that because the Board is an independent body (established

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[53] Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171. To date, there are 115 State Parties to the Optional Protocol. See the UN Treaty Collection database <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en> accessed 30 August 2017.

[54] A statistical survey of the jurisprudence of the Human Rights Committee is available via the website of the Office of the United Nations High Commissioner for Human Rights <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> accessed 30 August 2017.

[55] UN HRCtee, *B. d. B. et al. v The Netherlands* (273/1989) UN Doc. Supp. No. 40 (A/44/40) 286 (30 March 1989).

[56] ibid para 2.1.

merely to 'implement social security legislation'),[57] the Dutch State could not 'influence concrete decisions' of the Board.[58] Because of this, the Netherlands argued that it could not be held responsible for discrimination on behalf of the Board. The HRCtee, however, had a different point of view. It observed that the Dutch State was 'not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs'.[59] Through this statement, the Committee seems to imply that the Netherlands remains responsible here because the conduct of the non-State actor could be attributed to the State. Although the State was not directly controlling the Board, it had delegated traditionally 'public' functions to it, and thus would have retained responsibility for any discrimination that would have arisen from the Board's decisions (had the case been assessed on its merits).

The reasoning in *B. d. B. v The Netherlands* was later reiterated and to some extent also clarified by the Committee in *Cabal and Pasini v Australia*.[60] The latter communication was brought in relation to alleged discrimination by a privatised prison. The HRCtee again held that 'contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons' does not diminish the responsibility of the State; it remains an obligation of the State to ensure that the rights of individuals are protected vis-à-vis these private actors, the conduct of whom could be attributed to the State.

The HRCtee has discussed the obligation to protect in other cases that take place in a 'quasi-public sphere'. In discussing the admissibility of the case of *Nahlik v Austria*, for example, the HRCtee explicitly referred to the State's obligation to protect individuals from discrimination 'among private parties'.[61] This seems to reiterate General Comment No. 31, but its

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[57] ibid para 4.7.
[58] ibid.
[59] ibid para 6.5.
[60] UN HRCtee, *Mr. Carlos Cabal and Mr. Marco Pasini Bertran v Australia* (1020/2001) UN Doc. CCPR/C/78/D/1020/2001 (19 September 2003).
[61] UN HRCtee, *Franz Nahlik v Austria* (608/1995) UN Doc. CCPR/C/57/D/608/1995 (22 July

significance for horizontal effect is weakened due to the 'quasi-public' context. The case concerned alleged discrimination that had occurred through a private agreement. The Austrian State tried to rely on this fact to have the communication declared inadmissible. However, the HRCtee reaffirmed that States must protect individuals from discrimination 'within the public sphere or *among private parties* in the quasi-public sector of, for example, employment'.[62] Additionally, because agreement had to be confirmed by a public body before it could enter into force, the State was deemed to be in a position to protect the individual from discrimination through the agreement. Ultimately, the case was declared inadmissible on other grounds. Nevertheless, the statement made about private parties does demonstrate that the HRCtee believes non-discrimination to be one of the rights 'amenable to application' between private actors.

In contrast, the right to participation in the public life of the nation (protected by Article 25 ICCPR) does not seem to be considered as amenable in the same way. In the case of *Karakurt v Austria* the HRCtee emphasised that Article 25 could 'not extend to cover private employment matters'.[63] Interestingly, in another case involving Article 25 (*Arenz v Germany*), the Committee did suggest that the right to freedom of religion was subject to the 'obligation to *ensure'* all rights in the ICCPR, including Article 25, and in relation to private associations as well as State actors.[64] The complaint centred on the fact that a religiously-founded political party had denied the claimants membership of the party due to their membership of a different ideological organisation. The claimants argued that through upholding this decision, the German national courts had interfered with their right to take part in public affairs. The Committee rejected this argument, however, on the

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1996).

[62] ibid para 8.2.

[63] UN HRCtee, *Karakurt v Austria* (965/2000) UN Doc. CCPR/C/74/D/965/2000 (4 April 2002) para 8.2.

[64] Emphasis added. The use of the word 'ensure' rather than 'protect' is interesting here. Whether the same meaning was intended by the HRCtee is unclear, as no explanation of what the obligation entails was provided. UN HRCtee, *Arenz v Germany* (1138/2002) UN Doc. CCPR/C/80/D/1138/2002 (29 April 2004) para 8.5.

grounds that it was not the function of the Committee (not being an appeals court) to re-evaluate the German national courts' application of German domestic law, as long as there was no arbitrariness or denial of justice.[65] Despite not going to the merits, this case does show, to a limited degree, that a right so inherently linked to the public sphere can also be amenable to relationships between private actors. Because the applicants did not focus on this in their communication, however, the HRCtee restrained itself from 'address[ing] the broader issue of what legislative and administrative measures' must be taken to ensure the enjoyment of Article 25.[66]

*5.2.3 Critical remarks on the jurisprudence of the Human Rights Committee*
It may be concluded from the above examples that the HRCtee does indeed engage with the idea that non-State actors could cause infringements of human rights. So far, the Committee has not been particularly radical in its application of the obligation to protect human rights. Despite the backlash surrounding General Comment No. 31, it appears to have been based on a line of previous general comments within which the Committee elaborated on States' positive obligations to protect human rights from both public and private actors. It cannot be said, however, that the Committee has been as extensive in its views on individual communications. It is likely that this is because of the restrictions of what the Committee could discuss imposed by the subject matter of the complaint itself (e.g. in *Arenz v Germany*) or simply because the cases in which issues of horizontal effect have arisen have tended to be declared inadmissible, thus not warranting a detailed examination or application of the relevant provisions vis-à-vis non-State actors.

What is clear is that when the HRCtee engages with the obligation to protect, it requires certain measures to be taken by States to ensure that human rights protection is engrained on an institutional level within States (i.e. within their legal or administrative frameworks). As with other human rights monitoring bodies, when faced with human rights interference by a privatised

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[65] ibid para 8.6.
[66] ibid.

actor or with a situation where the State has delegated certain 'public' tasks, the HRCtee has not hesitated to attribute the actions to the State. It also has not shied away from applying States' obligation to protect in relation to rights that are often affected within private relationships, such as privacy and non-discrimination, although the HRCtee seems to tread more carefully with rights that are of a more public nature (e.g. Article 25 ICCPR). In terms of concrete indirect obligations for non-State actors at the international level (through direct obligations imposed by domestic law), the HRCtee has remained quite general. The actual standards that States are expected to hold non-State actors to prevent them from interfering with human rights are very vague. Most aspects of the obligation to protect that are discussed by the Committee go either to procedural obligations (i.e. due diligence), or simply state that, for example, non-State actors should not be permitted to discriminate. The HRCtee therefore predominantly stays within the realm of State's direct obligations rather than non-State actors' indirect ones.

Ultimately, whatever approach the HRCtee takes in its interpretation and application of the ICCPR, it remains limited by the international human rights framework, the non-binding nature of the HRCtee's general comments and views on individual communications, and, regarding the individual communications procedures, the very cases that appear before it.

### 5.3 Committee on Economic, Social and Cultural Rights

The UN CteeESCR has made quite widespread implicit references to indirect horizontal effect in relation to the ICESCR.[67] As with the HRCtee, the CteeESCR's general comments will be addressed before moving on to its jurisprudence.[68] The CteeESCR is not technically a 'UN treaty body' in the same sense as the other bodies discussed here, but will be treated as an

[67] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS vol. 999, 3.

[68] Although the use of this term may be controversial as the supervisory bodies cannot deliver binding judgments, this is the wording used by the Office of the United Nations High Commissioner for Human Rights.

equivalent body.[69]

### *5.3.1 General Comments of the Committee on Economic, Social and Cultural Rights*

The CteeESCR has consistently applied the tripartite typology of human rights, and focuses most of its consideration of indirect horizontal effect on the State obligation to protect.[70]

Even before the CteeESCR engaged with the full typology explicitly, it was applying some degree of indirect horizontal effect by applying States' protective obligations regarding human rights. For example, in General Comment No. 5 on persons with disabilities, the CteeESCR emphasised that the private sphere must be appropriately regulated by the State to ensure the protection of people with disabilities from inequitable treatment.[71] This could (and indeed has by some scholars) be seen as an 'obligation to regulate' private actors.[72] Going into more detail, CteeESCR explicitly mentioned that 'it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities' – an idea that was reaffirmed in General Comment No. 14 on the right to health.[73] The statement in General Comment No. 5 cannot be read as implying that the CteeESCR is

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[69] The CteeESCR was established not by the relevant core human rights treaty (in this case the ICESCR) as the other monitoring bodies were, but rather at a later point by the United Nations Economic and Social Council. See United Nations Economic and Social Council, Resolution 1985/17, 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (28 May 1985) E/RES/1985/17.

[70] For a discussion of the UN CteeESCR's use of the typology, see Ida E Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5(1) Human Rights Law Review 81.

[71] UN CteeESCR, 'General Comment No. 5: Persons with Disabilities' (9 December 1994) E/1995/22, para 11.

[72] See Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011); see also Marlies Hesselman and Lottie Lane, 'Disaster and non-State actors – Human rights-based approaches' (2017) 26(5) Disaster Prevention and Management 526.

[73] UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, para 26.

in favour of subjecting private actors directly to *international* human rights law. Rather, it requires States to adopt *national* norms concerning economic, social and cultural rights which must be applied within the private sphere (i.e. in private relationships). Indeed, the CteeESCR emphasised that the 'ultimate responsibility' for ensuring that people with disabilities' Covenant rights are complied with lies with the State.[74] The CteeESCR appeared to be particularly concerned that this was the case in relation to privatised public services – a concern consistent with that expressed by the HRCtee above. Indeed, very similar language was used by the CteeESCR here as by the HRCtee in *B. d. B. v The Netherlands*; the CteeESCR pointed out that delegation of activities by the State to private actors does not 'absolve' the State of its international obligations, whereas the HRCtee explained that the same did not '*relieve*' a State of its obligations.[75]

In the context of the right to food, the CteeESCR made similar claims regarding States' obligation to protect and the fact that this necessitates State regulation of the private sphere, in General Comment No. 12.[76] Here, the CteeESCR reiterated that '[v]iolations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States', confirming that violations can occur when the harm is directly caused by non-State actors.[77] A subsequent general comment on the right to water extended the requirement of a regulatory regime of private providers of public services to include a punitive aspect in case of non-compliance by the private actor.[78]

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[74] ibid para 12, 'ultimate responsibility' being a quotation by UN CteeESCR of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly through resolution 37/52 of 3 December 1982 (para 1), para 165.
[75] See *B. d. B. v The Netherlands* (n 55) para 6.5. See also UN CteeESCR, 'General Comment No. 5' (n 71) para 12.
[76] UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) E/C.12/1999/5. This was reiterated in other General Comments (see below), including General Comment No. 16. See UN CteeESCR, 'General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)' (11 August 2005) E/C.12/2005/4, para 20.
[77] UN CteeESCR, 'General Comment No. 12' (n 76) para 19.
[78] See UN CteeESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11, para 24.

Failing to adopt an effective regulatory system would, according to the Committee, result in a violation of the obligation to protect, and therefore of Covenant rights.[79] A similar statement can be found again in General Comment No. 23 on the right to just and favourable conditions of work. In the context of States' obligation to protect human rights, the CteeESCR emphasised that States must 'tak[e] steps to prevent, investigate, punish and redress abuse through effective laws and policies and adjudication.'[80] Taken together, these general comments not only create a framework for the obligation to regulate private actors, but also expound the Committee's view of what the duty of due diligence requires of States. Curiously, the CteeESCR did not mention an explicit duty of 'due diligence' until General Comment No. 16, and since then, it has not been consistent in using the term. This is not necessarily significant, as it can be argued that by providing States with guidance as to how they can fulfil the obligation to protect individuals, and what measures they should take for the prevention and punishment of non-State actors for certain conduct (such as the inclusion of the punitive aspect of regulatory regimes), the Committee is implicitly referring to due diligence, or at least leads to comparable obligations. This is particularly persuasive when the explicit language in different general comments is compared. Explicit reference was made in General Comment No. 16, in which the CteeESCR calls upon States to 'act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors'.[81] This is almost identical to the language of General Comment No. 23, quoted above. The reason for the inconsistency is unclear, although an explicit use of 'due diligence' returns repeatedly in the Committee's most recent general comment on business and human rights (see below). As with the HRCtee, the CteeESCR's treatment of non-State actors so far does not contain concrete or

[79] UN CteeESCR, 'General Comment No. 14' (n 73) para 51; UN CteeESCR, 'General Comment No. 15' (n 78) para 44(b).
[80] UN CteeESCR, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (27 April 2016) E/C.12/GC/23, para 59.
[81] UN CteeESCR, 'General Comment No. 16' (n 76) para 27.

detailed standards against which they should be held, even at the national level. Rather, because of the focus on due diligence and regulation, there is again an emphasis on States' procedural obligations. It could be assumed that the substantive standards to which non-State actors should be held therefore match those of the State (at least in terms of defining particular terms, such as 'access' to certain services, or in determining whether, for example, discrimination has occurred). On the other hand, it could also be assumed that the standards fall within States' margin of appreciation.

The CteeESCR has also discussed potential responsibilities of non-State actors themselves, for example in General Comment No. 12 on the right to adequate food. The CteeESCR emphasised (again) the fact that only States retain ultimate accountability for ensuring the right to food.[82] Significantly, though, it also highlighted that *all* members of society have a role to play in the *realisation* of this right.[83] This would seem to go further than the (generally accepted) assertion that non-State actors may have an international responsibility (although not a legal *obligation*) to *respect* human rights. The statement suggests that private actors may have a more 'positive' role vis-à-vis the right to food. While this is suggested by the wording of the comment, the CteeESCR has not made it explicit. In fact, in General Comment No. 12 the CteeESCR seemed to be more concerned with the actions of private businesses interfering with human rights and the State's obligation to prevent this, rather than any positive action that private businesses themselves could or should be making to *contribute* to the realisation of the right to food. Although not going into the positive actions of business vis-à-vis human rights realisation, the CteeESCR has gone so far as to explain how businesses should act so as to avoid interfering with the right to food (i.e. by operating 'within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society').[84] This goes further than the comments discussed until this point, as

[82] UN CteeESCR, 'General Comment No. 12' (n 76).
[83] ibid para 20.
[84] ibid.

it makes explicit reference to the possibility that non-State actors could have some responsibilities to take action, at least in terms of a responsibility to respect the right. The CteeESCR repeated the relevant passage almost verbatim in its General Comment No. 14 on the right to health.[85] The mention of a collaboration between a business and the State, and of the ultimate responsibility of the State, does temper the horizontal effect within the general comments to some extent though, and (as with General Comment No. 5) cannot be read as imposing direct (and in any case not binding) international obligations on non-State actors. Thus, this Comment remains an example of indirect horizontal effect.

Although the comments thus far have actually been relatively extensive in dealing with non-State actors, a noticeable shift occurred in General Comment Nos. 14 and 15, which include a section specifically entitled 'Obligations of actors other than States'. This suggests that the CteeESCR does in fact envisage more direct, and possibly even binding, human rights obligations for non-State actors. In the two comments the Committee mentions, for example, obligations of international organisations that have ties with the right to health and water, respectively (naming, for example, the World Health Organization, the Food and Agricultural Organization and UNICEF).[86] The obligations included mostly involve giving support and aid to States in the implementation of their Covenant rights, although international organisations (including international financial institutions) should also incorporate 'human rights law and principles in the[ir] programmes and policies'.[87] Although the Committee does actually say that the obligations of the international organisations fall under the scope of human rights obligations, it is significant that in General Comment No. 15 the CteeESCR notes that that the cooperation and support of the international organisations will be considered when assessing how capable States are of

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[85] UN CteeESCR, 'General Comment No. 14' (n 73) para 42.
[86] ibid, Section 5; UN CteeESCR, 'General Comment No. 15' (n 78) Section VI.
[87] UN CteeESCR, 'General Comment No. 14' (n 73) Section 5; UN CteeESCR, 'General Comment No. 15' (n 78) Section VI.

realising rights within their jurisdiction,[88] thereby implying that the obligations of the international organisations are related to the realisation of human rights, and could have a bearing on the standards expected of states in terms of their obligation to fulfil human rights. The fact that these obligations are only mentioned as existing for international organisations could be telling here, especially as other non-State actors (e.g. privatised companies) often contribute to the obligation to fulfil human rights by providing certain services without having an obligation to do so.[89] We normally assume that non-State actors are dealt with within national legal frameworks. However, international organisations, by their nature, operate in the international sphere, and are directly subject to some international laws (although not to date those found in human rights treaties). This makes it less of a stretch to imagine that the CteeESCR was directly involving international organisations in human rights realisation, particularly when the operations of many international organisations are connected to human rights in some way (e.g. the World Bank, or even the UN itself).

Significantly, though, in more recent general comments, the CteeESCR has even taken one step further to say that private actors do actually have an 'obligation' (rather than a responsibility) to respect certain human rights. In General Comment No. 22 on the right to sexual and reproductive health, the CteeESCR requires State Parties to avoid taking retrogressive measures that could, *inter alia*, 'reduce oversight by States of the obligation of private actors to respect the right of individuals to access sexual and reproductive health services'.[90] The language used here is significant, although admittedly it is not clear whether the 'obligations' envisaged for private actors exist at the national or international level (the assertion having been made in the context of the State's obligation to protect human rights). Although the statement is quite narrow in terms of substance,

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[88] UN CteeESCR, 'General Comment No. 15' (n 78) para 60.
[89] See Hesselman and Lane (n 72).
[90] UN CteeESCR, 'General comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) E/C.12/GC/22, para 38.

the broad term 'private actors' suggests that *all* private actors have an obligation not to interfere with access to sexual and reproductive health services. Whether or not the statements can really be read as an understanding that non-State actors do have human rights obligations, they still cannot result in legally binding obligations at the international level. As explained, general comments do not have a legally binding nature and cannot create obligations themselves, but rather constitute the (arguably authoritative) opinion of the CteeESCR as to what standards the Covenant rights demand.

The CteeESCR has recently adopted a general comment on business and human rights (General Comment No. 24),[91] in which it explains in more detail what obligations States have regarding human rights interference by businesses. Interestingly, the comment includes measures under the obligations to respect, protect and fulfil human rights, rather than just the obligation to protect. Although the document is directed predominantly at States, its relevance for 'the corporate sector' is also emphasised, as it seeks to help them 'in discharging their human rights obligations and assuming their responsibilities'.[92] Although the language of 'obligations' as well as responsibilities here is striking, it is unclear whether the CteeESCR is referring to obligations of businesses at the national or international level, and the CteeESCR later clarifies that it 'only deals with the conduct of private actors…indirectly.'[93] Of course, the comment is also of interest to individuals seeking redress against States for human rights interference by businesses.

In terms of the obligation to respect human rights, the CteeESCR explains that States could be responsible for violating this obligation due to the 'action or inaction of business actors', which can (following the rules on

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[91] UN CteeESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) E/C.12/GC/24.

[92] ibid, para 5. Interestingly, in an earlier draft of the general comment, the CteeESCR had referred to 'non-State actors' rather than the corporate sector, going against its previous trend of referring to 'private actors'. See UN CteeESCR, 'General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (draft of 17 October 2016) E/C.12/6-/R.1, paras 5-6.

[93] UN CteeESCR, 'General Comment No. 24' (n 91) para 11.

attribution found in the DASR[94]) be attributed to States in certain circumstances, namely:

> (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue, as may be the case in the context of public contracts; (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities; or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.[95]

This is the first time that the Committee has explicitly referred to the DASR. It seems that for the most part, the monitoring body seems to mention attribution in connection with the obligation to protect human rights, but without explaining how this fits within the framework of the DASR (or indeed whether it actually needs to). The fact that they are quoted in the general comment is therefore significant, and it will be interesting to see whether reference is also made in future general comments.

Following the tripartite typology of human rights, the CteeESCR details what States should do under each category of obligation. Under the obligation to protect human rights, this includes:

- 'prevent effectively infringements of economic, social and cultural rights in the context of business activities';[96]
- 'adopt legislative, administrative, educational, as well as other appropriate measures to ensure effective protection against Covenant rights violations linked to business activities'[97] (e.g. the adoption of criminal sanctions, imposing due diligence standards on

[94] Articles 8, 5 and 9 DASR (n 17).
[95] UN CteeESCR, 'General Comment No. 24' (n 91) para 11.
[96] ibid para 14.
[97] ibid.

businesses and conducting 'direct regulation and intervention' where necessary);[98] and
- to put in place 'effective monitoring, investigation and accountability mechanisms' to enable 'those whose Covenant rights have been violated in the context of business activities' access to effective remedy.[99]

The CteeESCR is explicit in laying down its general understanding of the obligation to protect, which it understands as being violated by 'a failure by the State to take reasonable measures that could have prevented the occurrence' of a violation caused by a private actor, even when the private actor was not the sole cause of the violation and even (as long as it was *reasonably foreseeable*) when the State did not foresee the violation.[100] The comment also provides considerable detail regarding precise legislative, administrative and other measures that could or should be adopted (and enforced) by States to regulate and monitor businesses' effects on economic, social and cultural rights in certain contexts (e.g. in relation to the tobacco industry, the housing market, the education and employment sectors, among others).[101] In this regard the CteeESCR also reiterates the obligation to regulate non-State actors, especially in the context of privatisation and the private provision of public services.[102] As well as explaining the obligations of States the CteeESCR elaborates on the due diligence standards that States should hold *businesses* to, including to 'act with due diligence to identify, prevent and address abuses to covenant rights' by their subsidiaries and business partners.[103]

Significantly, General Comment No. 24 also mentions that in some domestic legal systems, namely South Africa, individuals can bring a claim

[98] See ibid paras 14-22.
[99] ibid para 38.
[100] ibid para 11.
[101] See ibid para 19.
[102] ibid paras 21-22. For example, the CteeESCR states that '[p]rivate providers should [...] be subject to strict regulations that impose on them so-called "public service obligations"'. ibid para 21.
[103] ibid para 33.

directly against businesses in order 'to impose (*positive*) duties to adopt certain measures or to contribute to the fulfilment of such rights'.[104] This goes further than any other Committee to date in recognising the potential role of non-State actors regarding positive aspects of the realisation of human rights. However, the comment was made in laying down the context and scope of the general comment and was merely illustrating the practice of South Africa regarding businesses. It cannot therefore be read as an understanding of the CteeESCR that businesses have, or should have, such responsibilities. What can be seen from the general comment overall is that the CteeESCR applies indirect horizontal effect predominantly through States' obligation to protect human rights (including due diligence), but also by attributing non-State conduct to States in certain situations. Interestingly, the other monitoring bodies also tend to mention (without explaining in legal terms) attribution in the context of the obligation to protect.

*5.3.2 Views of the Committee on Economic, Social and Cultural Rights*

The CteeESCR has the competence to hear individual complaints pursuant to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.[105] However, as the Optional Protocol only entered into force in 2013, there is relatively little jurisprudence from the body as compared to the other UN human rights monitoring bodies.[106] The communications that have been considered by the Committee so far have not dealt with the horizontal effect of human rights, and will therefore not be discussed here.

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[104] ibid para 4, citing the Constitutional Court of South Africa, *Daniels v Scribante and Others*, case CCT 50/16 (judgment of 11 May 2017) paras 37-39 (leading judgment by J Madlanga).
[105] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 63/117 (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117.
[106] ibid. Despite being adopted in 2009, the Protocol lacked sufficient ratifications to enter into force until 5 May 2013. See the website of the Office of the United Nations High Commissioner for Human Rights, 'Monitoring the Economic, Social and Cultural Rights' <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx> accessed 30 August 2017.

### *5.3.3 Critical remarks on the jurisprudence of the Committee on Economic, Social and Cultural Rights*

Overall, the CteeESCR's general comments are quite telling of its attitude towards indirect horizontal effect. It has repeatedly referred to the State obligation to protect human rights, requiring specific action to be taken to regulate and control the actions of non-State actors, particularly those with a connection to the State (i.e. privatised companies) and actors that have been delegated certain public tasks. The fact that the Committee has adopted comment specifically on business and human rights is significant. Regarding the CteeESCR's interpretation and application of the obligation to protect, the same can be said as for the HRCtee – although there are now detailed recommendations for States to take certain action to protect human rights, it is not clear to which standards exactly non-State actors must be upheld at the national level. What is clear from its general comments is that the CteeESCR has a strong belief that non-State actors do have at least a role, and perhaps even obligations, within the international human rights framework. Thus, while the Committee has mostly confined itself to interpreting the ICESCR in a way that results in indirect horizontal effect, it has gone further than the HRCtee in alluding to direct horizontal effect.

Significantly, the Committee has even suggested that some non-State actors have a more active or positive role to play in the realisation of rights, with an obligation to help States with their own implementation. This already pushes the boundaries of the international human rights framework, which does not envisage human rights obligations for non-State actors. Getting to the point where the Committee could legitimately (i.e. within its mandate) and explicitly detail human rights obligations for non-State actors (beyond those to be imposed within domestic law) would require a change of the international legal framework. For such statements to have a practical effect, State Parties to the ICESCR would then need to act upon them. Of course, in theory, the Committee could choose to go down this road without a change in the framework or its mandate, but this is likely to be met with much resistance from disgruntled States that could choose to simply ignore the CteeESCR. Until the international human rights framework is expanded from

a State-centric system, or alternatives are found outside of the legal framework, it is unlikely that more horizontal effect will be achieved in relation to the Covenant on Economic, Social and Cultural Rights.

## 5.4 Committee on the Elimination of Discrimination Against Women

The UN CteeEDAW has also faced situations necessitating an application of horizontal effect of human rights. The following sections will assess the extent to which the CteeEDAW has applied this obligation in practice, looking first at its general recommendations before discussing its relevant jurisprudence.

### *5.4.1 General Recommendations of the Committee on the Elimination of Discrimination Against Women*

Significantly, non-State actors are mentioned explicitly in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) itself. Article 2(e) of the Convention imposes a general obligation on State Parties to 'take all appropriate measures to eliminate discrimination against women by *any person, organization or enterprise*'.[107] General Recommendation No. 28 on the core obligations of State parties under Article 2 affirmed that the provision embodies a positive obligation for States to ensure that women are not subject to discrimination by non-State actors, including by 'national corporations operating extraterritorially' (i.e. similarly to the standards upheld in the *Trail Smelter* case regarding transboundary harm).[108] In this Recommendation, the CteeEDAW also mentioned the attribution of non-State actors' conduct to the State in some situations, although it did not explain when this would be the case or refer to the DASR.

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[107] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981, UNTS vol. 1249, 13 [emphasis added]. The importance of this provision was most recently intimated by the UN Committee on the Elimination of all Forms of Discrimination Against Women (CteeEDAW) in the case of *Angela González Carreño v Spain* (47/2012) UN Doc. CEDAW/C/58/D/47/2012 (16 July 2014) para 9.6.

[108] UN CteeEDAW, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010) CEDAW/C/GC/28.

Rather, it simply noted that States are 'thus' obliged to take 'appropriate measures', including 'the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing'.[109] Again, this seems to either conflate 'attribution' as a concept within public international law with the obligation to protect, or to use it as a separate term. The approach of the CteeEDAW in this respect is unclear. As with the CteeESCR, the obligation to regulate is clear here, and seems to apply to all private actors that are providing services of a public nature.

Similar obligations were mentioned in CteeEDAW's General Recommendation No. 19 on violence against women. In this recommendation the CteeEDAW emphasised the importance of States 'tak[ing] appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private acts'.[110] It had previously emphasised that discrimination against women 'is not restricted to action' by State actors, but that 'States may also be responsible for private acts' if they do not act with due diligence.[111] Indeed, the general recommendation lists instances in which violence against women can 'result from the acts or omissions of State *or non-State* actors', including, *inter alia*, where a State has delegated public tasks, e.g. security within places of detention, to private actors.[112] In specific recommendations, the Committee suggested action that States should take relating to particular non-State actors, such as the media, people in the workplace and family members. The measures to be taken included the adoption and implementation of legislation, provision of services, and other 'preventive, punitive and remedial measures' which States

[109] ibid.
[110] UN CteeEDAW, General Recommendation No. 19: Violence against women', in UN CteeEDAW, 'General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)' 1992, para 24(a).
[111] ibid para 9.
[112] ibid para 12 [emphasis added].

should report to the Committee about.[113] The wording here suggests that taken together, the measures in the recommendations would constitute the precise standards of due diligence expected by the CteeEDAW. The Committee also mentioned due diligence in Recommendation No. 19 in its explanation of how the State could be held responsible for the conduct of non-State actors (i.e. when they fail to 'act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'[114]). Interestingly, in this instance, the CteeEDAW explained such responsibility without mentioning attribution.

In General Recommendation No. 24, the CteeEDAW (like the HRCtee and the CteeESCR), expressed concern about States trying to pass their human rights obligations to private actors when States delegate what are traditionally public functions to these actors.[115] The CteeEDAW reiterated the opinion of the HRCtee and the CteeESCR that States 'cannot absolve themselves of responsibilities' by delegating public tasks.[116] This has the effect of ruling out any *direct* horizontal effect of human rights contained within CEDAW that would occur if responsibility could be passed onto the non-State actors. However, the widespread concern of harmful actions of private actors operating in the 'public' sphere also serves to emphasise and recognise the impact that such non-State actors can have on human rights. Still, though, there is no explanation of what substantive obligations States should impose on non-State actors in order to ensure that they do not cause harm to individuals' human rights. The CteeEDAW's unease also reflects qualms regarding the attitude of States (although no examples were provided by CEDAW), that delegating functions to private actors would mean that the State no longer has to deal with the human rights aspects related to that function. What is not addressed by the CteeEDAW, or indeed the other monitoring bodies addressed so far, is the possibility of concurrent or shared

[113] ibid para 24.
[114] ibid para 9.
[115] UN CteeEDAW, 'General Recommendation No. 24: Article 12 of the Convention (Women and Health)' (1999) A/54/38/Rev.1, chap I, para 17.
[116] ibid.

responsibility for non-State actors that are delegated State functions – it could be possible for both the State to retain responsibility as well as confer a degree of responsibility on the non-State actor.[117] So far, as we have seen with the two previous treaty bodies discussed, this has only been deemed to be appropriate at the national, and not the international, level. Indeed, at the international level it is not considered possible for States to 'replac[e], legally delegat[e] or chang[e]' their *de jure* responsibility when they outsource certain tasks to non-State actors.[118]

Further explanation of the State obligation to protect women was provided in General Recommendation No. 34.[119] The CteeEDAW adopted the same approach as the CteeESCR by imposing an obligation to 'regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially.'[120] Specifically, reiterating its General Recommendation No. 28, the CteeEDAW requests States to 'prevent any actor under their jurisdiction, including private individuals, companies and public entities, from infringing or abusing the rights of rural women outside their territory'.[121] General Recommendation No. 28 is also reiterated in the CteeEDAW's 'Draft General Recommendation No. 37 on the Gender-related dimensions of Disaster Risk Reduction in a Changing Climate'. The draft contains a separate section detailing recommendations for States in relation

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[117] A discussion of 'shared responsibility' of international legal obligations falls outside of the scope of the present book. In-depth research into this notion has been carried out by the Research Project on Shared Responsibility in International Law (SHARES project) <http://www.sharesproject.nl/> accessed 30 August 2017

[118] See Lottie Lane and Marlies Hesselman, 'Governing Disasters: Embracing Human Rights in a Multi-Level, Multi-Duty Bearer, Disaster Governance Landscape' (2017) 5(2) Politics and Governance 93, referring to Ian Brownlie, 'State Responsibility: The Problem of Delegation' in Konrad Ginther and others (eds) *Völkerrecht Zwischen Normativem Anspruch und Politischer Realität* (Duncker & Humblot 1994) 300-330; and Lottie Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' in Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge 2017).

[119] UN CteeEDAW, 'General Recommendation No. 34 (2016) on the rights of rural women' women' (7 March 2016) CEDAW/C/GC/34.

[120] ibid para 13.

[121] ibid.

to business enterprises operating both nationally and extra-territorially, including that States 'should regulate the activities of non-state actors within their jurisdiction'.[122] As well as the obligation to regulate, however, General Recommendation No. 34 includes implicit reference to due diligence vis-à-vis non-State actors, requiring States to '[t]ake effective measures aimed at *preventing, investigating, prosecuting and punishing* acts of violence against rural women and girls, including migrant rural women and girls, whether perpetrated by the State, non-State actors or private persons'.[123] Similar to its approach in Recommendation No. 19, the CteeEDAW goes on to elaborate more precise recommendations to protect human rights and uphold due diligence (this time, in relation to different subject areas, e.g. 'adequate living conditions').[124]

While the obligation to protect is paramount in situations where private actors carry out State functions (and indeed more generally in the purely 'private' sphere as well), the indirect horizontal effect being applied unfortunately does not go very far in preventing human rights interference by actors outside of the control of the State, in situations where domestic law and policies are not effective in manipulating the behaviour of private actors (as explained in Chapter 1.3.3 due diligence is an obligation of conduct, not result). Interestingly though, in General Recommendation No. 25, the CteeEDAW noted that merely averring 'powerlessness' or succumbing to 'predominant market or political forces' is not enough for States to justify a failure to fulfil their obligation to protect women's rights from the actions of private actors.[125] In doing so, the Committee reaffirms that CEDAW holds

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[122] UN CteeEDAW, 'Draft General Recommendation No. 37 on the Gender-related dimensions of Disaster Risk Reduction in a Changing Climate' (11 October 2016) CEDAW/C/GC/37 paras 39-42. Significantly, the draft also acknowledges the positive impact that businesses can have on 'disaster risk reduction, climate resilience and the promotion of gender equality'.
[123] ibid para 25(b) [emphasis added].
[124] See ibid para 80.
[125] UN CteeEDAW, 'General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures' (2004) para 29.

States accountable for the actions of private actors such as businesses, which are in a position to assert influence over the State.[126]

Further reiteration of this, provided in some detail, can be found in the CteeEDAW's General Recommendation No. 30.[127] This Recommendation deals with the treatment of women during and after armed conflicts, and goes quite far in detailing the obligations of States to act with due diligence as well as (crucially) the behaviour expected of non-State actors towards women during these times.[128] Such recommended action includes refusing to reduce the protection afforded to women in order to mollify non-State actors,[129] engaging with non-State actors,[130] and helping non-State actors to act in a manner consistent with the Convention, in particular to 'address and assess' risks of human rights violations.[131] This standard could also be included, for example, in the codes of conduct of businesses alluded to by the CteeESCR above. General Recommendation No. 30 has recently been referred to in the CteeEDAW's General Recommendation No. 36, which recommends, in relation to the right to education, legislative, military and training activities that States should take vis-à-vis non-State actors during times of conflict and disaster.[132]

The context of armed conflict here arguably allows the CteeEDAW to go further in describing the obligations of non-State actors, because under

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[126] ibid. Referring here to Article 2 of the Convention, which deals with the nature of States' obligation under the treaty.
[127] UN CteeEDAW, 'General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' (1 November 2013) CEDAW/C/GC/30.
[128] Including in the duty of due diligence the provision of redress by the State for the 'acts of private individuals or entities'. See ibid para 17(a).
[129] ibid para 17(b).
[130] ibid para 17(c).
[131] ibid para 17(d).
[132] UN CteeEDAW, 'General Recommendation No. 36 on the right of girls and women to education' (16 November 2017) CEDAW/C/GC/36 paras 47 and 50. The Recommendation also notes the risks of privatisation of education and recommends that States ensure that 'respect for the same standards regarding on-discrimination of girls and women as in public institutions as a condition for the right of private actors to run academic institutions'. See paras 38 and 39(d) respectively.

international humanitarian law non-State actors are subject to direct obligations.[133] Breaches of some of these obligations, as well as 'gross violations of human rights' by non-State actors (an anomaly in terms of language), can result in these actors being held individually criminally responsible at the international level.[134] By mentioning these obligations and the connections that can be made between international humanitarian and human rights law during armed conflicts, the CteeEDAW allowed itself space to mention the human rights obligations of non-State actors during (or after) armed conflicts in their own right. The actors specifically targeted by the Recommendation were non-State armed groups,[135] which the CteeEDAW explicitly noted as having an obligation to respect human rights (particularly when they have an 'identifiable political structure' and 'significant control over territory and population').[136] Notably, this assertion was made after the CteeEDAW acknowledged the fact that non-State actors cannot become party to international human rights treaties.[137] Unfortunately though, the strength of the comments is diminished by the lack of legal basis provided by the CteeEDAW to justify how non-State actors could be said to hold these obligations. Nevertheless, the Committee continued not only to make recommendations to States in the general recommendation, but also directly to *non-State* actors. For example, besides calling on non-State armed groups to respect women's rights,[138] the CteeEDAW (like the CteeESCR did in relation to private providers of public services),[139] suggested that the groups

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[133] As noted by the UN CteeEDAW, ibid para 16.

[134] See Office of the United Nations High Commissioner for Human Rights, 'International Legal Protection of Human Rights in Armed Conflict' (2011) HR/PUB/11/01, 26 <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 7 November 2017.

[135] Although the CteeEDAW also mentioned 'paramilitaries, corporations, private military contractors, organized criminal groups and vigilantes' as actors that could affect the human rights enjoyment of women during or after armed conflicts. See UN CteeEDAW, 'General Recommendation No. 30' (n 127) para 13.

[136] ibid para 16.

[137] ibid para 16.

[138] ibid para 18(a).

[139] See UN CteeESCR, 'General Comment No. 12' (n 76) para 20.

'commit themselves to abide by codes of conduct on human rights'.[140] Again, the common downfall of treaty bodies' documents comes into play here, and the non-binding nature of General Recommendation No. 30 significantly reduces the impact that the recommendations may have in practice. Yet, the statements clearly show that the CteeEDAW is willing to entertain the notion of at least human rights *responsibilities* for certain non-State actors.

### *5.4.2 Views of the Committee on the Elimination of Discrimination Against Women decisions*

Many of the complaints filed with the CteeEDAW involve action taken by non-State actors as well as (inaction) by State actors. For reasons of space, some examples will be chosen which show clearly the ways in which the CteeEDAW engages with the private sphere and interference with human rights by non-State actors. The cases used rely to some extent on the provision in Article 2(e) CEDAW, which requires States to eliminate discrimination against women by private as well as public actors.

First, the application of due diligence by the CteeEDAW can be clearly seen in its jurisprudence relating to domestic violence suffered by women at the hands of private actors. The vast majority of the cases before the CteeEDAW involving horizontal effect concern instances of domestic violence, and failures of the State Party to provide effective protection for women from (for example) their partners. An oft-quoted example of this is the case of *A. T. v Hungary*.[141] In this case the Committee explicitly adopted the tripartite typology of human rights and the duty of due diligence.[142] The author of the complaint had repeatedly suffered domestic abuse and threats had been made against her children by her former partner. Despite the author bringing several civil and criminal proceedings against the husband, the Hungarian State had failed to protect both her and her children.[143] Quoting its comments in General Recommendation No. 19 on due diligence, the

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[140] UN CteeEDAW, 'General Recommendation No. 30' (n 127) para 18(b).
[141] *A. T. v Hungary* (2/2003) UN Doc. CEDAW/C/36/D/2/2003 (26 January 2005).
[142] ibid paras II (a) and II (b), respectively.
[143] ibid paras 2.1-2.7; 9.4-9.5.

Committee found Hungary to have violated the woman's rights due to its failure to effectively protect her from her former common law husband.[144]

A similar conclusion was reached by the CteeEDAW in the recent decision of *Angela González Carreño v Spain*,[145] in which the author had also suffered repeated abuse at the hands of her partner, culminating in the murder of her daughter by him.[146] The Committee's focus in this case was also on due diligence, looking specifically at Spain's failure to conduct an investigation or inquiry into the situation being suffered by the author and her daughter and failing to provide adequate supervision, despite over thirty complaints and requests made by the author to the State asking for protection.[147] Rather than fulfilling its duty of due diligence, the CteeEDAW found that Spain had made assumptions without analysing the specific situation of the author. In the context of the complaints made by the author in this case, the Committee's approach could be compared to the aspect of 'foreseeability' of harm by a non-State actor, as explained in Chapter 1. For example, the murder of the child occurred during an unsupervised visit of the abusive partner, which the domestic court had granted following its assumption that it was always better for children to have contact with their father, ignoring (or deeming irrelevant) the abusive history of this particular father. In this case, as well as previous cases, the CteeEDAW went on to provide specific action that should be taken by the respondent State in order to fulfil its positive obligations under the Convention in the future (as well as measures to provide the author with redress). For example, the Committee requested that Spain '[s]trengthen application of the legal framework to ensure that the competent authorities exercise due diligence' and '[c]onduct an exhaustive and impartial investigation'. This emphasis on investigations was also apparent in *A. T. v Hungary*, with CteeEDAW requesting Hungary to '[i]nvestigate promptly, thoroughly, impartially and

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[144] ibid paras 9.2-9.5.
[145] *Angela González Carreño v Spain* (n 107).
[146] ibid para 3.2.
[147] ibid para 9.9.

seriously all allegations of domestic violence and bring the offenders to justice'.[148] As the HRCtee and CteeESCR, the CteeEDAW appears to focus mostly on the State's procedural obligations under the obligation to protect, again limiting the extent to which its approach can really be considered to be one of 'indirect horizontal effect'.

The CteeEDAW has also applied a duty of due diligence outside of the context of domestic violence. In the case of *Reyna Trujillo Reyes and Pedro Arguello Morales v Mexico*, the CteeEDAW upheld the due diligence obligation of Mexico to 'prevent, investigate and punish acts of gender-based violence' in relation to a young woman who had allegedly been murdered by a private actor.[149] As well as emphasising the investigative obligation in this case, the CteeEDAW also highlighted the obligation to punish private actors for discriminating against women, particularly (in line with general Recommendation No. 28) when this constituted an abuse of other human rights, such as the right to life.

Further, similar to the HRCtee and the CteeESCR, the CteeEDAW has used the duty of due diligence to attribute the actions of private providers of public services to the State and find a violation of rights within CEDAW. In *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, for example, a complaint was brought on behalf of a woman who had died in a private health institution during her pregnancy. The Brazilian State tried to argue that because the health institution was a private actor, its 'professional negligence, inadequate infrastructure and lack of professional preparedness' could not be attributed to the State.[150] However, Brazil did acknowledge 'shortcomings in the system used to contract private health services and, by extension, the inspection and control thereof'. The Committee used this to find that Brazil

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[148] *A. T. v Hungary* (n 141).

[149] *Reyna Trujillo Reyes and Pedro Arguello Morales v Mexico* (75/2014) UN Doc. CEDAW/C/67/D/75/2014 (21 July 2017).

[150] *Alyne da Silva Pimentel Teixeira (deceased) v Brazil* (7/2008) UN Doc. CEDAW/C/49/D/17/2008 (27 September 2011) para 7.5. For discussion see Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25(2) The European Journal of International Law 561, 570-571.

had failed to fulfil its duty of due diligence in line with Article 2 CEDAW.[151] The CteeEDAW also reiterated its position taken in previous decisions and general recommendations that 'the State is directly responsible for the action of private institutions when it outsources its medical services' and 'always maintains the duty to regulate and monitor private health-care institutions'.[152] In other words, Brazil could not delegate its legal responsibility for the protection of human rights through the act of delegating certain public services (i.e. healthcare) to private institutions. Again, we see here reference to an obligation to regulate privatised services.

#### *5.4.3 Critical remarks on the jurisprudence of the Committee on the Elimination of Discrimination Against Women*

We can see from the above examples that the approach of the CteeEDAW in its views on individual complaints mirrors its approach taken in General Recommendations. Perhaps because of the wording of Article 2 of the Convention, the CteeEDAW has not wavered in States' positive obligations in order to lend more protection to women, particularly from situations of domestic violence. Further, it has repeatedly stressed the appropriate measures that State Parties must take to observe its duty of due diligence for what concerns 'purely' private relationships (e.g. between two or more individuals) and 'quasi-public' relationships (e.g. between an individual and a private public service provider). As did the CteeESCR, the CteeEDAW also examined, to a limited extent, more direct obligations of non-State actors. Its comments on non-State armed groups in General Recommendation No. 30 show that in some situations (primarily, when a group has effective control over some territory), non-State armed groups may have direct responsibilities to at least respect human rights both during and after armed conflicts.

### 5.5 Committee against Torture

The fact that the UN CteeAT has given any attention to the application of the UN CAT between non-State actors is extremely interesting in light of the

[151] *Alyne da Silva Pimentel Teixeira (deceased) v Brazil* (n 150) para 7.6.
[152] ibid.

definition of torture provided in the CAT.[153] Article 1 CAT appears to explicitly rule out the possibility that torture could be committed by a private person without any involvement of the State. The definition includes as a criterion that an act be committed 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity' for it to be torture. The same criterion applies in relation to acts of cruel, inhuman or degrading treatment, which is prohibited by Article 16 CAT.[154]

From this wording, we could assume that the direct horizontal effect of torture can be *prima facie* ruled out (as suggested by Alice Edwards).[155] However, it does not seem to preclude the possibility of some forms of indirect horizontal effect, relying on State's positive obligations and attributing the actions of a non-State actor to the State. In the context of Articles 1 and 16 CAT this would most obviously be through a private actor acting under the instruction of, with the consent of, or at the acquiescence of a public actor. As Article 1 is prohibitive and therefore inherently negative in nature, it may be argued that Article 1 CAT also does not, *prima facie*, give rise to a positive State obligation to protect which would allow the CteeAT to invoke indirect horizontal effects in its views on individual communications.[156] Additionally, as a civil and political, rather than an economic, social or cultural right, some may try to argue that the tripartite

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[153] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS vol. 1465, 85.

[154] Although the distinction between torture and cruel, inhuman and degrading treatment is clear in the CAT, it will not be dwelt upon here. For discussion, see e.g. Manfred Nowak and E McArthur, 'The Distinction between Torture and Cruel, Inhuman or Degrading Treatment' (2006) 16(3) Torture 147. As both prohibitions share the requirement of the involvement of a public actor, the following discussions will refer to cases involving both Article 1 and Article 16 CAT.

[155] Alice Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19(2) Leiden Journal of International Law 349, 371.

[156] Such individual communications may only be brought against a State Party to the CAT that has made a declaration under Article 22 of the CAT to the effect that it 'recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims' of a violation of the CAT by that State Party.

typology of human rights does not apply to the prohibition of torture, as it only concerned negative obligations. A related argument was made above by the US regarding positive obligations under the prohibition of torture in the ICCPR (Section 5.2.1). The likely success of such an argument is now very low. As Magdalena Sepùlveda notes, '[t]oday it is beyond doubt that civil and political rights instruments […] also impose "positive obligations" on the part of States Parties which are often not explicitly contained in the text'[157] – 'attempting to classify every right as either flatly negative or positive, is an "artificial, simplistic and arid exercise"'.[158]

Indeed, the Committee has been willing to openly apply Article 1 in such a way as to allow indirect horizontal effect of the prohibition using the State's responsibility to protect individuals from harmful actions by non-state actors. The Committee has also allowed for indirect horizontal effect by treating some non-State actors as State actors by virtue of them carrying out particular 'governmental' functions. As was the case with the treaty monitoring bodies examined above, the following examination will look firstly at the Committee's general comments and then the jurisprudence arising from its views on individual complaints, to determine how the CteeAT understands the obligations in the CAT vis-à-vis non-State actors.

### *5.5.1 General Comments of the Committee against Torture*

The attitude of the CteeAT towards horizontal effect initially appeared quite limited. In its first general comment adopted in 1998, the CteeAT emphasised the importance of the public official criterion, and did not mention private actors.[159] In its second comment, however, the Committee paid more attention to the acts of non-State actors, in particular the due diligence obligations of States. The CteeAT held the due diligence obligation to apply

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[157] Magdalena Sepùlveda, *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 124.
[158] ibid, quoting Henry Shue, 'The interdependence of duties' in Philip Alston and Katarina Tomaševski (eds), *The right to food* (Martinus Nijhoff Publishers 1984) 84.
[159] UN Committee Against Torture (CteeAT), 'General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)' (21 November 1997) A/53/44, Annex IX.

in instances where States 'know or have reasonable grounds for believing' that non-State actors are committing torture or acts of ill-treatment.[160] The rationale of the Committee here is that because of the wording of Article 1, States must be under a positive obligation to protect individuals from torturous acts by non-State actors. The 'consent or acquiescence' of the State essentially means that if a State fails to take positive measures to protect individuals, it is implicitly permitting, or acquiescing to the harm by the non-State actor.[161] This interpretation has vastly changed the landscape of the prohibition of torture within international law, and is also applied by other human rights monitoring bodies (in particular regional human rights courts).[162]

*5.5.2 Views of the Committee against Torture*

The interpretation and its application by the CteeAT in its own views on individual complaints undoubtedly affords broader protection to individuals. However, the CteeAT has not actually applied horizontal effect to the full potential allowed by Article 1. Certainly, it is positive that the Committee has addressed the duty of due diligence explicitly, but its interpretation of State 'consent or acquiescence' is actually relatively limited.[163] For example, in the case of *S. V. et al. v Canada*,[164] the Committee dealt with complaints relating to torture by the Liberation Tigers of Tamil Elam (LTTE) in Sri Lanka. The

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[160] UN CteeAT, 'General Comment No. 2: Implementation of Article 2 by States Parties' (24 January 2008) CAT/C/GC/2, para 18.

[161] See ibid.

[162] The European Court of Human Rights, for example, adopts the CteeAT's definition of torture and has repeatedly taken the approach that the prohibition of torture includes positive, protective State obligations. See e.g. *A. v United Kingdom*, App. No. 100/1997/884/1096 (23 September 1998), para 22; *Z. and Others v United Kingdom* App No. 29392/95 (10 May 2001) paras 73-75; and *E. and Others v United Kingdom*, App No. 33218/96 (26 November 2002); *M. C. v Bulgaria*, App No. 39272/98 (3 December 2003).

[163] Katharine Fortin, 'Rape as Torture: An Evaluation of the Committee against Torture's Attitude to Sexual Violence' (2008) 4(3) Utrecht Law Review 145, 153. See also Robert McCorquodale and Rebecca La Forgia, 'Taking Off the Blindfolds- Torture by Non-State Actors' (2001) 1 Human Rights Law Review 189, 206.

[164] UN CteeAT, *S. V. et al. v Canada* (19/1996) UN Doc. CAT/C/26/D/49/1996 (15 May 2001).

author feared that if he were to return to Sri Lanka, he would be subjected to torture either by the LTTE, or by the State (whom he argued had caused him brain damage on an earlier occasion following allegations by the State that he was actually a member of LTTE). The Committee clearly held any consideration of torture by the LTTE with no consent or acquiescence of the State to fall outside of the scope of the CAT.[165] However, it did not provide indications as to what actions they believed *could* constitute consent or acquiescence. Nevertheless, Edwards has deducted from this case, along with that of *G.R.B v Sweden* (below, also dealing with torture by non-State actors) that the CteeAT sees 'consent and acquiescence' as amounting to either some knowledge on behalf of the State of the actions by the non-State actor, the State being in 'general agreement' with them, or purposefully refusing to act against them.[166] This seems to be consistent with the application of due diligence by the previous bodies discussed, although narrower than the obligation to protect more generally. It is unclear whether the knowledge on behalf of the State would also require State *investigations* into the actions of non-State actors (as is the case with due diligence under other bodies), or refers solely to information provided to the State by the non-State actors themselves.

One major issue that surfaces repeatedly in individual complaints relating to torture is that of women being raped by private individuals. Interestingly, the cases in relation to which these comments have been made do not usually include any involvement of public officials, making them noteworthy studies of whether and how horizontal effect has been applied in practice. Furthermore, these cases demonstrate the limitations in the way that the CteeAT looks upon due diligence.

Since 1986, UN special rapporteurs have defined rape as constituting torture.[167] The UN has also noted that in the last few decades, 'significant

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[165] ibid para 9.5.
[166] Edwards (n 155) 372.
[167] See Ellie Smith, *A legal analysis of rape as torture in the international and regional (non-European) fora* in Michael Peel (ed), *Rape as a Method of Torture* (Medical Foundation for the Care of Victims of Torture 2004) 189.

efforts' have been made to 'redefine the meaning of human rights'[168] in order to answer the feminist critique of those such as Hilary Charlesworth, Christine Chinkin and Shelley Wright that the prohibition of torture is inherently biased against women.[169] This is largely due to the fact that the majority of rapes of women happen within private relationships (being, for example, aspects of situations of domestic violence).[170] In consequence, several bodies have now held that rape may constitute torture '*per se*',[171] and will always meet the 'minimum threshold' required to engage provisions prohibiting torture.[172]

In the case of *G. R. B. v Sweden*,[173] the author of the complaint feared being subjected to torture by both State and non-State officials upon her return to Peru after having three applications for asylum in Sweden rejected. The fear stemmed from previous instances in which the author was kidnapped and raped by a terrorist organisation in Peru, and the fact that she and her family had been politically active against the Peruvian State in the past, with her father already having been tortured by State authorities. The CteeAT held that the fact that an individual 'might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government,

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[168] See Report of the Secretary-General, which was submitted pursuant to the Commission Resolution 1998/29 (18 December 1998) E/CN.4/1999/92, para 12, cited in Clare McGlynn, 'Rape, Torture and the European Court of Human Rights' (2009) 58(3) Human Rights Law Review 189, 594.

[169] See Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613, 628.

[170] See Office of Justice Programs National Institute of Justice, 'Victims and Perpetrators' <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/victims-perpetrators.aspx> accessed 31 August 2017.

[171] For example, the African Commission of Human Rights in *Malawi African Association and Others v Mauritania*, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (11 May 2000) para 118; European Court of Human Rights, *Aydin v Turkey*, App No. 57/1996/676/866 (25 September 1997) para 86.

[172] E.g. International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Delalić and Others*, Case No. IT-96-21-A (20 February 2001); *M. C. v Bulgaria*, App No. 39272/98 (3 December 2003) discussed in McGlynn (n 168) 571-572.

[173] UN CteeAT, *G. R. B. v Sweden* (83/1997) UN Doc. CAT/C/20/D/083/1997 (15 May 1998).

falls outside the scope of […] the Convention'.[174] The risk of torture by the Peruvian State itself was ruled out by the Committee, mainly because the author had not been politically active for 13 years, and she had never been subjected to torture by the Peruvian authorities in the past.[175] The author's complaint was therefore unsuccessful. Unfortunately, the CteeAT did not assess Peru's investigations into the occurrence of rape that the victim suffered at the hands of the non-State actor, having failed to detail what standards the Peruvian State would have to fulfil to be acting with due diligence. This could imply that the CteeAT does not understand the CAT as meaning that States Parties are obligated to perform investigations into harm caused by non-State actors.[176] Indeed, on a literal reading of the Convention and combined with the State actor requirement in Articles 1 and 16, this is understandable, particularly in light of Article 12 CAT. Article 12 places a duty on States to ensure 'prompt and impartial' investigations by 'competent authorities' when an act or torture can reasonably be believed to have been committed within their jurisdiction. Taking this on face value, it does not appear to place any obligations on States to investigate acts conducted by *private* individuals. Reading Article 12 consistently with CteeAT's interpretation of Article 1, however, the obligation to investigate would equally apply where the act of torture reasonably believed to have been committed would be by a private actor, as well as a public official. Indeed, as we have already seen, other human rights bodies have used the duty of due diligence to impose investigative obligations on States without explicit mention of private actors in the relevant treaty provisions. This is also true specifically in relation to the prohibition of torture, which the European Court of Human Rights understands as requiring States to investigate private acts of torture.[177]

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[174] ibid para 6.5.
[175] ibid paras 6.4 and 6.6.
[176] Edwards (n 155) 371.
[177] See *M. C. v Bulgaria* (n 172) para 36, where the Court upheld an obligation to conduct an official investigation into private acts of rape, the effectiveness of which the Court may then assess. See for discussion Lee Hasselbacher, 'State Obligations Regarding Domestic

One case in which the relevant State Party (Serbia and Montenegro) was found responsible for not protecting an individual from inhuman or degrading treatment or punishment by private actors was *Hajrizi Dzemajl et al. v Serbia and Montenegro*.[178] The complaint concerned a group of Romani individuals who, following an incident in which a non-Roma girl had been raped by other Romani individuals, were subject to severe violence by a large group of non-Romani citizens. The group of individuals made threats to the Romani, who were advised by police to leave their homes. After the group began setting the Romani homes on fire and hazing them to the ground, the complainants managed to escape, although some of them had been hiding in the basement of their houses when the violence began. The State authorities had been informed of the action being taken, but 'did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence"' of the State.[179] In its finding of a violation of Article 16 CAT, the CteeAT explicitly stated that '[a]lthough the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence'.[180] The CteeAT did not go so far as to explain in general what suffices for actions of non-State actors to be attributed to the State due to the latter's 'consent or acquiescence' – does it require that the State actually *knew* about the risk to the complainants, as in this case, or is it sufficient that the State *should* have known, as is the standard followed by the European Court of Human Rights?[181]

A second approach towards horizontal effect can be found in the CteeAT's jurisprudence, this time treating some non-State actors as public

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Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8(2) Northwestern Journal of International Human Rights.

[178] UN CteeAT, *Hajrizi Dzemajl et al. v Serbia and Montenegro* (161/2000) UN Doc. CAT/C/29/D/161/2000 (21 November 2002).

[179] ibid para 9.2.

[180] ibid.

[181] See e.g. *Osman v United Kingdom*, App No. 87/1997/871/1083 (28 October 1998); *Z. and Others v United Kingdom* (n 162); *Kaya v Turkey*, App No. 22729/93 (19 February 1998). See also Fortin (n 163) 156. Within the European human rights system this standard actually developed in relation to the right to life (See Chapter 6.2.2).

actors according to the functions that they are fulfilling within a State. This approach was famously taken in the case of *Sadiq Shek Elmi v Australia*.[182] The claimant in this case was a Somali national at risk of being transferred to Somalia by the Australian Government. He argued that by transferring him to Somalia, Australia would be breaching the rule of *non-refoulement* enshrined in Article 3 CAT.[183] This rule stipulates that individuals may not be extradited or transferred to a country where they would be at 'real risk' of being subjected to torture. A pivotal factor in this case was that the actor at whose hands the claimant feared being subjected to torture upon his return to Somalia was the Somali Hawiye clan, a non-State armed group.[184] The nature of cases of *non-refoulement* is rather special, in that to find a violation of torture by the responding State does *not* require this State to actually commit acts of torture. Simply putting the claimant in a situation where he is at risk of being subject to torture by transferring him to a second State is enough for the respondent State to violate the prohibition. If torture were to be committed within the destination State, that State could then also be held responsible (assuming that State is also party to the CAT). The consequence for horizontal effect in cases like *Elmi* is not a finding that a non-State actor did/not violate the prohibition of torture itself, but can result in a finding that the acts of a non-State actor *could* amount to torture, were they to be committed against the claimant after their arrival in the destination State.

The *Elmi* case is very important here because, despite not involving a claim of torture directly against a non-State actor, the CteeAT acknowledged that actions by non-State armed groups could amount to torture, fulfilling the requirement of State involvement. This was because the non-State armed group in question was 'exercising certain prerogatives that [were] comparable to those normally exercised by legitimate governments'.[185] This seems quite a progressive move by the Committee. Indeed, treating a non-

[182] UN CteeAT, *Sadiq Shek Elmi v Australia* (120/1998) UN Doc. CAT/C/22/D/120/1998 (25 May 1999).
[183] ibid para 3.1.
[184] ibid.
[185] ibid paras 3.1 and 6.5.

State armed group as a State actor goes further than any of the approaches seen thus far, but the special circumstances of the case demonstrate that in order to protect the applicant, the CteeAT did not have much choice in its approach. At the time, there were several clans in Somalia vying for State control, each having 'prescribed its own laws and law enforcement mechanisms and [having] provided their own education, health and taxation system'.[186] The ultimate lack of control by the State itself over these established groups seems to have been instrumental in the CteeAT's decision. In contrast, even the abovementioned cases that considered the public function of a non-State actor to be decisive in attributing their actions to the State relied (at least partially) on the fact that the functions had been delegated to the non-State actor in order to find a human rights violation. However, in the *Elmi* case, it was not a public function that the non-State actor was fulfilling *on behalf of* the State (as in the cases concerning privatised public services), but a wide range of public activities that the group had *taken upon itself* in the context of a failed State. The lack of a stable State authority meant that indirect horizontal effect through Somalia's obligation to protect human rights was not possible; the only avenue open to the CteeAT to prevent the transferral was to find a way to categorise the non-State actor as a State actor for the purposes of the case. Had the Committee disregarded the case based on the non-State identity of the potential torturing entity, it would have resulted in a gap in human rights protection solely because the actors perpetrating the violations could not be held directly to the norms under international human rights treaties.

It is certainly an interesting outcome when compared to other cases heard by the Committee dealing with potential torturous acts being committed by other non-State armed groups, such as *S. V. et al. v Canada*, in which the Committee took the approach of upholding the State's positive obligation to protect human rights. In that case, however, the relevant non-State armed group (the LTTE) did not have effective control over an area of territory within Sri Lanka, which had not itself failed as a State. The extreme

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[186] ibid paras 3.1 and 5.5.

rarity of the circumstances of a failed State in *Elmi* has indeed prevented the CteeAT from applying this kind of indirect horizontal effect again. Even in a subsequent case regarding extradition to Somalia of an individual who believed himself to be at a real risk of torture by a non-State armed group, the CteeAT distinguished the case on the grounds that Somalia had by then regained a State authority acting as central Government in the international community.[187] The fact that the group in question still controlled a portion of Somalian territory was not considered enough to treat it as a State actor. Curiously, though, in a latter case concerning the LTTE, the CteeAT did consider that in cases where 'the non-governmental entity occupies and exercises governmental authority over the territory to which the complainant would be returned', it was not necessary to ascertain State consent or acquiescence in future acts of torture by that actor.[188] The distinguishing factor for the Committee here seems to be whether the individual will be returned to the territory controlled by the LTTE. Further evidence that the CteeAT is not willing to broaden the application of *Elmi* to non-State actors more generally can be found in the case of *V. X. N. and H. N. v Sweden*. The Committee explicitly stated that whether *non-refoulement* extends to a 'risk [of] pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of article 3'.[189]

It is clear, then, that while the CteeAT will take a case-by-case approach, in general it is not actually willing to apply indirect horizontal effect beyond invoking States' consent or acquiescence.

*5.5.3 Critical remarks on the jurisprudence of the Committee against Torture*

The CteeAT has engaged to a considerable degree with the horizontal effect of human rights within the CAT. On the one hand, the definition of torture it

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[187] *H. M. H. I. v Australia* (177/2001) UN Doc. CAT/A/57/44/177/2001 (1 May 2002), para 6.4.

[188] UN CteeAT, *S. S. v The Netherlands* (191/2001) Un Doc. CAT/C/30/D/191/2001 (5 May 2003), para 6.4.

[189] *V. X. N. and H. N. v Sweden* (130199 and 131/1999) UN Doc. CAT/A/55/44/130 and 131/1999 (15 May 2003), para 13.8. This decision was further upheld in *M. P. S. v Australia* (138/1999) UN Doc. CAT/A/57/44/138/1999 (30 April 2002), para 7.4.

has adopted through general comments and views on individual communications is broad, in that the CteeAT has understood it to include a positive obligation on States to protect individuals from torture by non-State actors. On the other hand, the Committee's application of the requirement that torture or inhuman or degrading treatment or punishment be done at least with the 'consent and acquiescence' of a State actor has so far been restricted to cases in which the State had concrete knowledge of a risk of an individual being subject to this treatment. While this appears stricter than the 'foreseeability' standard applied by the CteeEDAW, it could simply be due to the facts of the cases brought before the Committee.

In the case of *Sadiq Shek Elmi v Australia*, the CteeAT has certainly shown that in extreme circumstances it is willing to go beyond an application of indirect horizontal effect through States' obligation to protect, to treat certain non-State actors as State actors to prevent torture. By no means, though, can this be considered a general rule for the Committee. The special circumstances of the case must be borne in mind. Specifically, the context of the failed State, the governmental authority being exercised by the non-State actor and the fact that it was not actually the non-State actor, but rather the *State* wishing to extradite the applicant, who was being held responsible for a potential violation of human rights. These circumstances considerably temper the possible significance of the decision.

### 5.6 Committee on the Elimination of Racial Discrimination

The Convention on the Elimination of Racial Discrimination includes a potential exception to the vertical nature of the human rights obligations contained within it.[190] This can be found in Article 5(e) of the Convention, dealing with economic, social and cultural rights, which has been the subject of a brief General Recommendation (No. 20) by the UN CteeERD. It is also interesting that reference to the positive obligations of State Parties to the Convention can be found in Article 4. This provision requires States to take

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[190] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNTS vol. 660, 195 (CERD). See Chapter 4.4 of the present book.

'immediate and positive measures designed to eradicate all incitement to, or acts of' racial discrimination. Significantly, reference is also made here to the possible exception of vertical obligations found in the UDHR,[191] the principles embodied within this instrument having to be taken into account by States in the taking of the aforementioned measures.[192] Although no mention of a specific provision from the UDHR is given in Article 4, it can be inferred that the principles mentioned are those found in Article 29(2)[193] – an inference made explicit by the CteeERD in its General Recommendation No. 15 on Article 4.[194] The CteeERD's recommendations and jurisprudence dealing with potential horizontal effect of the Convention will now be assessed.

### *5.6.1 General Recommendations of the Committee on the Elimination of Racial Discrimination*

As stated, Article 5 CERD was briefly discussed by the CteeERD in General Recommendation No. 20, with explicit reference to non-State actors. The recommendation seems to suggest that private actors themselves could be (partially) responsible for protecting the rights contained in Article 5 'and any similar rights'. The CteeERD states that 'protection may be achieved in different ways, be it by the use of public institutions or *through the activities of private institutions*'.[195] While this may emphasise the private actor's potential *role* in protecting human rights, the Committee does not go so far

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[191] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

[192] Article 4 CERD.

[193] Article 29(2) UDHR provides: '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.'

[194] Committee on the Elimination of Racial Discrimination (CteeERD), 'General Recommendation 15, Measures to eradicate incitement to or acts of discrimination' (Forty-second session, 1993) A/48/18 at 114 (1994) para 4.

[195] UN CteeERD, 'General Recommendation No. 20, The guarantee of human rights free from racial discrimination' (14 March 1996) para 5 [emphasis added]. See also Clapham (n 25) 321.

as to say that private institutions should actually be *responsible* for ensuring protection. Indeed, the CteeERD goes on to identify the obligation to ensure human rights protection as a State obligation, which covers the actions of private actors: where 'private institutions influence the exercise of rights…the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.'[196] In another recommendation, the CteeERD has reiterated the fact that States' obligation to protect human rights refers to the actions of non-State actors as well as public actors. In its General Recommendation No. 30 on the rights of non-citizens, the CteeERD identified such actors as including 'politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large',[197] in relation to whom States must (again under their obligation to protect) take 'resolute action' to protect individuals from racial discrimination.[198]

Earlier inference to States' positive obligation to protect human rights from non-State actors can be found in General Recommendation No. 15, dedicated to Article 4 of the Convention.[199] The recommendation does not elaborate much on the meaning of the 'positive measures' mentioned in the article. Interestingly, General Recommendation No. 32 did elaborate on what kinds of measures States are obliged to take in this context, including, *inter alia*, the adoption of 'legislative, executive, administrative, budgetary and regulatory instruments'.[200] The underlying goal of Article 4 must be to protect

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[196] ibid.

[197] UN CteeERD, 'General Recommendation No. 30, on Discrimination Against Non-Citizens' (19 August 2004) CERD/C/64/Misc.11/Rev. 3, para 12. See also Clapham (n 25) 322.

[198] ibid.

[199] UN CteeERD, 'General Recommendation No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11.

[200] UN CteeERD, 'General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination' (24 September 2009) CERD/C/GC/32, para 32. Although this was stated in the context of 'special measures', the CteeERD referred to this when discussing Article 4 in a subsequent Recommendation. See UN CteeERD, 'General Recommendation No. 35, Combating racist hate speech' (26 September 2013) CERD/C/GC/35, para 10.

individuals from propaganda involving racial discrimination by all actors (reflected in the requirement that States 'declare an offence punishable by law all dissemination of ideas based on racial superiority').[201] Nevertheless, there was no reference either in the Convention itself, or in the General Recommendation, to the obligation to protect, or to the due diligence duty of States. Indeed, the Recommendations only mention an investigative requirement of States in relation to the 'national law and its implementation'[202] – inherently public matters. This seemingly rendered investigation into private acts outside of the scope of the positive measures to be taken unless this can be read into the implementation aspect. However, in a later General Recommendation also dealing with Article 4 (No. 35), the CteeERD suggested that obliging States to conduct such investigations could be read into the obligation that States make certain conduct 'punishable by law'.[203] This is because simply making certain conduct constitute a criminal offence is not sufficient without its effective implementation.[204] This implementation, the CteeERD states, requires investigations of potential offences to be carried out, leading to prosecution when appropriate.[205] Taken together with the wording of Article 4, the provision *could* be seen as reflecting (or being part of) a duty of due diligence to be fulfilled by State Parties.

This assertion is supported by a comparable obligation to that in Article 4, found in Article 3 CERD. This provision requires State Parties to 'prevent, prohibit and eradicate all practices of racial segregation'. In its General Recommendation No. 19, the CteeERD has read this as placing positive obligations on States, emphasising the possibility that partial segregation arise as an 'unintended by-product of private persons'.[206] The

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[201] Article 4(a) CERD.
[202] UN CteeERD, 'General Recommendation No. 15' (n 199) para 5.
[203] UN CteeERD, 'General Recommendation No. 35' (n 200).
[204] ibid para 17.
[205] ibid.
[206] UN CteeERD, 'General Recommendation XIX on article 3 of the Convention' (18 August 1995) contained in A/50/18, para 3.

consequence of this – that racial segregation can occur 'without any initiative or direct involvement by the public authorities'[207] – prompted the CteeERD to recommend that States Parties monitor the kinds of situations that could lead to racial segregation.[208] Again, despite no allusion to due diligence by the Convention or the CteeERD, this reflects very similar principles to those referred to by the other treaty bodies in their discussions of due diligence. It is curious that the CteeERD has chosen not to follow suit in using the same terminology as other treaty bodies, but this also shows that assumptions cannot necessarily be made as to the effect of bodies' decisions from the fact that they do not refer directly (or even indirectly) to the horizontal effect of the rights within their jurisdiction. To avoid speculating, it suffices to say that the CteeERD has in effect applied indirect horizontal effect by fleshing out States' positive obligations and making concrete recommendations as to how they could be fulfilled. These recommendations have, as they did with the other bodies discussed above, been restricted mostly to procedural obligations of States rather than laying down concrete standards against which to hold non-State actors (other than the general terms used). The question therefore remains whether the State should impose obligations or responsibilities at the national level holding non-State actors to the same standards as the State in terms of the substance/content of human rights.

*5.6.2 Views of the Committee on the Elimination of Racial Discrimination*

Pursuant to Article 14 CERD, the CteeERD can hear individual complaints from individuals regarding alleged violations of the Convention by States that have adopted a declaration accepting its competence to do so. The CteeERD has dealt with horizontal effect on quite a few occasions. This is to be expected, since racial discrimination is something that often happens in private relationships rather than by the State itself. Several examples will be focused on in the following discussion.

The CteeERD made several references to States' obligation to protect

[207] ibid para 4.
[208] ibid.

vis-à-vis non-State actors in the case of *L. K. v The Netherlands*.[209] The applicant, a Moroccan citizen residing in the Netherlands was subject to verbal abuse and threats from a group of Dutch citizens who refused to accept him as a resident on their street, going so far as to sign a petition refusing his acceptance. The applicant complained to the police, who he alleged failed to conduct a thorough or complete investigation into the events. In its opinion, the CteeERD agreed with the applicant that the words and actions of the Dutch citizens constituted 'incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin' under Article 4 CERD, which the State had violated through its lack of an adequate investigation.[210] In particular, the CteeERD stated that '[w]hen threats of racial violence are made, especially when they are made in public and by a group, it is incumbent upon the State to investigate with *due diligence* and expedition.'[211] The explicit references to non-State actors and due diligence in the context of a State's obligation to protect human rights suggest an application of indirect horizontal effect by the CteeERD based on procedural obligations of the Dutch State (i.e. to investigate and punish non-State actors accused of racial discrimination). The reasoning of the CteeERD in this case mirrors that in its General Recommendations on Article 4, discussed above.

The obligation of States to conduct a thorough investigation into instances of racial discrimination by non-State actors was also discussed in the case of *Habassi v Denmark*.[212] The author of the complaint, a Tunisian man with permanent residence in Denmark, had applied for a loan from a private bank, which required him ('motivated by the need to ensure that the loan was repaid'[213]) to provide evidence of his Danish nationality before approving the loan (after previously stating that they would accept loan requests from individuals with permanent residence). After his loan

[209] UN CteeERD, *L.K. v The Netherlands* (4/1991) UN Doc. A/48/18 at 131 (16 March 1993).
[210] ibid para 6.3.
[211] ibid para 6.6.
[212] UN CteeERD, *Habassi v Denmark* (10/1997) UN Doc. CERD/C/54/D/10/1997 (17 March 1999).
[213] ibid 9.3.

application was rejected, with the help of an antidiscrimination organisation the applicant complained to the Danish police, who did not pursue an investigation. The State's argument was that there was insufficient evidence that an unlawful act had taken place. The CteeERD, however, agreed with the applicant that a human rights violation had occurred. It based its decision on the need for States to investigate whether or not racial discrimination had occurred (whether directly or indirectly), which requires a 'proper investigation' into the facts.[214] Here, the basis upon which the bank required an individual to prove Danish nationality before granting a loan was in question – although nationality is not an issue of racial discrimination as such, it may have an unintended, indirect effect of racial discrimination.[215] Since the police had accepted the bank's reasons on face value and had not conducted such an investigation, it was found to be in violation of Article 6 CERD (the right to an effective remedy) in connection with Article 2(d) (the definition of racial discrimination). The case therefore goes quite far in requiring States to protect individuals from non-State actors (albeit focusing on procedural requirements). A very similar reasoning and findings were applied by the CteeERD in its opinion on *Kashif Ahmad v Denmark*.[216] In this case, the applicant alleged that he had been racially discriminated against by a teacher and a headmaster of a school, on school property. He complained that the Danish authorities refused to prosecute the individuals or conduct a thorough investigation into what happened. After a cursory investigation into the facts, the authorities stated that the offensive statements made to the applicant fell outside of the scope of Danish criminal law, and that the applicant could only seek redress through civil law – a finding that the applicant was unable to appeal.[217] The CteeERD opined that had a thorough investigation been undertaken, the authorities would have been able to establish whether the applicant was subject to racial discrimination within the

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[214] ibid. See also Clapham (n 25) 319-320.
[215] ibid.
[216] UN CteeERD, *Kashif Ahmad v Denmark* (16/1999) UN Doc. CERD/C/56/D/16/1999 (8 May 2000).
[217] ibid para 4.6.

meaning of Article 2(1)(d) CERD.[218] The CteeERD ultimately found that because of the lack of investigation and ability of the applicant to find out whether his rights had been violated at the national level, the State had failed to effectively protect him from racial discrimination.[219]

As well as an obligation to investigate instances of racial discrimination by private actors (in a timely manner), the CteeERD has made recommendations that States 'complete' their legislation protecting individuals from racial discrimination by private actors. In the case of *Lacko v Slovakia*, for example, the Committee recommended such legislative action to 'guarantee the right of access to public places in conformity with article 5 (f) of the Convention and to sanction the refusal of access to such places for reason of racial discrimination.'[220] The case had involved a Roma individual being refused service in a restaurant at a railway station on the basis that he was Roma. The State investigated the situation and prosecuted the culprit, which led the CteeERD to find no violation of the Convention. However, it did not refrain from giving this extra counsel to Slovakia to strengthen its performance of the duty of due diligence.[221]

### *5.6.3 Critical remarks on the jurisprudence of the Committee on the Elimination of Racial Discrimination*

In light of the specific references made within the CERD to various non-State actors, the CteeERD has not actually gone very far in applying the Convention horizontally. This is odd in light of the mention of private actors in the Convention itself – the clear obligation to protect individuals from racial discrimination in the private, as well as in the public sphere could seem to render further consideration of private actors even more necessary. However, it could also be said that there are not as many substantive human

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[218] ibid para 6.2.

[219] A similar finding was made in UN CteeERD, *Mohammed Hassan Gelle v Denmark* (34/2004) UN Doc. CERD/C/68/D/34/2004 (6 March 2006).

[220] UN CteeERD, *Lacko v Slovakia* (11/1998) UN Doc. CERD/C/59/D/11/1998 (9 August 2001) para 11.

[221] The UN CteeERD also suggested that Slovakia 'take the necessary measures to ensure that the procedure for the investigation of violations is not unduly prolonged': ibid.

rights contained in the CERD that could be upheld vis-à-vis non-State actors, other than those in Articles 4 and 5. Most of the cases that involved a non-State actor found violations of the State of these two provisions, as well as Article 6 which provides the right to effective remedy. Taken together, the clear obligation to conduct thorough investigations into alleged incidents of racial discrimination by private parties, and the obligation to have a legal framework in place to punish such parties when found responsible, strongly reflect at least two elements generally considered to constitute a duty of due diligence (together with the duty to prevent interference by non-State actors). Indeed, the CteeERD has made explicit reference to this duty, although not on a regular basis.

### 5.7 Critical reflections on the treaty bodies' reasoning

Before drawing conclusions on the application of horizontal effect by the treaty bodies examined, a few comments on the bodies' reasoning will be made. Although it did not form part of the research of this chapter *per se* and will thus not be discussed in detail, it was very interesting to see how the Committees made their decisions in relation to individual complaints, and how they framed their comments in general recommendations and comments. The following comments are made only in relation to the practice included in the analysis, and should not be read as applying to the practice of the treaty bodies generally.[222]

Each of the five bodies regularly relied upon their own previous practice, both in general comments and views on individual communications. They did refer to each other's practice as well, although not particularly often.[223] The analysis nonetheless showed that at least in relation to those

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[222] For an in-depth discussion of interpretation by the human rights treaty bodies more generally, see Birgit Schlütter, 'Aspects of human rights interpretation by the UN treaty bodies' in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 261.

[223] This can be presumed on some occasions to be because of timing – the HRCtee's general comment on torture, for example, predated the practice of the CteeAT, and so could not have considered it. The CteeESCR however, has been more forthcoming in referring to other bodies' work, and also referred extensively to the work of the International Labor

aspects of the bodies' practice relating to horizontal effect, the interpretations of the bodies have converged to a large extent (notwithstanding the inconsistencies in the use of language).

They also regularly mentioned other international treaties in general comments (particularly the other 'core' human rights treaties) as well as, to a lesser degree, the output of international organisations, particularly UN agencies and subsidiary organs. However, it was striking to see how rarely most of the bodies relied on sources of international law other than international treaties when interpreting the human rights treaties.[224] Indeed, even in instances where one of the parties to an individual communication relied upon the jurisprudence of judicial bodies (e.g. the European Court of Human Rights) or customary international law, the treaty bodies most often declined to mention the sources in their own reasoning.[225] It was very rare indeed that a treaty body referred to customary international law. Although several references were made,[226] on most occasions the reference was simply to the fact that as well as being bound by the relevant treaty, States were also bound by customary international law that covered the same material. An exception to this was the CteeESCR's General Comment No. 24, which referred more substantively to customary international law,[227] as well as to the DASR,[228] which have customary status. In fact, in both its general comments and views on individual communications, the CteeESCR

Organization in the context of the right to work. See CteeESCR, 'General Comment No. 23' (n 80).

[224] The primary and secondary sources of international law are listed in Article 38 Statute of the International Court of Justice, 18 April 1946. The bodies regularly noted other relevant international treaties, particularly other 'core' human rights treaties but also International Labor Organization Conventions.

[225] This occurred in, for example, *Sadiq Shek Elmi v Australia* (n 182); and *Hajrizi Dzemajl et al. v Serbia and Montenegro* (n 178).

[226] See e.g. UN CteeESCR, 'General Comment No. 24' (n 91); UN CteeEDAW, 'General Recommendation No. 28' (n 108); UN CteeAT, 'General Comment No. 2' (n 160).

[227] The CteeESCR stated that '[c]ustomary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State.' UN CteeESCR, 'General Comment No. 24' (n 91) para 27.

[228] ibid paras 11, 29 and 32.

consistently took into account a broader range of sources than the other treaty bodies.[229] Perhaps General Comment No. 24 will prove to be part of a broader trend to take into account other sources of law, although it does not seem as though the other bodies have considerably altered their approach to this over the years.

Overall, as also suggested by the previous comments in relation to attribution and the DASR, the reasoning of the human rights treaty monitoring bodies in the practice analysed was sometimes lacking in terms of grounding outcomes in a legal basis. While the treaties being applied were always discussed, the legal reasoning which led to a particular interpretation of the provisions was sometimes extremely minimal. For example, it is unclear whether the treaty bodies follow the Vienna Convention on the Law of Treaties' rules on interpretation – something that has been discussed more generally.[230] This may cause problems concerning the legitimacy of the bodies' jurisprudence and the willingness of States to implement changes pursuant to general comments and/or views, both of which have already been called into question.[231]

In turn, such problems may affect the role and impact of the treaty bodies within international law more generally, as well as their place within the community of international courts, tribunals and other adjudicatory bodies. These aspects should also be considered when looking at the significance of the treaty bodies' practice for what concerns the horizontal effect of human rights. It is important to remember, for example, that unlike

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[229] This is particularly true of its most recent general comment, which also considered national case law, decisions of the International Centre for Settlement of Investment Disputes and soft-law principles such as the Maastricht Principles on Extraterritorial Obligations. See ibid.
[230] See e.g. Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 40 (2009) Vanderbilt Journal of International Law 905; Ulfstein, 'Individual Complaints' (n 10). On reform of the treaty bodies system more generally, see e.g. Michael O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10(2) Human Rights Law Review 319. In the context of the European Court of Human Rights, see George Letsas, 'Intentionalism and the Interpretation of the ECHR' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers 2010).
[231] Mechlem (n 230).

other human rights adjudicatory bodies such as the European Court of Human Rights, the treaty bodies do not have binding authority.[232] Nonetheless, their practice has been relied upon by binding regional and international adjudicatory bodies (e.g. the European Court of Human Rights, the Inter-American Court of Human Rights and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, respectively),[233] although to a lesser degree than by other non-binding bodies (the Inter-American Commission on Human Rights, for Example, has referred to the practice on many occasions). Together with the prevalent reference to the practice of treaty bodies in the national context (both in jurisprudence and in the development of new legislation), this gives the findings of the bodies more significance than may be initially expected; the practice may not constitute formal (international) law, but certainly constitutes important guidance for those bodies (whether national, regional or international) that *are* able to make binding decisions on the same or related matters.

Bearing this in mind, it is a shame that the treaty bodies are not more candid in their reasoning, which currently makes it harder to evaluate whether or not they do justice to the topic of non-State actors and human rights. In particular, a lack of precise explanation of the legal bases for conclusions

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[232] They have nonetheless had a considerable impact on the development of international human rights law at the national level. See International Law Association Committee on International Human Rights Law and Practice (n 5) which provides many examples of national courts relying on the practice of the bodies. See also Kasey L McCall-Smith, 'Interpreting International Human Rights Standards: Treaty Body General Comments as a Chisel or a Hammer' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 25. The willingness of national courts to do this is by no means mirrored in the reaction of States to the bodies' views on individual communications in which they were party; compliance by States with views on individual communications has been notoriously low. See, also for a discussion of the legal status of treaty bodies' decisions in national law, Rosanne van Alebeek and André Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in: Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 356.

[233] For a discussion of references to the practice of the UN human rights treaty monitoring bodies by binding adjudicatory bodies, see International Law Association Committee on International Human Rights Law and Practice (n 5).

within general comments (although this may be changing) sometimes obscures the Committees' views on horizontal effect. This could be clarified through more reference to and engagement with rules and sources of international law and theories of horizontal effect in those instances where the Committees do indeed apply it, as well as more consistent use of terminology. As it stands, the Committees very rarely actually consider 'horizontal effect' as a concept, preferring to move directly to the practical measures that should be taken by (predominantly) States to protect human rights. That being said, the bodies have applied horizontal effect to the extent that their mandates and the international legal framework allow. In this respect, the findings of the analysis fit within the prevalent approach in legal science towards horizontal effect – that within the legal framework as it is, there is no possibility of direct horizontal effect. In this respect, the findings do not seem to fit within new theories of horizontal effect being developed in literature (e.g. those briefly discussed in Chapter 3.2 that rely on a reconceptualization of human rights). However, the adoption and content of General Comment No. 24 regarding business activities suggests that at least the CteeESCR is willing to keep pace with the international community as it moves towards the elaboration of duties and obligations for business enterprises.

## 5.8 Concluding reflections on the horizontal effect of international human rights in international jurisprudence

The above discussions show widespread and varied acknowledgements of the considerable role that non-State actors have to play in the enjoyment of human rights. While the international legal framework does not allow for non-State actors to be directly burdened with international legal obligations, the UN human rights treaty bodies have on many occasions upheld the standards within international human rights law against the actions of non-State actors. This has been done primarily through applying States' obligation to protect human rights, focusing on the duties of States to act effectively when a non-State actor interferes with the enjoyment of human rights. This does not appear to have changed much over time, although the Committees

seem more willing to discuss the conduct of non-State actors themselves in general comments rather than views on individual communications. Interestingly, the requirements of the obligation to protect seem to differ somewhat depending on what kind of non-State actor has interfered with the enjoyment of human rights, and the relationship they have with the victim of human rights violations also appears to play a role in the way in which treaty bodies apply indirect horizontal effect.

First, the bodies, both in their general comments and views on individual communications, have upheld States' obligation to protect individuals from harmful acts by other individuals. This would include, for example, other family members (e.g. CteeEDAW, General Recommendation No. 19; *A. T. v Hungary*), neighbours (e.g. *L. K. v The Netherlands*), and employers (e.g. CteeESCR General Comment Nos. 5 and 14). In cases where such actors were involved, the focus of the treaty bodies was mostly on due diligence obligations of the State. An emphasis has certainly been placed on the obligations to investigate interference with human rights by non-State actors, as well as to prevent and punish the actions, especially where the State is aware of a risk to the individual. In one sense, the cases show a stronger application of horizontal effect, as the relationships between the individuals is often exclusively in the private sphere (e.g. between spouses). However, the actions of the non-State actors themselves are not the subject of much discussion by the Committees, except to the extent that they show that a particular right is engaged. Rather, the focus is (as it should be, according to the international human rights law framework) on the action or inaction of States either to prevent the harm occurring, or in reaction to the harm that occurred, which allows the private actor's conduct to be attributed to the State. Interestingly, because of the wording of Article 1 CAT requiring at least the 'consent or acquiescence' of the State for an act to fall within the scope of the Convention against Torture, the CteeAT has seemed to take a strict stance as to when acts of torture by private actors can lead to a violation of the Convention. It seems to be that only when the State knew of a risk of torture would the actions be imputable to the State. This contrasts with the approach suggested by CteeEDAW in *Angela González Carreño v Spain* and

the approach of other bodies with jurisdiction over the prohibition of torture, which are comparatively broader.

Second, the treaty bodies have applied States' positive obligation to protect human rights from private businesses (CteeESCR, General Comment Nos. 5 and 12) and entities such as banks (e.g. *Habassi v Denmark*) and insurance boards (e.g. *B. d. B. v The Netherlands*). The horizontal effect here is very similar to that found in the jurisprudence concerning relationships between individuals.

Third, the treaty bodies have applied indirect horizontal effect in relation to private companies or institutions that are carrying out public functions that have been delegated to them by the State. This category of actor has included, for example, privately run prisons (e.g. *Cabal and Pasini v Australia*) and private healthcare institutions (e.g. *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*). In their discussions of these actors, the treaty bodies have focused on attributing the actions of the non-State actors to the State because of the public nature of the functions that the actors are carrying out and because they were delegated these activities by the State. Here, the main argument appears to be that States cannot give up their own international responsibility by delegating certain functions to non-State actors. The treaty bodies have upheld (within the obligation to protect) an obligation to regulate and supervise the privatised companies, using a failure to do so as the basis for a State violation of a particular right. As well as the obligation to regulate, the treaty bodies have also applied the duty of due diligence to these actors (indeed, it appears to be applied in some form in relation to every kind of actor). The result of the obligation to regulate and supervise privatised companies is that the private actors providing the relevant service will be held, by the State, to the same standards as the State would by the human rights monitoring bodies. This is one of the few instances in which the practice of the treaty monitoring bodies can really be said to stipulate the standards expected of non-State actors.

Fourthly, cases of indirect horizontal effect have also occurred where the actor interfering with human rights is a non-State armed group. Here, the Committee against Torture has taken different approaches to horizontal

effect. In the case of *S. V. et al. v Canada*, the State's obligation to protect was upheld. In *Sadiq Shek Elmi v Australia,* though, the approach taken was to treat the non-State actor as a State actor. This seems only to apply when the group as effective control over the area of land to which an individual is going to be extradited, and/or when there is no effective central State authority within the receiving State. In these cases, it does not appear that there actually has to be any attribution to the State. The CteeEDAW has also dealt with these actors in General Recommendation No. 30, stating non-State armed groups' obligation to respect human rights during armed conflict (also placing emphasis on those groups with effective control over an area of territory).

Fifthly, suggestions have been made, at least by the CteeESCR (General Comment Nos. 14 and 15), that international organisations may have human rights obligations. However, no legal basis was provided by the CteeESCR and there are no examples of treaty bodies applying human rights treaties to international organisations in individual communications. The obligations could therefore be read as being moral, but not yet legal, in nature.

It is possible to conclude that the vast majority of the jurisprudence of the UN human rights treaty bodies involves a connection being made between the State and the private actor concerned. The basis on which to make this connection and attribute the private acts to the State differs slightly between different bodies and depending on the non-State actor involved. The bases remain significantly limited by the current international legal framework. So far, with the exception of the unique case of *Sadiq Shek Elmi v Australia* (which, it must be remembered, did not *actually* apply the Convention obligations to a non-State actor), treaty bodies seem reluctant to push the boundaries too far, at least in their views on individual communications, in which they are careful to invoke a legitimate legal basis. In order to fill gaps in human rights protection arising from situations falling outside of the State's obligation to protect human rights, either the international human rights framework will have to evolve to cover certain non-State actors, or ways of protecting individuals outside of the confines of the legal framework will have to be strengthened.

Overall, in relation to the kinds of actors that are treated differently, perhaps what is not present in the documents analysed is more telling than what is – the application of the law seems to allow individuals to be protected from other individuals and from private companies (especially privatised ones) but there are some non-State actors that fall (sometimes completely) out of the mix. The more 'public' non-State armed groups and international organisations have been dealt with to a limited degree, which has been particularly significant for the potential *direct* horizontal effect of human rights. Their treatment has been more direct within general comments, whilst in views on individual communications it has at most been said that these actors *could* be capable of violating human rights, or have responsibilities to help States in the implementation of their rights.

In general, and as repeatedly noted during the analysis, the monitoring bodies examined in this chapter primarily address the concrete standards expected of States vis-à-vis non-State actors, but not the standards of behaviour expected of the non-State actors themselves. While this does not actually limit the contribution of the practice to the study of 'horizontal effect', it does significantly limit the usefulness of the practice in identifying how international human rights law expects non-State actors to behave. The corollary of this is that the identification of these standards will have to be done through means outside of the international human rights law framework.

# Part 3

# Horizontal Effect of International Human Rights at the Regional and National Level

# Chapter 6

# Horizontal effect of international human rights at the regional level

## 6.1 Preliminary remarks

This chapter provides an analysis of the horizontal effect of international human rights within three regional human rights systems: (1) the Council of Europe (CoE) human rights system (Section 6.2); (2) the African human rights system (Section 6.3); and (3) the Inter-American human rights system (Section 6.4). The human rights protection systems under the Association of Southeast Asian Nations and the League of Arab States will not be included in the discussion, for reasons of space and relevance.[1] The three systems discussed differ somewhat from each other and from the international (UN) system for the protection of human rights,[2] but have each dealt, in their own way, with horizontal effect.

The aims of this chapter are threefold and dictate the structure of Sections 6.2-6.4. First, it aims to analyse whether, and if so, how, the human rights treaties under each regional system allow for the (direct) horizontal

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[1] For information on these systems, see respectively Human Rights in ASEAN Online Platform <www.humanrightsinasean.info/> accessed 18 March 2017; and Mervat Rishmawi, 'The League of Arab States: Human Rights Standards and Mechanisms' (2015) <https://www.opensocietyfoundations.org/reports/league-arab-states-human-rights-standards-and-mechanisms> accessed 31 August 2017.

[2] A major difference here being that the Courts of the regional human rights systems have the authority to adopt decisions legally binding Member States, whereas the outcome of individual communications procedures at the international level are not legally binding.

effect of human rights; second, it aims to conduct an analysis of the ways in which regional bodies have applied indirect horizontal effect in their jurisprudence; and third, it seeks to provide an overview of some of the main contributions to the academic debate concerning the application of horizontal effect within the three regional human rights systems examined. Due to restraints of time and space, the chapter will not attempt an exhaustive analysis of scholarly works or the systems' treaties and jurisprudence. Instead, examples of each will be used to identify the different ways in which horizontal effect is discussed and applied, and trends in application. Comparison amongst and between the three systems, and with the international human rights system, is made throughout Sections 6.2-6.4, and a brief overview of significant differences and similarities is provided in Section 6.5.

## 6.2 Examples of horizontal effect of human rights in the Council of Europe human rights system

The CoE is an inter-governmental organisation composed of 47 Member States.[3] Based in Strasbourg, France, the CoE is the body responsible for the ECHR.[4] The ECHR, adopted in 1950, has served as the main instrument for the protection and safeguarding of human rights within Europe for over 60 years. Alongside the ECHR, the CoE has now adopted several Protocols to the treaty which protect rights additional to those found in the original Convention.[5] The body responsible for overseeing the implementation of the CoE human rights treaties is the ECtHR.

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[3] For more information, see Council of Europe, 'Who We Are' <http://www.coe.int/en/web/about-us/who-we-are> accessed 31 August 2017.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (adopted 4 November 1950, entered into force 1 January 1990) ETS 5.

[5] For a list of Protocols to the ECHR, see Council of Europe Treaty Office, 'Search on Treaties' <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3> accessed 31 August 2017.

### *6.2.1 The Council of Europe human rights system: legislation*

The CoE system of human rights contains only scant reference to any responsibilities or duties of non-State actors. Indeed, the sole reference in the ECHR is rather vague and cannot really be said to place any concrete obligations on private actors. Article 10(2) provides that the exercise of the right to freedom of expression 'carries with it duties and responsibilities'. It could be inferred from the subsequent text in the provision, which lays down the limitations that States may impose on freedom of expression, that individuals have a responsibility to be considerate in the way that they exercise freedom of expression.[6] However, Gavin Phillipson and Alexander Williams have argued against such an interpretation, stating that the provision does not '*creat[e]* correlative duties on speakers not to interfere with the Convention rights of others; rather it simply *recognises* the fact that, at the time the Convention was drafted…various contracting states *already* laid numerous duties on speakers'.[7] The statement in Article 10(2) therefore seems to act as an extension of, or perhaps the rationale behind, the subsequent limitations that can be placed on individuals *by the State* when they are enjoying their rights. Such limitations are also found in other provisions within the ECHR, and often require individuals' rights to be balanced against one another. The ECtHR's practice in this respect will be briefly discussed in the following section.

### *6.2.2 The Council of Europe human rights system: jurisprudence*

In many ways, the European Court of Human Rights is seen as a role model in international human rights law. It is known for its often progressive judgments and willingness to treat the ECHR as a 'living instrument';[8] the

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[6] This is supported by the case of *Von Hannover v Germany*, App No. 59320/00 (24 June 2004), which essentially upheld a state obligation to ensure one private actor's 'proper consideration' for the rights of an individual. See Beate Rudolf, 'Council of Europe: *Von Hannover v Germany*' (2006) 4(3) International Journal of Constitutional Law 533, 534 (see below, Section 6.2.2).

[7] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) Modern Law Review 878, 883.

[8] The Court first mentioned the concept in *Tyrer v United Kingdom*, App No. 5856/72 (15

Court understands that the ECHR should be interpreted in a way that allows modern-day circumstances to be taken into account, rather than restricting interpretation to the original understanding or intention of those who drafted the Convention in a different social and legal environment. This approach of the Court has certainly allowed it to apply indirect horizontal effect to various degrees. Indeed, Olha Cherednychenko has noted that 'the Court avails itself of broad possibilities to exert an impact on the relationships between private parties'.[9] In this section, examples of the Court's case law will be discussed to provide an overview of how the Court has applied the ECHR in cases concerning human rights interference by non-State actors.

An illustrative and well-cited example of horizontal effect before the ECtHR is the case of *Costello Roberts v United Kingdom*.[10] In this case, children in a private school (hence a non-State actor) were being whipped with a cane as a form of discipline. The father of one of the children tried to bring a claim directly against the school, arguing that this corporal punishment qualified as inhuman and degrading treatment under Article 3 ECHR. This claim was unsuccessful, given the nature of the school as a non-State actor, but the father was able to successfully bring a complaint against the UK State itself. The ECtHR held the UK responsible for failing to protect the children by effectively enacting laws to criminalise such behaviour. In a similar statement to that of several international monitoring bodies seen in Chapter 5, the Court noted that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individual'.[11] This ensures that States cannot delegate their legal human rights

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March 1978) para 31. See for discussion George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Its Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013).

[9] Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2009) 13(2) Maastricht Journal of European and Comparative Law 195, 197.

[10] *Costello Roberts v United Kingdom*, App No. 13134/87 (25 March 1993) para 26.

[11] ibid para 27, cited in Andrea Bianchi (ed), *Non-State Actors and International Law* (Routledge 2009) 454.

responsibility along with the delegation of public tasks to non-State actors,[12] following the findings of previous case law before the ECtHR, namely *Van der Mussele v Belgium*.[13]

Another case in which responsibility for interfering with the enjoyment of human rights was attributed to the State (although the interference was caused directly by a non-State actor) is that of *López Ostra v Spain*.[14] In this case, a waste treatment plant had not been regulated by the State to prevent it from polluting nearby homes. The Court stated in this case that whether the dispute concerned positive obligations or 'direct interference by a public authority' justified under Article 8(2), 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and, in any case, the state enjoys a certain margin of appreciation'.[15] This suggests that whatever source is used to indirectly place standards of behaviour on non-State actors to protect human rights (i.e. the obligation to protect itself, or the legitimate limitations of human rights – see Chapter 3), the interests and possibly the rights of others will be weighed against those of the complainant, allowing the State certain leeway to decide how to achieve this balance.[16]

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[12] Bianchi (n 11) 455.
[13] *Van der Mussele v Belgium*, App No. 8918/80 (23 November 1983); see also *Casado Coca v Spain,* App No. 15450/89 (26 February 1994), discussed in Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 248-251.
[14] *López Ostra v Spain*, App No. 16798/90 (9 December 1994).
[15] Aoife Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors Through the Role of the State: A Comparison of Regional Approaches to the Obligation to Protect' (2009) 9 Human Rights Law Review 225, 246.
[16] For further examples of a case in which the ECtHR balanced competing interests and afforded States a relatively wide margin of appreciation, see e.g. *Hatton and Others v United Kingdom*, App No. 36022/97 (8 July 2003); *Pla and Puncernau v Andorra*, App No. 69498/01 (13 July 2004); and *J. A. Pye (Oxford) Ltd and J. A. Pye (Oxford) Land Ltd v United Kingdom*, App No. 44302/02 (30 August 2007). See for discussion, Ineta Ziemele, 'Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies' (EUI Working Papers 2009) AEL 2009/8, and on *Pla and Puncernau v Andorra* specifically, Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9).

A later case of *Fadeyeva v Russia*[17] also involved a State failure to regulate a private actor. A family living near a private steel plant argued that the pollution from the plant interfered with their right to private and family life under Article 8 ECHR. The ECtHR held that the Russian State had a positive obligation to regulate the private industry,[18] and to approach the problem with due diligence.[19] According to the Court, in this specific instance it would require the State to ensure that Ms. Fadeyeva and her family were resettled to housing outside of the area affected by the pollution. In rendering its judgment, the Court stated that the 'steel plant was not owned, controlled, or operated by the State', but that 'the State's responsibility in environmental cases may arise from a failure to regulate private industry.'[20] One of the contributing factors to this conclusion appears to be the fact that prior to it being controlled and operated by private actors, the plant *had* been owned by the State, which still imposed certain operating conditions on the plant. This, taken together with the fact that the State was well aware of the long-standing pollution being caused by the plant (which could be easily established as the source of the pollution) and calls for it to be reduced, 'show[ed] a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.'[21] The importance of the State being in a position to do something to regulate the private steel plant was central to being able to attribute the harm to the Russian State and allowed a broader application of Article 8 even though the 'State could not be said to have directly interfered with the applicant's private life or home'.[22] This case thus brought privatised companies squarely within the CoE human rights regime as a form of indirect attribution to the State. The notion of an 'obligation to regulate' non-State actors, particularly private or privatised companies, is now widely applied by different human rights

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[17] *Fadeyeva v Russia*, App No. 55723/00 (2005).
[18] ibid para 89.
[19] ibid para 128.
[20] ibid para 89.
[21] ibid para 92 (see also paras 89-92).
[22] ibid para 92.

monitoring bodies (including at the international level) falling within States' obligation to protect human rights.[23]

In the case of *Storck v Germany*,[24] the ECtHR similarly attributed a private actor's conduct to the State, in this case to find a violation of the right to liberty under Article 5(1) ECHR. The applicant was a German woman who had been detained in psychiatric institutions and hospitals for almost 20 years of her life. After becoming an adult, the applicant was detained for some time in a private clinic against her will, and without any legal mandate requiring that she stay at the clinic. Indeed, the woman tried to escape the clinic on several occasions. In determining whether there were any violations by the German State in relation to this detention, the Court considered that to interpret Article 5(1) as not encompassing a positive obligation would 'leave a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society.'[25] The Court explained that the positive obligation applicable here was that the State must take 'reasonable steps to prevent' an individual's liberty being deprived where the 'authorities have or ought to have knowledge' of the potential deprivation.[26] The Court relied on the fact that on one of the occasions that the applicant had tried to escape the private clinic, she was taken back by police officers. This fact (which established a connection between the private clinic and the public authorities) was enough for the Court to conclude that the State knew or should have known about the unlawful detention, which the Court suggested should have led to a legal

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[23] See e.g. Chapter 5; UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (2000) E/C.12/2000/4. Other cases before the ECtHR have dealt with the interference with individuals' right to private and family life caused by pollution. In the case of *Guerra v Italy*, App No. 14967/89 (19 February1998) also concerning pollution by a private plant, the ECtHR required that States must *efficiently* protect private and family life in such situations, thereby seeming to take the obligation to protect a step towards becoming an obligation of result.

[24] *Storck v Germany*, App No. 61603/00 (6 June 2005).

[25] ibid para 102.

[26] ibid.

review of the legality of her detention.[27] Ultimately, the lack of action by the State led the Court to hold that the supervision of private clinics by the State was not sufficient to protect individuals' right to liberty under Article 5(1). This decision goes a step further than *Fadeyeva v Russia* as it entailed a less significant nexus between the State and the actions of the non-State actor involved. Indeed, the judgment of *Storck v Germany* extended the scope of indirect horizontal effect to cover truly private institutions as well as privatised bodies, as seen in *Fadeyeva v Russia*.

As Clapham has noted, however, the ECtHR has sometimes refrained from separating those violations of the Convention that are the *direct* responsibility of the State (i.e. with a direct link to State action) from those occurring as a result of the State neglecting to protect individuals from the harmful actions of non-State actors (i.e. fulfilling the obligation to protect).[28] For example, rather than trying to attribute the conduct of non-State actors to the State, in the case of *Young, James and Webster v United Kingdom* the ECtHR based its finding of a violation of the positive obligations within Article 1 ECHR solely on the fact that the State had not taken appropriate legislative action to protect individuals.[29] This is a violation by omission, which would have been found regardless of whether the actor who directly interfered with the individual's rights was a State or non-State actor.[30] This contrasts with the approach of the same Court in *Fadeyeva v Russia* in which the Court looked specifically at attribution.[31] The reasoning in *Young, James and Webster* could represent an understanding of the Court that the positive obligation to protect is an intrinsic aspect of the Convention obligations generally, which may in part be due to the fact that the doctrine of positive obligations under the ECHR is seen not only in terms of inducing indirect

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[27] ibid para 106.
[28] Andrew Clapham, *Human Rights Obligations of Non-State-Actors* (Oxford University Press 2006).
[29] *Young, James and Webster v United Kingdom*, App Nos. 7601/76 and 7806/7 (18 October 1982).
[30] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 353, in footnote 22. See also Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press 1993) 234-236.
[31] *Fadeyeva v Russia*, App No. 55723/00 (9 June 2005).

horizontal effect, but also positive obligations relating to protection from *State* action.[32]

The ECtHR has also held the State responsible for the actions of private individuals, as well as companies and institutions. For example, in the case of *M. C. v Bulgaria*, the Court held that that the Bulgarian State had violated Articles 3 and 8 ECHR by failing to 'establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse'.[33] The applicant in the case was a 14-year-old girl, who had claimed to have been raped by two private individuals. The positive obligations that the Court read into Articles 3 and 8 ECHR required, as part of the criminal law system, that the State conduct a thorough investigation into allegations of rape. In the present case, the Court (relying on standards found within international law and other States' domestic laws) found that the investigation conducted by the Bulgarian authorities was not sufficient, as it did not look at the coercive circumstances in which the girl had been placed, but was rather limited to the existence of evidence that physical force had been used against the girl. The approach taken here by the ECtHR that States' positive obligations under the ECHR can include an obligation to investigate interference with rights by private actors corresponds with the approach taken by the Inter-American Court of Human Rights, discussed below, and to a limited extent, with that of the UN HRCtee in the case of *Herrera Rubio (on behalf of Herrera and Rubio de Herrera) v Colombia*.[34]

The application of horizontal effect of human rights in play here is

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[32] See generally, Hugh Tomlinson, QC, 'Positive obligations under the European Convention on Human Rights', paper presented at the Constitutional and Administrative Law Bar Association Summer Conference 2012 <www.adminlaw.org.uk/events_consultations/event_2012_07_24.php> accessed 17 November 2014.

[33] *M. C. v Bulgaria*, App No. 39272/98 (3 December 2003) para 185.

[34] UN HRCtee, *Herrera Rubio (on behalf of Herrera and Rubio de Herrera) v Colombia* (161/1983) UN Doc. CCPR/C/31/D/161/1983 (2 November 1987) para 6.2 (see Chapter 5 of this book). This case involved the enforced disappearance and murder of the claimant's parents by members of an unidentifiable group. The HRCtee held the Colombian State to be responsible regardless of the absence of State involvement in the actions, because of their failure to duly investigate the situation.

similar to the obligation to regulate/supervise found in the cases of *Fadeyeva* and *Storck* – the Court found a positive obligation on the State to take measures to effectively protect the individual's rights. Most significantly in *M. C. v Bulgaria*, the Court found a violation of Article 3, which prohibits torture and inhuman and degrading treatment or punishment. Under the authoritative definition of torture (applied repeatedly by the ECtHR) found in the Convention against Torture, an act constitutes torture if 'inflicted by or at the instigation of or with the consent or acquiescence of a *public* official or other person acting in an *official* capacity.'[35] The fact, then, that in *M. C. v Bulgaria* the ECtHR explicitly reiterated previous decisions that understood 'ill-treatment' as 'including ill-treatment administered by private individuals' allowed the positive obligation of the State under Article 3 ECHR to be applied in a manner which resulted in (a limited degree of) horizontal effect.[36]

A similar conclusion to *M. C. v Bulgaria* was reached by the Court in *X and Y v The Netherlands*, although with respect to Article 8 ECHR. Again, the case dealt with the treatment of a minor by private individuals, this time a mentally disabled girl of 16 years who lived in a private home for mentally disabled children and was raped by the director of the home's son-in-law. The public prosecutor had chosen not to prosecute the son-in-law, and the Dutch criminal law system required that children above the age of 16 must institute criminal proceedings on their own, as it 'requires a complaint by the actual victim before criminal proceedings can be instituted against someone who has contravened this provision'. The girl was unable to do this because of her disabilities, which meant that she could not avail herself of the protections offered by the Dutch criminal law system. Because of this lack of protection, the Court found a violation of Article 8 ECHR, the obligations under which

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[35] Emphasis added.

[36] Previous decisions reaching this conclusion, referred to by the Court in *M. C. v Bulgaria* (n 33) para 149, include *A. v United Kingdom*, App. No. 100/1997/884/1096 (23 September 1998), para 22; *Z. and Others v United Kingdom* App No. 29392/95 (10 May 2001), paras 73-75; and *E. and Others v United Kingdom*, App No. 33218/96 (26 November 2002). Interestingly, as with *M. C. v Bulgaria*, the other cases relied on by the Court which found a positive obligation to protect individuals from torture/ill-treatment by private actors have all concerned children.

require States to take 'measures designed to secure respect for private life even in the sphere of relations of individuals between themselves';[37] the applicable criminal laws in the Netherlands did not effectively and practically protect the girl.[38]

Article 8 ECHR has been at the centre of many cases concerning horizontal effect at the ECtHR. In the case of *Glaser v United Kingdom*,[39] for example, the ECtHR laid down the general requirements of the obligation to protect the 'respect for family life' guaranteed by Article 8. The applicant in the case was an individual who complained that contact orders between himself and his children's mother, to allow him access to the children, had failed to be enforced by the UK authorities. He therefore claimed a breach of Article 8 ECHR.[40] The ECtHR ultimately found that there had been no violation of Article 8, since the failure to enforce the contact orders was due to the mother's opposition thereto, rather than the authorities' conduct. The Court found that the UK authorities had struck a 'fair balance between the competing interests and did not fail in their responsibilities to protect the applicant's right to family life'.[41] However, in explaining the positive obligations owed under Article 8, the ECtHR stated that

> [t]he essential object of Article 8 is to protect the individual against arbitrary interference by *public* authorities. There may however be positive obligations inherent in an effective "respect" for family life. These obligations may involve the adoption of measures designed to secure respect for family life even in the *sphere of relations between individuals*, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps.[42]

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[37] *X and Y v The Netherlands*, App No. 8978/80 (26 March 1985) para 23.
[38] ibid para 30.
[39] *Glaser v United Kingdom*, App No. 32346/96 (19 September 2000).
[40] The applicant also claimed a violation of Article 6 ECHR in relation to the length of domestic proceedings and the fact that he had not been provided with legal assistance.
[41] *Glaser v United Kingdom* (n 39) para 87.
[42] ibid para 63 [emphasis added]. See also Ivan Hare, 'Vertically challenged: private parties,

The findings here clearly show that Article 8 can certainly be applicable between private actors, but the Court has been criticised for having 'consistently refused to develop "any general theory of positive obligations which may flow from the Convention"'.[43] Instead, the Court seems to have developed different strands of case law in relation to certain rights. Since *Glaser v United Kingdom*, the case law regarding the application of Article 8 ECHR has been considerably developed. A notable development occurred through the landmark case of *Von Hannover v Germany*,[44] in which the Court 'finally provided comprehensive guidance' as to the (scope of) applicability of Article 8 between private actors.[45] The case involved a claim by the Princess of Monaco that Germany had violated her right to private life when the national courts had not awarded her damages for photographs taken by the press of her in her private life (e.g. at a private beach).[46] The case is a classic example of the balancing act that is required when limitations on rights allowed for under the ECHR come into play. Ultimately, Princess Caroline Von Hannover's right to private life (Article 8 ECHR) was not found to have been correctly balanced by the German courts against the

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privacy and the Human Rights Act' (2001) 5 European Human Rights Law Review 526, 535.

[43] Hare (n 42) 536, citing *Plattform "Artze fur das Leben" v Austria*, App No. 10126/82 (21 June 1988) para 30. Certainly, the case of *Appleby and Others v United Kingdom* (n 48) demonstrates that while the ECtHR may interpret the ECHR as giving rise to positive State obligations, it does not uphold them on every occasion. See Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10(6) European Law Journal 776-779; and Oliver Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law' (2004) 17 Canadian Journal of Law and Jurisprudence 61, 70-74.

[44] *Von Hannover v Germany* (n 6).

[45] Gavin Phillipson, 'Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 142. As Aurelia Colombi Ciacchi notes, the Court laid down the balance that must be struck between freedom of expression and the privacy of celebrities, but left the manner in which this is achieved to the discretion of States. Aurelia Colombi Ciacchi, 'Horizontal Effect of Fundamental Rights, Privacy and Social Justice' in Katja Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing 2007) 63-64.

[46] For a summary and discussion of the case, see Beate Rudolf, 'Council of Europe: *Von Hannover v Germany*' (2006) 4(3) International Journal of Constitutional Law 533.

freedom of the press (and the interests of the public in having access to the information portrayed through the photographs) under Article 10 ECHR. In coming to this conclusion, the ECtHR 'recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result'.[47] The ECtHR therefore applied the State's obligation to protect human rights, and in doing so required Germany to ensure that the press be prevented from publishing photos of Princess Von Hannover that would infringe her (considerably broad) right to privacy. In effect, this would require the State to impose human rights-related standards of behaviour on non-State actors at the national level.

Another well-known case concerning a balance between the rights of individuals is *Appleby and Others v United Kingdom*.[48] In this context, the ECtHR has refused to accept that positive obligations could be placed on private owners of publicly accessible spaces (such as shopping malls) in order to allow individuals to enjoy their right to freedom of expression. In the case, a balance of the claimants' right to freedom of expression (Article 10 ECHR) against the private owner's right to property (Article 1 Protocol 1 ECHR[49]) was conducted. The dispute involved an environmental group, led by a Mrs. Appleby, that wished to use a privately-owned shopping centre in the town of Washington, UK, to set up stalls and distribute leaflets against preliminary planning permission which had been granted to a local college to build on the only playing field that local residents were able to use.[50] At the time of the

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[47] *Douglas v Hello! Ltd (No. 3)* [2006] QB 125, discussing *Von Hannover v Germany* (n 6), cited in Gavin Phillipson, 'Clarity Postponed: Horizontal Effect after Campbell' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 170.
[48] *Appleby and Others v United Kingdom*, App No. 44306/98 (6 May 2003).
[49] Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) ETS 9.
[50] *Appleby and Others v United Kingdom* (n 48) para 16, as discussed in MA Sanderson, 'Free Speech in Public Places: The Privatisation of Human Rights in *Appleby* v *UK*' (2004) 15(1)

group's request to use the shopping centre, it was publicly owned, and the permission was granted. After the property was transferred to a private company, however, the permission was rescinded by the new owner on the grounds that their 'stance on all political and religious issues [was] one of strict neutrality'.[51]

In the first place, the ECtHR opined that there was no element of direct State responsibility arising from the fact that the shopping centre used to be publicly owned. Unable to directly impose ECHR obligations on private actors, the Court then addressed whether indirect obligations could and should be imposed via the State to regulate the conduct of the private owners, invoking the UK's positive obligation to protect human rights.[52] The claimants argued that this obligation required the UK to change the legal framework pertaining to private owners of publicly accessible spaces, but the Court rejected this argument. It held that despite an 'interesting trend in accommodating freedom of expression to privately owned property open to the public'[53] that had emerged in other jurisdictions, this did not equate to individuals' rights being equally applicable in relation to private, as well as public actors.[54] Had the actions of the private owner sufficiently barred the effective exercise of the claimants' Article 10 right, the Court would have required the UK to take action to protect the individuals.[55] Since there were other publicly accessible locations that could have been used for the petition, this threshold was not met.[56] The autonomy of the private owner in relation

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Kings Law Journal 159, 160.

[51] ibid.

[52] This obligation requires States to take immediate steps to ensure that violations by the State, its agents, and NSA are prevented. See Office of the United Nations High Commissioner for Human Rights, 'Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions, Professional Training Series No. 12', United Nations, New York and Geneva (2005)17-18 <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 28 May 2014.

[53] *Appleby and Others v United Kingdom* (n 48) para 46.

[54] ibid para 44.

[55] ibid para 47.

[56] The dissenting opinion of Judge Maruste on this point raises questions regarding the Court's reasoning – although the area that the claimants wanted to use for their petition was privately

to their property was such that the limitation of their right, which would arise from obliging them to allow the environmental group to use it for the proposed purpose, would be disproportionate. The result of this finding by the ECtHR, unlike the other cases discussed in the present chapter so far, was that there was 'no "protective function" of the State' for what concerned the claimant's freedom of expression. The decision has been criticised on this ground, in particular for failing to consider why the freedom of speech is important in a functioning society and the role that the town centre may play as an institutional setting, or 'civic common'.[57] Despite the criticisms that can be levelled against the case, the approach of the European Court in *Appleby and Others v United Kingdom* is exemplary of the balancing act that the Court typically employs in cases dealing with interference with ECHR rights.

In other cases, the ECtHR has substantially developed its approach to States' positive obligations to protect human rights. One such case is that of *Osman v United Kingdom*.[58] The case concerned the right to life under Article 2 ECHR and the measures that could be expected of States to protect an individual's right to life from another private actor. Article 2(1) is particularly interesting because it includes a positive obligation for States to protect individuals' right to life through law.[59] The *Osman* case involved a high

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owned, it still functioned as a public forum, where individuals could publicly discuss matters of a public nature. For this reason, Maruste was of the opinion that 'it cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights', thus bringing in similar reasoning as in the case of *Costello Roberts v United Kingdom* (n 10), for example. See *Appleby and Others v United Kingdom* (n 48) Partly dissenting opinion of Judge Maruste, cited in Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 43) 768 and 778; and Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (n 43) 73. The reasoning of the majority that alternative locations were open to the claimants reflects, according to Gerstenberg, 'a partisan and narrow conception of the value of political speech': Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't) at 74; and Gerstenberg, 'Private Law and the New European Constitutional Settlement' at 779.

[57] Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't) (n 43) 74; and Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 43) 779.

[58] *Osman v United Kingdom*, App No. 87/1997/871/1083 (28 October 1998).

[59] The text of Article 2(1) ECHR reads: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court

school teacher, Mr Paget-Lewis, who had developed a 'disturbing attachment' to one of his pupils, Ahmet Osman.[60] The Osman family and Ahmed's school informed the police on several occasions about instances that they knew or believed to concern Mr. Paget-Lewis. This included activity such as the threatening of one of Ahmet Osman's friends, stealing school records, vandalising the Osman family home with graffiti and 'ramming' a van in which Ahmet Osman's friend was a passenger.[61] The situation culminated in the murder of Ahmet Osman's father by Mr. Paget-Lewis, who also seriously wounded Ahmet himself. This took place at the Osman family home, after neighbours had reported to the police that they had seen the perpetrator in the vicinity with a gun. The claimants (Ahmed and his mother) argued that the State authorities, which had been repeatedly informed of the teacher's behaviour, failed to take 'adequate and appropriate steps to protect the lives' of Ahmed and his father 'from the real and known danger posed' by Mr. Paget-Lewis, leading to a violation of Article 2(1) ECHR.

In assessing the case, the ECtHR took the opportunity in the *Osman* case to clarify that the scope of positive obligations under Article 2 extended to protection from the taking of life by private actors. In this respect, the Court stated that the positive obligation in Article 2 may 'imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'[62] The Court further lay down the test for determining whether a State has fulfilled its obligation to protect the right to life from third (private) parties. Accordingly, the Court will consider there to be a violation where:

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following his conviction of a crime for which this penalty is provided by law.' See Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights' (2007) Human Rights Handbooks No. 7, 21.

[60] *Osman v United Kingdom* (n 58) para 68.

[61] ibid para 38; Ziemele (n 16) 13; and Akandji-Kombe (n 59) 26.

[62] *Osman v United Kingdom* (n 58) para 115.

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[63]

The Court therefore employed a test of foreseeability, akin to that often found in the context of due diligence in international law, mentioned in Chapter 1 and seen in the practice of the UN Committee on the Elimination of Discrimination Against Women in the case of *Angela González Carreño v Spain*.[64] Ultimately, the ECtHR did not find a violation of the State's positive obligation to protect, holding that although the authorities had been informed about the conduct of Mr. Paget-Lewis, his behaviour was not such as to imply that he posed a 'real or immediate' threat to the life of Ahmed or his family members. In other words, the applicants had failed to show that there was a 'decisive stage' in the events before the murder 'when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk'.[65]

The *Osman* case shows that the ECtHR engages with a duty of due diligence in relation to the right to life (although it may not label it as such) and follows the premise that the obligation to protect is one of conduct, not of result. The concrete standards established in *Osman v United Kingdom* to assess whether a State has fulfilled its obligation to protect have been subsequently applied by the ECtHR in a number of cases concerning the right

[63] ibid para 116.
[64] UN Committee on the Elimination of Discrimination Against Women, *Angela González Carreño v Spain* (47/2012) UN Doc. CEDAW/C/58/D/47/2012 (16 July 2014).
[65] *Osman v United Kingdom* (n 58) para 121.

to life.[66] A recent case is that of *Özel and Others v Turkey*,[67] which involved the death of several individuals after the collapse of their apartment buildings following an earthquake. It emerged that the buildings had not been built in full compliance with special regulations that applied because of the 'high risk zone' in which the buildings were placed. At the national level, two employees of the construction company that had built the buildings were convicted under criminal law, whilst no prosecution of government officials that had failed to enforce the relevant regulations were authorised.[68] Assessing the applicant's claim under Article 2 ECHR, the ECtHR re-examined the scope and application of positive obligations under the right to life. Reiterating its findings in *Budayeva and Others v Russia*,[69] the Court stated that the obligation

> not only to refrain from intentionally causing deaths but also to take appropriate steps to safeguard the lives of those within their jurisdiction… must be construed as applying in the context of any activity, *whether public or not*, in which the right to life may be at stake, but it also applies where the right to life is threatened by a natural disaster.[70]

This makes it clear that the Court (still) understands positive obligations to

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[66] See e.g. *Denizci and Others v Cyprus,* App Nos. 25316-25321/94 and 27207/95 (23 May 2001); *Kontrová v Slovakia*, App No. 7510/04 (31 May 2007); *Yasa v Turkey*, App No. 63/1997/847/1054 (2 September 1998). Ziemele (n 16) 15, further notes that in several cases against Turkey, the ECtHR has applied the crtieria from the *Osman* case where the risk to an individual's life came from an unkown person. See *Mahmut Kaya v Turkey*, App No. 22535/93 (28 March 2000); *Akkoç v Turkey*, App Nos. 22947 and 8/93 (10 October 2000); and *Killiç v Turkey*, App No. 22492/93 (2000). Akandji-Kombe (n 59) 26 also briefly mentions in this context the cases of *Çakici v Turkey*, App No. 23657/94 (8 July 1999); and *Tanrıkulu v Turkey*, App No. 23763/94 (8 July 1999).

[67] *Özel and Others v Turkey*, App Nos. 14350/05, 15245/05 and 16051/05 (17 November 2015).

[68] See for discussion Lieselot Verdonck, 'How the European Court of Human Rights evaded the Business and Human Rights Debate in *Özel v. Turkey*' (2016) 2(1) Turkish Commercial Law Review 111, 113.

[69] *Budayeva and Others v Russia*, App No. 15339/02 (30 March 2007).

[70] *Özel and Others v Turkey* (n 67) para 170 [emphasis added]. See also Verdonck (n 68) 113.

be applicable vis-à-vis non-State actors and during natural disasters, which by their nature fall outside the full control of the State. In finding a violation of the procedural aspect of Article 2 ECHR (declaring the substantive aspect inadmissible) the Court upheld that States should 'preven[t] any appearance of tolerance of or collusion in unlawful acts',[71] which required them to 'establish the circumstances in which the disaster occurred, investigate whether there were deficiencies in (the implementation of) the regulatory framework, and identify all state actors who may be implicated in the chain of events.'[72] These obligations seem to correspond with the duty of due diligence upheld by the UN human rights treaty monitoring bodies at the international level, at least with regards to investigative obligations.

Similar (arguably due diligence) standards have also been applied by the ECtHR in the context of the prohibition of torture under Article 3 ECHR. For example, in the case of *Z. and Others v United Kingdom*, the Court referred to *Osman v United Kingdom* when it stated that the measures required by the State to comply with its positive obligation to protect individuals from torture or inhuman or degrading treatment by non-State actors (held to be an obligation in itself in the case of *A. and Others v United Kingdom* at around the same time as the *Osman* case[73]) 'include reasonable steps to prevent ill-treatment of which the authorities *had or ought to have had* knowledge'.[74] This standard seems to mirror that of foreseeability discussed in relation to due diligence in Chapter 1 and seen in Chapter 5 of the present book in the practice of the UN CteeESCR.

Finally, the case of *llascu and Others v Moldova and Russia*[75] deserves some consideration. Although this case did not deal directly with the question of horizontal effect, nor even involve a non-State actor that had interfered with individuals' rights, the findings of the Court could be used to

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[71] *Özel and Others v Turkey* (n 67) para 189.
[72] Verdonck (n 68) 113.
[73] *A. v United Kingdom* (n 36) para 22, cited in *Z. and Others v United Kingdom* (n 36) para 73.
[74] *Z. and Others v United Kingdom* (n 36) para 73 [emphasis added].
[75] *Ilascu and Others v Moldova and Russia*, App No. 48787/99 (8 July 2004).

argue for the application of indirect horizontal effect. The case dealt with a situation that occurred in the Transdniestria, which although being in Moldovan territory was under *de facto* control of Russia. Despite not having effective control over the territory, the Court held Moldova to an obligation to take all appropriate measures 'still within its power to take'.[76] The Court further concluded that 'where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation…it does not thereby cease to have jurisdiction', and the State 'must endeavour, with all the legal and diplomatic means available to it…to continue to guarantee the enjoyment of the rights'.[77] As well as applying in situations of occupation or control by another State, this could also apply to situations where a particularly powerful non-State actor (such as a non-State armed group) has taken control over an area of a State's territory. It could therefore be argued that the ECHR would require States to continue to uphold and fulfil their duty of due diligence in such situations.

On limited occasions, the ECtHR has looked at horizontal effect outside of the context of positive obligations. This occurred in the case of *Pla and Puncernau v Andorra* which concerned the State's interpretation of a will (a typically private act and regulated by private law) concerning an estate.[78] The national court had, in its interpretation of the will, distinguished between adopted and biological children, despite no distinction having been made by the testatrix. The testatrix herself had required that her son, 'future heir to the estate must leave it to a son or grandson of a lawful and canonical marriage'.[79] However, the result of the national court's interpretation of the will was that the adopted son of the original heir, who had been left the estate by his late father, was barred from inheriting the estate. In its assessment of the case, the ECtHR opined that while 'in theory' it is not for the Court to settle purely private disputes, when a national court interprets a legal act (of whatever

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[76] ibid para 313.
[77] *Ilascu and Others v Moldova and Russia* (n 75) para 333.
[78] *Pla and Puncernau v Andorra* (n 16).
[79] ibid para 12.

nature) in a way that is 'blatantly inconsistent with the prohibition of discrimination as established by Article 14 and more broadly with the principles underlying the Convention', the Court could not 'remain passive'.[80] As such, the Court found a violation of Article 14 taken together with Article 8 ECHR.

According to Cherednychenko, the ECtHR's approach of assessing the national court's *interpretation* of the will must be distinguished from an approach of 'horizontal effect' *per se*, which would involve the Court considering whether private parties are able to discriminate in their wills and whether a State would violate the ECHR by upholding a discriminatory will.[81] In other words, if the case were to involve horizontal effect as such, it would have involved a ruling of the ECtHR as to the obligations of the State 'either to prohibit or refuse to give effect to private action which interfered with' an individual's ECHR rights.[82] This is the question that dissenting Jugde Garlicki argued to be at stake in the case,[83] and as Cherednychenko correctly underlines, would bring the case within the scope of State's positive obligations vis-à-vis non-State actors. Although Cherednychenko does not seem to categorise this case as one of horizontal effect, she does consider it an example of how the ECHR, through the Court's review of a State's national (private law) decision, influence the relationship between private parties.[84] The effect of this approach is somewhat similar to that taken by the national courts in private law disputes in the United Kingdom, which will be

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[80] *Pla and Puncernau v Andorra* (n 16) para 46, cited by Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9) 205; and Ziemele (n 16) 20.
[81] Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9) 205.
[82] ibid 206.
[83] Indeed, Judge Garlicki explicitly used the term 'horizontal effect' in his argument, stating that 'he real question before our Court is to what extent the Convention enjoys a "horizontal" effect, i.e. an effect prohibiting private parties from taking action which interferes with the rights and liberties of other private parties.' *Pla and Puncernau v Andorra* (n 16) Dissenting Opinion of Judge Garlicki.
[84] Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9) 197.

discussed in Chapter 7.

Without wishing to categorise the types of horizontal effect found in the ECtHR's practice at this stage, a comment must be made regarding the legal bases that the Court uses for applying the ECHR in cases concerning human rights interference by non-State actors. As with the UN human rights treaty monitoring bodies at the international level, the legal source and basis for the ECtHR to apply the ECHR in cases concerning non-State actors is a matter for discussion. Akandji-Kombe points out that in the context of positive obligations the Court has used a combination of individual substantive provisions in the ECHR together with Article 1 ECHR as the basis for applying the Convention in cases of horizontal effect.[85] Article 1 ECHR provides that: '[t]he High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'[86] Akandji-Kombe further observes that the use of Article 1 as a basis has allowed the ECtHR to apply (at least the procedural element of) the doctrine of positive obligations to cases concerning *all* rights in the Convention (as opposed to only those in provisions such as Article 2(1) which already include positive obligations).[87] However, Cherednychenko has

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[85] Akandji-Kombe (n 59) 8.

[86] Emphasis added. Cherednychenko observes that scholars such as David Harris, Michael O'Boyle, Colin Warbrick and Andrew Drzemczewski hold this view, which can be seen in the case of *Young, James and Webster v United Kingdom* (n 29). See Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9) 200, citing David Harris, Michael O'Boyle, Colin Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995) 19-22; and Andrew Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties' (1979) 2 Netherlands International Law Review 163, 176-177.

[87] ibid. Article 2(1) ECHR states that '[e]veryone's life shall be protected by law' and has been regarded as comprising a positive obligation, e.g. in the case of *Osman v United Kingdom* (n 58). Originally, the Court used different bases depending on whether it was imposing substantive or procedural obligations on the State vis-à-vis the actions of a non-State actor. Substantive obligations are those 'basic measures needed for full enjoyment of the rights guaranteed' in the legislation, for example 'laying down proper rules governing intervention by the police, prohibiting ill-treatment or forced labour, equipping prisons' etc. The basis for substantive positive obligations was initially the provision containing the right itself. Procedural obligations, however, are those that 'call for the organisation of domestic procedures to ensure better protection of peoples' (e.g. obligations to investigate, as seen in

highlighted that other possible bases that have been put forward are Article 17 ECHR regarding the prohibition on the abuse of rights (as discussed in Chapter 3) and Article 13 ECHR, which contains the right to an effective remedy in the event that an individual's rights are violated.[88]

Overall, the practice of the ECtHR shows that it is very willing to apply some degree of horizontal effect. The specific type used will be explained and discussed in Chapter 8, but it is interesting to note here that the Court seems to rely almost exclusively on the positive obligations of States to impose standards of behaviour on non-State actors. Because of the focus on the State, the same issue arises as at the international level – that although it is clear from the jurisprudence that States must act to regulate the activities of non-State actors and take measures to prevent them from interfering with the rights of others, the actual behaviour of non-State actors regarding human rights is less clear. The focus on State obligations is certainly valid in the light of the European human rights law framework, but the Court has been criticised for not engaging with the discussion of (for example) business and human rights in recent cases such as *Özel and Others v Turkey*. Lieselot Verdonck, for instance, considers the case to be a missed opportunity for the Court to discuss whether it is possible for businesses to violate human rights and how domestic courts could or should enforce corporate accountability.[89] While the opinion of an institution such as the Court on this matter would certainly be welcome and would carry a certain authority, Verdonck herself notes that 'from a legal point of view' the Court's State-oriented approach is appropriate.[90] To require more of the Court in this respect within its judgments could expect it to go beyond the confines of its mandate. We

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many cases concerning the right to life and the prohibition of torture). The basis for procedural obligations has been the individual provisions taken together with Article 1 ECHR. Most recently, Akandji-Kombe has identified a trend of the ECtHR to 'infer positive obligations from a combination of standard-setting provisions and the general principle of "the rule of law" or "state governed by the rule of law"'. See Akandji-Kombe (n 59) 8, 9 and 16.

[88] Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (n 9) 200.

[89] Verdonck (n 68) 114.

[90] ibid.

therefore come across the same obstacle as in Chapter 5 with regards the limits of the application and discussion of horizontal effect by human rights adjudicatory bodies.

*6.2.3 The Council of Europe human rights system: scholarly works*

One of the most substantive analyses of horizontal effect in the jurisprudence of the ECtHR can be found in Andrew Clapham's book entitled *Non-State Actors and Human Rights Obligations*.[91] His chapter on the regional systems consists of a 90-page analysis of the horizontal effect in the case law of the ECtHR, and the Inter-American and African systems more broadly. Clapham makes some extremely interesting observations regarding the potential of the ECHR to create new obligations for non-State actors. In particular, he notes that although it is not possible for individuals to file a complaint against another non-State actor before the Court, it *is* possible for the ECHR to be applied with direct horizontal effect at the national level, by national judges.[92]

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[91] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28). For further examples, see Aurelia Colombi Ciacchi, 'European Fundamental Rights and Private Law: The Dutch System in the Context of Different Legal Families' in Bettina Heiderhoff, Sebastian Lohsse and Reiner Schulze (eds), *EU-Grundrechte und Privatrecht*: *EU Fundamental Rights and Private Law* (Nomos 2016); and Olha Cherednychenko, 'The Impact of Fundamental Rights on Dutch Private Law: Revolution or Evolution?' in Verica Trstenjak and Petra Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law*, *Ius Comparatum - Global Studies in Comparative Law; Vol. 15* (Springer 2016).

[92] This happens in countries that follow the monist theory for incorporating international law into a domestic legal order, such as the Netherlands and France. Article 93 of the Constitution of the Kingdom of the Netherlands 2002, for example, provides that treaties and decisions of international organisations that are binding become legally binding within the Netherlands after their publication. For a discussion of the way in which horizontal effect is applied in the Netherlands, and a discussion of the horizontal effect of human rights in different national legal systems, see Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in Hans Micklitz (ed) *Constitutionalization of European Private Law* (Oxford University Press 2014); Colombi Ciacchi, 'European Fundamental Rights and Private Law' (n 91); and Olha Cherednychenko, 'The Impact of Fundamental Rights on Dutch Private Law: Revolution or Evolution?' (n 91). For a discussion of the situation in France, see Frédéric Sudré, 'Les "obligations positives" dans la jurisprudence européenne des droits de l'homme' in Paul Mahoney and others (eds), *Protecting Human Rights: The European Perspective – Studies in memory of Rolv Ryssdal* (Carl Heymanns 2000) 1369, quoted in Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 349. In contrast, in countries such as the United

This depends on the extent to which a particular State has integrated the ECHR into its domestic legal order, and touches upon a huge field of academic studies into the horizontal effect of human rights within national legal systems, and in particular private law cases.[93] An example of horizontal effect of the ECHR in national legal systems (the United Kingdom) will be discussed in detail in Chapter 7.

In his examination of the application of the ECHR by the ECtHR itself, Clapham takes a right-by-right approach, looking at the way in which the Court has applied some degree of horizontal effect in relation to each substantive article of the Convention. Through his analysis, Clapham identifies three different applications of horizontal effect by the ECtHR. First, he finds that the ECtHR has sometimes refrained from separating those violations of the Convention that are the *direct* responsibility of the State (i.e. with a direct link to State action) and those occurring as a result of the State neglecting to protect individuals from the harmful actions of non-State actors (i.e. fulfilling the obligation to protect).[94] This was discussed in relation to the case of *Young, James and Webster v United Kingdom* in Section 6.2.2.

Second, under States' positive obligation to protect human rights, Clapham identifies and examined the balancing of individuals' rights against each other by regional human rights courts, introduced in Chapter 3 of the present book and discussed in Section 6.2.2 above. Again, this dovetails the large amount of literature on horizontal effect in domestic private law throughout Europe.

Finally, Clapham identifies that the ECtHR has applied horizontal effect with regard to the right to an effective remedy protected by Article 13,

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Kingdom which take a dualist approach international law must be incorporated into the national legal system through domestic legislation. The approach of the United Kingdom will be discussed in detail in Chapter 7 of the present book.

[93] See e.g. Hans Micklitz (ed), The *Constitutionalization of European Private Law* (Oxford University Press 2014); Olha Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?' (2007) 3(2) Utrecht Law Review 1; Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 International Journal of Constitutional Law 79.

[94] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28).

even if a threat to the right was caused by a non-State actor (as was the case in *Hatton and Others v United Kingdom* and *Costello-Roberts v United Kingdom*).[95] It is therefore clear from Clapham's chapter that he believes there to be three different strands of indirect horizontal effect within the case law of the ECtHR, although he does not label these strands, as other authors have done and as will be done in Chapter 8 of the present book.

Another significant analysis of the ECtHR's case law concerning private actors has been conducted by Jean-François Akandji-Kombe.[96] The analysis, like Clapham's, takes a thematic approach and addresses case law concerning a wide range of rights protected by the Council of Europe's human rights legislation. However, Akandji-Kombe starts from the perspective of 'positive obligations' within the European human rights system, rather than horizontal effect *per se*. Thus, although he indeed examines the 'horizontal effect' of human rights within the ECtHR's case law and his study contributes to literature on horizontal effect, the focus of the study is not actually on the application of the ECHR between private parties, but on positive obligations regarding State actors as well.

## 6.3 Examples of horizontal effect of international human rights in the African human rights system

The African system for the protection of human rights exists as part of the African Union. The rights protected by the system can be found in the African Charter on Human and Peoples' Rights (ACHPR) as well as several other human rights instruments.[97] The bodies responsible for monitoring the implementation of the ACHPR are the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which may both hear individual communications against States.[98]

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[95] *Hatton and Others v United Kingdom*, App No. 36022/97 (8 July 2003); and *Costello Roberts v United Kingdom* (n 10)see Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 420.
[96] Akandji-Kombe (n 59).
[97] For a list of the relevant instruments, see African Commission on Human and Peoples' Rights, 'Legal Instruments' <http://www.achpr.org/instruments/> accessed 31 August 2017.
[98] See respectively African Charter on Human and Peoples' Rights ("Banjul Charter")

### *6.3.1 The African human rights system: legislation*

The ACHPR directly specifies certain duties for individuals.[99] Similar to Article 29 of the Universal Declaration of Human Rights which provides that '[e]veryone has duties to the community' (see Chapter 4 of this book), some of the duties proposed by the ACHPR are predominantly owed by individuals towards their community. Unlike the UDHR, however, Articles 27-29 ACHPR detail duties to be owed by individuals to specific members of society (namely their parents and families) as well as the State itself.

Article 27 lays down the very fact that individuals are subject to duties under the Charter, with Articles 28 and 29 offering more detail on the precise behaviour expected. Article 28 focuses on non-discrimination, stating that '[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.' Although more specific than Article 27, this duty still remains vague and subject to interpretation. Article 29 can be said to contain the most concrete duties for individuals, listing the following eight duties:

> 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
>
> 2. To serve his national community by placing his physical and intellectual abilities at its service;
>
> 3. Not to compromise the security of the State whose national or resident he is;
>
> 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
>
> 5. To preserve and strengthen the national independence and the

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(adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58; and Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2005) 1379.

[99] ACHPR.

> territorial integrity of his country and to contribute to its defense in accordance with the law;
>
> 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
>
> 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society;
>
> 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Although fairly extensive, the duties are imposed by Articles 27-29 have a limited impact. As with any human rights treaty, only States can become party to the ACHPR and only States may be the subject of complaints before the African Court on Human and Peoples' Rights. This means that in practice, it would not create a benefit for individuals so much as for the State itself – the fact that a State has ratified the ACHPR may allow it, at the national level, to rely on non-compliance with Articles 27-29 to limit the enjoyment of an individual's rights under the same instrument. This is particularly evident in light of Article 27(2), which provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' This provision is commonly referred to as a 'clawback clause', allowing State Parties to claw back the protection of human rights and shirk some of their own duties by shifting the burden onto individuals.[100] In light of the lack of a 'legitimate limitations' clause in the Charter, as is found in other regional and international human rights instruments, the African Commission on Human and Peoples' Rights has sought to place restrictions on States' use of Article 27. The Commission has invoked its authority (under Article 60 ACHPR) to

[100] Christof Heyns, 'The African Regional Human Rights System: In Need of Reform?' (2001) 1(2) African Human Rights Law Journal 155.

'draw inspiration' from general international human rights law.[101] In doing so, it has proclaimed that the rights in the Charter may only be limited for the 'legitimate' reason of protecting a State interest, and that such limitations must at all times remain proportional and be restricted to what is 'absolutely necessary for the advantages' at stake.[102]

As John H Knox has commented, it is likely that State Parties to the treaty endorsed the idea of converse duties for individuals in order to place greater limitations on the enjoyment of rights, to prevent individuals exercising rights in a way that could make a national government feel threatened.[103] Given the object of some of the duties, it is possible to argue that the ACHPR does not in fact allow for such a great deal of horizontal effect of human rights as one may assume. As with the vertical (State) duties in the ACHPR, the duties that are owed by individuals to the State, or to a community or society as a whole, could not be directly *invoked* against an individual (or another State actor interfering with human rights). This is because under the African human rights system (as with the other regional and international systems), only States can be the subject of complaints of alleged violations of the ACHPR, either before the African Commission on Human Rights or the African Court of Human Rights.[104] This means that in effect, whatever impact Articles 27-29 have, and how compliance with the duties of individuals is monitored, will be a decision for States at the national level.

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[101] John H Knox, 'Horizontal Human Rights Law' (2008) 102(1) The American Journal of International Law 1, 17.
[102] *Media Rights Agenda v Nigeria*, Communication Nos. 105/93, 128/94, 130/94, 152/96 (31 October 1998) paras 66-70.
[103] Knox (n 101) 1.
[104] See African Charter on Human and Peoples' Rights (n 98); and Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2005) respectively. The Charter and the Protocol have now been merged together by the Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

*6.3.2 The African human rights system: jurisprudence*

A landmark case concerning horizontal effect of human rights is that of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (the *Ogoni* case).[105] The case drew much attention across the globe, the facts resulting in cases being brought in two other (national) jurisdictions (namely the United States and the Netherlands).[106] One of the reasons for the publicity behind the cases is that the interferences with the applicants' human rights were done by the National Nigerian Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation. The *Ogoni* case was the first time that a case concerning a major multinational corporation (Shell) had been brought before a regional or international human rights monitoring body. The claims brought against the Nigerian Government accused the military government of being directly involved in and failing to protect the indigenous people of Ogoniland from the harmful actions of the corporations.[107] The harm incurred included 'skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems' caused by contaminated water, soil and air as a consequence of the corporations 'exploit[ing] oil reserves in Ogoniland with no regard for the health or environment of the local communities, [and] disposing toxic wastes into the environment and local waterways. The applicants alleged that the government had 'condoned and facilitated' the actions as it allowed the corporations to make use of Nigerian legal and military powers and failed to regulate the corporations' activities.[108] A second claim by the applicant alleged that further harm was then caused by violent attacks on the Ogoni people, who had challenged the corporations through a non-violent

[105] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No.155/96 (27 October 2001).
[106] Including cases at the US Supreme Court of the United States, *Kiobel et al. v Royal Dutch Petroleum et al*, Case No. 10-1491 (2013); and the Netherlands, *Akpan/Royal Dutch Shell*, LJN BY9854, C/09/337050 HA ZA 09-1580.
[107] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 105) para 1.
[108] ibid para 3.

campaign. The attacks, conducted with weapons and armoured tanks, involved some Ogoni people being killed, and left thousands of people homeless.[109]

In its decision, the Commission took an 'obligations' approach which can be likened to the tripartite typology of human rights,[110] although going slightly further to envisage four types of obligations (seeing the obligation to promote as a distinct obligation from the obligation to fulfil).[111] Those issues regarding the actions of the corporations were dealt with under the rubric of the 'obligation to protect', which the Commission understood as 'generally entail[ing] the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.'[112] In explaining this obligation in more detail, the Commission relied on the cases of *Velásquez Rodriguez* before the IACtHR[113] (see Section 6.4.2) and *X and Y v The Netherlands* before the ECtHR. In particular, the Commission noted that pursuant to these cases the obligation to protect human rights obligates States to prevent individuals from 'act[ing] freely and with impunity to the detriment' of human rights, and 'to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.'[114] Applying these standards to the actions of Nigeria and the NPPC Shell consortium, the Commission held that 'the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis' and had therefore violated Article 21 ACHPR providing individuals a right to 'freely dispose of their wealth and natural

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[109] ibid paras 7-8.
[110] This was done by, for example, Fons Coomans in his discussion of the Ogoni case. Fons Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights' (2003) 52 International and Comparative Law Quarterly 749, 752-754.
[111] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 105) paras 44-47.
[112] ibid para 46.
[113] *Velásquez Rodriguez v Honduras*, IACHR (Ser. C) No. 4 (29 July 1988).
[114] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 105) para 57.

resources'.[115] Beyond this, however, the Commission did not elaborate how precisely the Nigerian government should have acted. Although it referred to the applicants' argument that the government had 'did not monitor or regulate the operations of the oil companies and in so doing paved a way for the Oil Consortiums to exploit oil reserves in Ogoniland', the Commission did not go so far as to say that the obligation to protect human rights includes a duty to regulate private companies (unlike the IACtHR and ECtHR). Perhaps, because the violation of the obligation to protect was so clearly caused by the government's *facilitation* of the oil companies (the government thus being more directly involved in the actions interfering with the enjoyment of human rights) the Commission did not feel the need to look at the issue of regulation in relation to Article 21. Indeed, those cases of the IACtHR and ECtHR regarding the obligation to regulate deal more with cases where the State has taken a slightly laxer approach, failing to take action to supervise private bodies, rather than situations where the State is actively contributing to the actions of the private actor (even though in the first cases the State knew or should have known about the risk of harm to individuals).

With regards to the applicants' other complaints, the Commission was more direct about interference with rights by non-State actors. For example, the Commission explicitly mentioned human rights interference by non-State actors when discussing the applicants' rights to housing, food and life.[116] Significantly, the Commission stated that 'wide spread violations perpetrated by the Government of Nigeria and by *private actors*' had led to a violation of the right to life,[117] suggesting that the Commission believes private actors to be capable of violating, as well as interfering with, human rights. Tying its findings together in a conclusive recommendation, the Commission focused again on the State's obligation to protect and suggested that Nigeria undertake 'appropriate environmental and social impact assessments' by

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[115] Article 21(1) ACHPR.

[116] See Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 434-435.

[117] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 105) para 67, emphasis added. Cited in Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 435.

'effective and independent oversight bodies' which should guarantee the safe operation of future oil development.[118] It further urged Nigeria to 'provid[e] information on health and environmental risks and meaningful access to regulatory and decision-making bodies'.[119] The conclusions reached by the Commission as to the actions that should be taken to protect individuals from the harm caused by the Consortium is thus comparable to the conclusions of the ECtHR and IACtHR regarding the obligation to regulate, although did not frame its conclusions as such.

The findings of the Commission in the Ogoni case also, as Fons Coomans has highlighted, reveal a lack of due diligence of the Nigerian State, although the Commission did not use this language itself.[120] Implying how the Commission's approach fits into this duty (due diligence) and the conceptual framework of the tripartite typology is very helpful in allowing the reader to see how the Commission's approach generally fits with that of other international and regional bodies. This shows, as Clapham also emphasises, that the degree of horizontal effect within a regional human rights system does not necessarily depend on the language of the relevant regional human rights treaties or the extent to which human rights obligations/duties for non-State actors appear to be incorporated into them.[121]

Regarding the Commission's discussion of Article 21 ACHPR, it could be said that the horizontal effect is not as evident as in the cases before the other regional human rights monitoring bodies (or even as in the discussion of the rights to housing, food and life in the same case), as it was not as clear that the human rights interferences were caused by an actor that could not normally be attributed to the State. Nonetheless, the Commission was explicit in its treatment of the Consortium's actions under the rights to food, housing and life, and consistently relied on the State obligations theory. Taken as a whole, the case is a good example of how the African Commission

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[118] ibid.
[119] ibid.
[120] Coomans (n 110).
[121] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 436.

views the role of the State in protecting (and indeed also preventing) human rights violations caused by non-State actors. Additionally, the widespread attention attracted by the case brought a wide condemnation of the Shell Corporation and an increased awareness of the importance of monitoring the actions of multinational corporations and the impact of their operations on human rights.

*6.3.3 The African human rights system: scholarly works*

The African human rights system has been the subject of much academic literature, which often discusses the inclusion of duties within the African Charter on Human and Peoples' Rights.[122] However, an in-depth analysis of the horizontal effect of human rights in the system has not been undertaken by many scholars, as focus is generally placed on the *Ogoni* case, discussed above.

One scholar that has contributed to the debate on horizontal effect has done so through the lens of the 'public-private divide'. In her book examining the African Commission on Human and Peoples' Rights, Rachel Murray discusses the way in which traditionally, international human rights law has distinguished public (State) actors from private (non-State) actors.[123] She deems this dichotomy to be inappropriate in the African context, in which 'the notion of a state does not, to the same extent, presume such a dichotomy'.[124] Murray suggests that this may have stemmed from the pre-colonial structure in African States, which did not distinguish between

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[122] See e.g. Kofi Quashigah, 'Scope of Individual Duties in the African Charter' in Manisuli Ssenyonjo, *The African Regional Human Rights System: 30 Years After the African Charter on Human and Peoples' Rights* (Brill 2011); Ralph Beddard, 'Duties of Individuals under International and Regional Human Rights Instruments' (1999) 3(4) International Journal of Human Rights 30; and Mumba Malila, 'The Place of Individuals' Duties in International Human Rights Law: Perspectives from the African Human rights System' (2017) <https://repository.up.ac.za/bitstream/handle/2263/60063/Malila_Place_2017.pdf?sequence=1> accessed 4 January 2018.

[123] Rachel Murray, *The African Commission on Human and People's Rights and International Law* (Hart Publishing 2000).

[124] ibid 38-39.

individuals and the State, but rather emphasised the community.[125] Even now, the importance of the community can be seen reflected in the duties included in the ACHPR, which, as shown above, are owed predominantly to the community (or to the State) rather than necessarily to other individuals. Murray suggests that because of this lack of focus on the dichotomy by the African system, it 'may take into account a wider range of violations involving non-state actors.'[126] Clapham, who has undertaken a review of the practice of the African Commission vis-à-vis horizontal effect, has discussed how this has come to play out in practice.[127] His findings, however, do not show that the Commission has placed any more emphasis on the actions of non-State actors than the other regional systems. One significant finding (although Clapham does not flag this as such) is that the Commission does, in one instance, frame the actions of a non-State actor as a 'violation' of human rights rather than an interference.[128] Nonetheless, in light of the discussion of the *Ogoni* case, it does not appear that either the text of the ACHPR itself nor the practice of the monitoring bodies within the African system have led to an increased level of horizontal effect within the African human rights system, compared to that within the other regional systems discussed in the present chapter. This supports the finding in Section 6.3.2 that the extent to which horizontal effect is applied within a regional system does not necessarily depend on the inclusion of duties for non-State actors within the system's human rights instruments.

## 6.4 Examples of horizontal effect of international human rights in the Inter-American human rights system

The Inter-American human rights system exists within the umbrella body of the Organization of American States (OAS). The rights protected by the system can be found in the American Declaration on the Rights and Duties

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[125] ibid.
[126] ibid 39. See also Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 432-433, who also discusses Murray's comments.
[127] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 432-435.
[128] See Section. 6.3.2.

of Man (ADHR)[129] and the American Convention on Human Rights (ACHR – the legally binding human rights treaty under the Inter-American system),[130] as well as several more specialised instruments.[131] Implementation of rights protected under the Inter-American human rights system is monitored by both the Inter-American Commission on Human Rights and the IACtHR.

*6.4.1 The Inter-American human rights system: legislation*

The Inter-American human rights system explicitly refers to human rights duties for individuals in legal instruments, providing more extensive individual duties than the ACHPR. The ADHR contains in its preamble the rationale behind individual duties and the relationship between individuals' rights and duties: '[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.' Chapter 2 ADHR contains a list of ten duties owed by individuals, some of which correspond to the rights laid down in Chapter 1. For example, Article XII, in Chapter 1, provides a right to education, whereas Article XXXI, in Chapter 2, stipulates a duty to 'receive instruction', which is equated in the provision to a duty to 'acquire at least an elementary education.'[132] This appears to place an obligation on individuals to exercise the right to education.[133] Other duties in Chapter 2 ADHR are owed more clearly to the State, community or society as a whole, much in the same way as those duties in the ACHPR. Similar to the ACHPR duties, then, it may not be possible to say that the ADHR actually includes direct horizontal effect, as presumably the duties owed to society cannot be claimed by a single

[129] American Declaration of the Rights and Duties of Man, 2 May 1948.
[130] American Convention on Human Rights, "Pact of San Jose" (adopted 22 November 1969, entered into force 18 July 1978).
[131] For a list of the instruments, see Inter-American Commission on Human Rights, 'Basic Documents in the Inter-American System' <http://www.oas.org/en/iachr/mandate/basic_documents.asp> accessed 31 August 2017.
[132] See for further discussion, Knox (n 101) 1, 4-5.
[133] See for discussion ibid.

individual. Knox suggests that (as he identified with the duties in the ACHPR), most of the duties in the ADHR are intended to be used more as limitations on the enjoyment of individuals' rights, most relevant in situations of conflict between two individuals' rights. This is also reminiscent of the 'balancing' of individuals' rights through legitimate limitations discussed in Chapter 3 of this book. This connection between duties and the limitation of human rights within the ADHR is also evidenced by the fact that Article XXVIII (the ADHR's 'limitations clause') is placed directly before the list of duties.[134]

Again, as with the ACHPR, the potential consequence of the duties in the ADHR for the horizontal effect of human rights has to be considered with some degree of caution, due to the fact that, firstly, the Declaration itself is not a legally binding treaty. However, this may not have as significant an effect on the application of the Declaration as may be expected. The fact that the Declaration does not have the status of a legal treaty has not prevented the Inter-American Court of Human Rights from applying it as a 'the relevant text for assessing human rights within the OAS member states',[135] reflected in the Court's assertion in an advisory opinion in 1989 that 'for the member states of the Organization, the Declaration is the text that define the human rights referred to in the Charter.'[136] Indeed, the Court also emphasised in the advisory opinion that the ADHR has been 'repeatedly recognized' by the OAS General Assembly as a source of international obligations for OAS Member States and that its lack of status as a treaty cannot be equated to a lack of legal effect.[137] Further, Article 29(d) American Convention on Human

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[134] ibid.

[135] See Dinah Shelton, 'The Jurisprudence of the Inter-American Court of Human Rights' (1994) 10(1) American University International Law Review 333, 353.

[136] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10189, IACHR (Ser. A) No. 10 (14 July 1989) para 45.

[137] ibid paras 42 and 47, cited in Hurst Hannum, 'The Status of the Universal Declaration Human Rights in National and International Law' (1996) 25 Georgia Journal of International and Comparative Law 287, 339. These findings have led the Inter-American Commission on human rights to apply both the ADHR and the American Convention on Human Rights in the

Rights states that '[n]o provision of this Convention shall be interpreted as excluding or limiting the effect that the American Declaration of the Rights and Duties of Man…may have'.[138] This opens the way for the duties contained in the Declaration to be incorporated into interpretations of the Convention, especially of Article 32(1), which provides that '[e]veryone has responsibilities to his family, his community, and mankind'.[139]

The second reason for taking a cautious approach was also applicable for the ACHPR – the duties are listed for individuals, but only States can be the subject of the individual complaints procedure within the Inter-American human rights system. This means that any legal effect of the duties would be afforded through domestic, rather than international mechanisms. It also means that the only non-State actors that could be considered as having human rights duties under the ADHR are individuals, thereby excluding duties for actors such as corporations or non-governmental organisations.

It appears from the text of the ADHR and the ACHPR that at least two regional human rights systems have been more embracing of duties for non-State actors than the international human rights system. The Inter-American Court of Human rights also seems to have been quite creative in its interpretation of regional instruments to extend the purview of human rights protection.

*6.4.2 The Inter-American human rights system: jurisprudence*

As noted above, although the ADHR is not a legally binding treaty (as opposed to the ACHR), where an OAS Member State has not ratified the

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same case, and to go so far as to interpret the ADHR with reference to the Convention, which has not been ratified by all OAS Member States. This 'incorporation' of a binding treaty into a non-binding declaration has the effect of binding States to treaty provisions without their consent, going against fundamental rules within the Vienna Convention on the Law of Treaties. See Christina M Cerna, 'Reflections on the Normative Status of the American Declaration on the Rights and Duties of Man' <http://www.corteidh.or.cr/tablas/r31598.pdf> accessed 4 January 2018.

[138] See for discussion Douglas Hodgson, *Individual Duty Within a Human Rights Discourse* (Routledge 2016) 108.

[139] ibid.

ACHR, the Court and the Commission have not shied away from holding that State to the standards contained in the ADHR. Since the start of its operations, the Inter-American system has provided some landmark cases concerning horizontal effect, which have been influential within other regional systems.[140]

The most well-known case regarding horizontal effect of human rights law decided within the Inter-American human rights system is arguably that of *Velásquez Rodriguez v Honduras*, which was actually the first case ever heard by the Court.[141] The case took place in a more widespread situation of enforced disappearances within Honduras. The applicant argued that the right to life of Mr. Velásquez Rodriguez, who had been disappeared for seven years, had been violated by the State. During the seven years, his body had never been found, which led the Court to presume that he was no longer alive. Considering Honduras' obligation under the American Convention on Human Rights, the Court found that the provision to 'ensure to all persons subject to their jurisdiction the free and full exercise' of the Convention rights requires States to 'prevent, investigate and punish any violation of the rights'. This obligation, was explained as one of due diligence, which extends to the protection of rights from actions of private actors:

> [a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence to prevent* the violation or to respond to it as required by the Convention.[142]

The Court went on to explain that due diligence, as explained in Chapter 1 of the present book, is an obligation of conduct rather than result. This means

[140] E.g. the case of *Velásquez-Rodríguez v Honduras* (n 113) which was relied upon in the *Ogoni* case before the African Commission on Human and Peoples' Rights.
[141] ibid.
[142] ibid para 166.

that the State does not necessarily have to succeed in preventing a violation, but that it must take 'reasonable steps' to do so, including of a 'legal, political, administrative and cultural nature'.[143] It is very interesting to see from the above quotation that the duty of due diligence is seen by the IACtHR as a duty of prevention, rather than necessarily of protection (as due diligence is viewed within international law more broadly).[144] Indeed, although the Court did refer at times to protection, the obligation is clearly stated as one to 'prevent' human rights violations from both State and non-State actors. The actor accused of being directly responsible for Mr. Velásquez Rodriguez was the Honduras armed forces, clearly a State actor. Nonetheless, the Court explained how, if it had been a non-State actor that was directly responsible, it would have been able to create a sufficient nexus between the perpetrator and the State to hold the State itself responsible. In doing so, it stated that '[w]here the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.'[145]

This reasoning by the IACtHR can be explained as one of attribution of actions by private actors to the State (i.e. the 'State obligations theory' explained in Chapter 3) and seems to correspond quite closely with the reasoning of the ECtHR in cases such as *M. C. v Bulgaria*, where the ECtHR considered an appropriate investigation by the State as a necessary requirement to establish that the State had protected the applicant's rights. The IACtHR case has also been referenced (and followed) in more recent ECtHR cases, such as *Bevacqua and S. v Bulgaria*,[146] and more substantially

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[143] ibid paras 175 and 174, respectively.
[144] See discussion on due diligence in Chapter 1.3.3.
[145] *Velásquez Rodriguez v Honduras* (n 113) para 177.
[146] *Bevacqua and S. v Bulgaria*, App No. 71127/01 (12 June 2008) para 53; *Opuz v Turkey*, App No. 33401/02 (9 June 2009) paras 83-84. See European Court of Human Rights, 'References to the Inter-American Court of Human Rights and Inter-American Instruments in the Case-Law of the European Court of Human Rights' (2016) <http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> accessed 31 August 2017.

in *Opuz v Turkey*.[147]

Within the Inter-American system, the findings in *Velásquez Rodriguez* regarding due diligence and non-State actors were not addressed until 2001, when the case of *Maria da Penha v Brazil* was decided by the Inter-American Commission on Human Rights.[148] In this case, the applicant was a woman who had experienced severe domestic violence at the hands of her (then) husband, which led to her suffering from paraplegia.[149] Despite repeatedly bringing the situation to the attention of the Brazilian authorities, the applicant alleged that the State 'failed to take the effective measures required to prosecute and punish the aggressor'.[150] Referring to an earlier report by the Commission regarding the human rights situation in Brazil, the applicant relied directly on the duty of due diligence as enunciated in the *Velásquez Rodriguez* case.[151] The Commission agreed with the applicant, quoting the Court's statement that 'when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention' as well as Brazil's obligation to act with due diligence to 'prevent, investigate and punish' human rights violations. The Commission ultimately found that 'the domestic judicial decisions in this case reveal inefficiency, negligence, and failure to act on the part of the Brazilian judicial authorities and unjustified delay in the prosecution of the accused' (who after 17 years, still had not been prosecuted). Although explicitly following the approach of *Velásquez Rodriguez*, the decision in *Maria da Penha* seems to focus more on the basis of a failure to punish the individual rather than a failure to sufficiently investigate the situation (although the obligation to punish individual perpetrators was also raised in *Velásquez Rodriguez*). Significantly, the application of the approach in *Maria da Penha* to a situation regarding the actions of a non-State actor can be seen as an application of indirect horizontal effect.

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[147] *Opuz v Turkey* (n 146).
[148] *Maria da Penha v Brazil*, IACHR Report No. 54/01, Case 12.051 (16 April 2001).
[149] ibid para 2.
[150] ibid.
[151] ibid para 20.

A second significant case in which a degree of horizontal effect in a situation of domestic violence was applied is the case of *Jessica Lenahan (Gonzales) v United States*.[152] The applicant was a mother who had a domestic violence restraining order against her estranged husband. The police in the US failed to enforce the order when requested by Ms. Gonzales, after which her three daughters were murdered by the husband. The Commission reiterated that although perpetrated by private actors, domestic violence 'has been recognized at the international level as a human rights violation'.[153] The judgment explains in detail how the obligation of due diligence relates to domestic violence against women, how this falls within the scope of the right to life, and that this was becoming a matter of consensus within international law.[154] Citing case law of the ECtHR and the UN CteeEDAW, the Inter-American Commission placed much importance on situations where a State 'knew of a situation of real and immediate risk' regarding domestic violence, particularly where a State had already recognised that a women (and/or her children) was at risk, but failed to act diligently to take reasonable measures, i.e. those that would have a 'a real prospect of altering the outcome or mitigating the harm'.[155] Interestingly, as seen with the ECtHR, the standard applied by the Inter-American Commission here is one of foresight, and the Commission actually referred (citing the case of *Osman v United* Kingdom, above) to the standards provided by the ECtHR, which includes that the State will be responsible if it *ought* to have known about the real and immediate risk.[156] Applying this standard of due diligence to the present case, the Commission concluded that the State had not fulfilled its obligation of due diligence because, in particular through granting a restraining order, the US State had recognised that the women and her children were at risk of harm by the husband. Further, the police's lack of action to implement and enforce the restraining order showed

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[152] *Jessica Lenahan (Gonzales) v United States*, Report No. 80/11 Case 12.626 (21 July 2011).
[153] ibid para 111.
[154] ibid paras 122-134.
[155] ibid paras 132 and 134.
[156] ibid para 134.

non-compliance with the duty to take reasonable measures to protect the children. The Commission therefore found a violation of the US' obligation to protect victims from discrimination under Article 11 ADHR as well as the right to life under Article 1 ADHR. The indirect horizontal application of the rights, particularly regarding the right to life, was therefore similar in this case to that by the Court in previous cases.[157]

Patricia Tarre Moser notes that in the *Jessican Lenahan* case and the case of *Gonzales et al. v Mexico*,[158] among others, the IACtHR applied the 'theory of foreseeable risk', which allows States to be held responsible for human rights interference caused by the actions of non-State actors provided that four elements have been fulfilled: '(1) There must be a situation of real and immediate risk, (2) this situation must threaten a specific individual or group, (3) the State must know or ought to have known of the risk, and (4) the State could have reasonably prevented or avoided the materialization of the risk.'[159] As Moser further notes, the evolution of this theory and its application by the Court have 'created a standard that States must meet and clarify as to what mechanisms should be in place to prevent domestic violence.'[160] The theory, with its specific requirements and the way that the Court has applied it to concrete situations requiring particular action by States, goes further than other regional systems in detailing in which exact circumstances a State could be held responsible for human rights interference caused by non-State actors.

Other significant cases decided within the Inter-American human rights protection system regarding horizontal effect concern the actions of companies rather than individuals. A good example is that of *Ximenes-Lopes*

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[157] The approach has been applied again in cases such as *Gonzalez et al. v Mexico (In re Cotton Field)*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACHR (Ser. C) No. 205, 294 (16 November 2009). For a discussion of the relationship between these cases, see Patricia Tarre Moser, 'Duty to Ensure Human Rights and Its Evolution in the Inter-American System: Comparing *Maria de Pengha v. Brazil* with *Jessica Lenagan (Gonzales) v. United States*' (2012) 21(2) Journal of Gender, Social Policy & the Law 437.
[158] *Gonzalez et al. v Mexico (In re Cotton Field)* (n 157).
[159] Moser (n 157) 444-445.
[160] ibid 437, 448.

*v Brazil*, in which the non-State actor was a private psychiatric clinic.[161] The applicant brought a case against the Brazilian State for failing to protect her brother, an individual with a psychiatric disorder who was admitted to the private clinic where he suffered inhuman and degrading treatment and ultimately died. The Commission applied a different reasoning from the above cases when determining that the acts of the private clinic could be attributed to the Brazilian State. The reasoning appears to match more closely that in *Fadeyeva v Russia* before the ECtHR, which involved a privatised company. In *Ximenes-Lopes*, the private clinic was providing a public service (healthcare). In its explanation of the applicable law to this case, the Court noted first that 'States' liability may also result from acts committed by private individuals which, in principle, are not attributable to the State'. It then extended the attributability of non-State actors' actions to the State, holding that 'a person or entity which, though not a state body, is authorized by the State legislation to exercise powers entailing the authority of the State…[s]uch conduct must be deemed to be an act by the State, inasmuch as such person acted in such capacity.'[162] Applying this understanding to the case at hand, the Court stated that 'health is a public interest the protection of which is a duty of the States', meaning that 'States must regulate and supervise all activities related to the health care given to the individuals under the jurisdiction thereof, as a special duty to protect life and personal integrity, regardless of the public or private nature of the entity giving such health care'[163] – i.e. Brazil was under an obligation to regulate the private clinic. The wording here is interesting, as the Court suggests that although the private clinic remains a private actor, through its provision of a public service the clinic was a 'private entit[y] acting in a State capacity'.[164] The idea that human rights protection must be upheld in relation to (or even by) non-State actors carrying out public functions is also applied with the United Kingdom

[161] *Ximenes-Lopes v Brazil*, IACHR (Ser. C) No. 149 (4 July 2006).
[162] ibid para 86.
[163] ibid para 89.
[164] ibid para 90.

through the Human Rights Act 1998 (see Chapter 7 of this book).

Finally, the IACtHR has dealt with issues of the horizontal effect of human rights in advisory opinions. In an advisory opinion on the *Juridical Condition and Rights of the Undocumented Migrants*,[165] for example, the Court appears to treat illegal acts by non-State actors as violations of rights in themselves, without restricting the use of the term 'violations' to instances where the State has failed to ensure rights (as was discussed by Moser).[166] The Court opined, for instance, that as well as creating positive obligations for States vis-à-vis the actions of non-State actors (in situations where the non-State actor is under the 'tolerance, acquiescence or negligence' of the State),[167] due to the *erga omnes* nature of the principle of non-discrimination 'the obligation to respect and ensure human rights…has effects on relations between individuals',[168] in particular on employers. This interpretation of the ACHR is very much reminiscent of the effect of Article 5 of the CERD (see Chapter 4). The notion in the advisory opinion that non-State actors are also capable of *violating* human rights goes against a popular point of view (and that adopted in this study) that since non-State actors cannot technically be bound by international legal instruments and there is no direct horizontal effect within international human rights law, it is not possible to say that non-State actors themselves actually violate human rights. Rather, they *interfere* with the enjoyment of human rights, which often leads to a human rights violation of the State for failing to protect the affected individual.[169]

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[165] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC–18/03 (17 September 2003).

[166] See Clapham, *Human Rights Obligations of Non-State-Actors* (n 28), discussing the case of *Velásquez Rodriguez v Honduras* (n 113).

[167] *Juridical Condition and Rights of the Undocumented Migrants* (n 165) para 100. See Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) 430.

[168] *Juridical Condition and Rights of the Undocumented Migrants* (n 165) para 146.

[169] Clapham, *Human Rights Obligations of Non-State-Actors* (n 28) also discusses this advisory opinion in his regional human rights analysis, although he does not appear to take issue with it. This could be, perhaps, because the advisory opinion on migrant workers provides a clear explanation of the Court's reasoning or because the consequence of the opinion is a greatly increased protection of migrant workers' human rights.

*6.4.3 The Inter-American Human Rights system: scholarly works*

One author has examined one particular strand of horizontal effect in the case law of the Inter-American human rights system. In a research article, Patricia Tarre Moser carried out an analysis of the Commission's application of States' duty to 'ensure' the rights contained within the Inter-American system.[170] Moser looked at the application in relation to private actors in cases of domestic violence, how the Inter-American Commission on Human Right's approach has evolved since the its first case in 1988, and as mentioned above, at the 'theory of foreseeable risk' that has been developed within the Inter-American human rights system.

A slightly different approach again was taken by Ineta Ziemele in her discussion of horizontal effect in the Inter-American human rights system.[171] Although she looks at some of the same case law and documents produced by the Inter-American system as both Clapham and Moser, Ziemele first seems to look at each case under the rubric of attribution, or 'imputability', before labelling each different application by the Commission and Court as 'elements' of obligations of States that could increase the accountability of private actors for what concerns human rights interference. She examines several cases in which the Commission and the Court held States responsible for the actions of paramilitary organisations that operated in coordination with, under the supervision or support of State actors or with the 'tolerance and agreement' of the State. Ziemele notes that in these cases the non-State actors were treated *as State agents*, which allowed their actions to be imputable to the State.[172] Ziemele treats this as a separate 'element' from the true obligation to prevent human rights violation, which she sees as being applied specifically in cases regarding States' due diligence obligations in relation to the adoption and execution of legislation. Ziemele appears to

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[170] Patricia Tarre Moser, 'Duty to Ensure Human Rights and Its Evolution in the Inter-American System: Comparing *Maria de Pengha v. Brazil* with *Jessica Lenagan (Gonzales) v. United States*' (2012) 21(2) Journal of Gender, Social Policy & the Law 437, 444-445.

[171] Ziemele (n 16).

[172] E.g. *Riofrio Massacre*, IACHR Report No. 62/01, Case 11.654 (6 April 2001); *Yanomami v Brazil*, Resolution No. 12/85, Case 7615 (5 March 1985), cited in Ziemele (n 16).

consider these cases to deal with a different element from cases detailing the obligations to investigate, prosecute and punish private perpetrators of human rights interference that were discussed in Section 6.4.2.[173]

## 6.5 Concluding reflections on the horizontal effect of international human rights under regional human rights systems

This chapter has provided an overview of the ways in which regional human rights legislation and jurisprudence of regional human rights bodies deal with the horizontal effect of human rights, and provided some examples of scholarly works on the topic. What is clear from all of the discussions is that the terminology used differs across both systems and the actors discussing the issues. Indeed, most examples (including those from scholarly works) referred to did not actually use the term 'horizontal effect', but rather focused on State obligations to 'protect', 'ensure', and/or 'prevent' human rights.

Scholarly works on the regional human rights systems are plentiful, and take very different approaches. Few actually conduct a full (or comparative) analysis of horizontal effect in the regional human rights systems, often focusing more on one system as a whole (with horizontal effect being treated as a small portion of this) or looking at horizontal effect from a particular perspective (e.g. Knox on correlative duties). Very useful contributions, however, have provided an overview of regional systems' treatment of non-State actors which allow comparisons to be drawn (e.g. Clapham, Moser, Ziemele) whether this appears to be intentional or not (e.g. Coomans).

Of course, the African Charter on Human and Peoples' Rights and the American Declaration on the Rights and Duties of Man both refer explicitly to the duties of individuals. However, as was highlighted above, the practical impact of these provisions is limited. In the African system the duties are owed to communities and the State rather than individuals. In the Inter-American system the duties often equate to an obligation on an individual to

[173] Ziemele also refers to the obligation to 'outlaw' human rights violations at the national level, and the extension of human rights obligations to non-State actors seen in the advisory opinion on migrant workers discussed by Clapham. See Ziemele (n 16) 12.

exercise her rights rather than an obligation owed towards other individuals. In both systems, the duties are only owed by individuals (and thus no other non-State actors such as corporations, non-governmental organisations or even international non-State actors), who cannot be the subject of individual complaints before the regional monitoring bodies.

The discussions on the jurisprudence of the regional bodies show an increasing willingness to engage with the possibility of human rights violations by non-State actors. The bodies are to be applauded for being creative within the boundaries of their mandates and regional human rights frameworks. The limits of these frameworks, however, is clear from the jurisprudence. The cases require that States impose their own obligations (or at least regulations) on non-State actors vis-à-vis human rights, but the abuse by the non-State actor will, according to current approaches, always be inseparable from that of the State. Non-State actors are not currently seen as being (separately) responsible for their own actions that violate human rights (at the international or regional level), and individuals remain at the mercy of States to follow the rulings of the human rights bodies and adopt and implement the relevant national criminal, civil and administrative law and policies to enable individuals to enjoy their rights.

Looking at the jurisprudence of the bodies, a range of terminology is used to reflect these State obligations, such as positive obligations, a duty of due diligence or an obligation to regulate. Different terms were used across the different systems, often to denote very similar understandings of the action that States should take vis-à-vis non-State actors. What is evident from the discussions more generally, and the use of this terminology in particular, is that each of the regional systems connects the conduct of the non-State actor with the responsibility of the State by finding the non-State actor's actions attributable to the State. In the European and Inter-American systems this was often done on the basis of the State having some degree of control over a private actor (e.g. a privatised company in *Fadeyeva v Russia*), on the fact that the non-State actor was carrying out a public function (e.g. *Ximenes-Lopes v Brazil*) or on the basis that the State knew or should have known that an individual was a risk of having their rights interfered with by private actors

(e.g. *Osman v United Kingdom*; *Storck v Germany*; *Jessica Lenahan (Gonzales) v United States*). The latter method was used in cases where the State did not have control over the private actor but was aware of facts that had a reasonably foreseeable risk of leading to the individual's harm.

In the African system, attribution was clearer in the *Ogoni* case because the Nigerian State had facilitated and 'given the green light' to the actions causing some of the human rights violations. The other violations in this case were found on the basis of the State's obligation to protect human rights. This obligation appeared in the majority of cases to be the basis upon which attribution of non-State conduct to the State can be ascertained. Within the Inter-American system, due to the wording of the American Convention on Human Rights, the obligation is framed as one to 'prevent' rather than 'protect', and in the European system reference was made to 'positive obligations' rather than a specific 'obligation to protect' as such. In this vein, many of the cases in the Inter-American system relied specifically on the duty of due diligence to prevent, investigate and punish non-State actors for interfering with the enjoyment of human rights. Within the European system very similar standards have emerged (e.g. concerning investigations and the adoption of appropriate legislative measures), although other ways of achieving some degree of horizontal effect can be seen in the balancing of private actors' rights against one another. It could be said that in this respect the methods used by the regional human rights systems do not differ vastly from those used by the international human rights treaty monitoring bodies.

Given the lack of reference to non-State actors' obligations in the European human rights legislation and the lack of practical effect of the duties in the Inter-American and African systems, the only forum in which any degree of horizontal effect has been upheld is the jurisprudence of the monitoring bodies. While judges seem to have been proactive in engaging as much as possible with horizontal effect within their respective frameworks, this method of applying human rights horizontally is limited by the boundaries of interpretation and the legitimate role of the judiciary.

Chapter 7

# Horizontal effect of international human rights at the national level: The example of the United Kingdom

## 7.1 Preliminary remarks

The UK is a dualist State, meaning that it incorporates its international human rights obligations arising from international treaties by adopting domestic legislation. Until such legislation is adopted, international law does not become applicable in national courts or enforceable within the UK's domestic legal system.[1] The primary human rights instrument for which incorporation has been achieved is the European Convention on Human Rights,[2] given effect to through the Human Rights Act 1998 (HRA).[3] The

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[1] See Dinah Shelton, *International Law and Domestic Laegal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011) 621; Andrew Byrnes and Catherine Renshaw, 'Within the State' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2018) 484; and Marko Novaković, *Basic Concepts of Public International Law – Monism and Dualism* (Faculty of Law, University of Belgrade 2013).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 1950 ETS 5.

[3] United Kingdom, Human Rights Act 1998: Elizabeth ll. Chapter 42, (1998). See Department for Constitutional Affairs, 'Guide to the Human Rights Act 1998: Third Edition', para 1.4 <http://www.dca.gov.uk/peoples-rights/human-rights/index.htm> accessed 15 August 2017. Whether the Convention rights can truly be said to have been incorporated into UK domestic law is less certain. See Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?' (1999) 62 Modern Law Review 824, 834-835. The Human Rights Act is the only piece of legislation in the UK to fully incorporate a human rights treaty – *international* human rights treaties as a whole have

HRA came into force in 2000 and is widely considered to be constitutional in nature because 'it concerns the legal relationship between citizen and State in a general, overarching manner and enlarges or diminishes the scope of what would now be regarded as fundamental constitutional rights.'[4]

The UK has been the focus of much discussion on the horizontal effect of human rights. Indeed, it is one of the birth places of the terms 'direct' and 'indirect horizontal effect' of human rights, which were heavily debated in the run-up to the adoption of the HRA.[5] Within the UK, 'horizontality' refers to the 'scope within which, and the extent to which, fundamental rights either are, or should be, binding in the private sphere.'[6] This chapter first introduces the HRA and theories of horizontal effect that have been put forward by scholars, before addressing two main issues of contention and discussion post- (but also pre-) HRA. The issues are: first, the extent to which the provisions of the Statute place obligations on private actors (i.e. through considering them, under specific circumstances, to be public authorities); and second, whether the HRA 'imports' or incorporates rights or values found in the ECHR into UK private law. This chapter will review the two issues, relying on academic discussion and judicial decisions to identify what kinds

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not been incorporated into UK domestic law (the practice is rather to implement principles or provisions from within a treaty into several pieces of domestic legislation. See Arabella Lang, 'Parliament's role in ratifying treaties', House of Commons Briefing Paper No. 5855 (17 February 2017) <researchbriefings.files.parliament.uk/documents/SN05855/SN05855.pdf> accessed 3 January 2018; Equality and Human Rights Commission, 'Monitoring and promoting UN treaties' <https://web.archive.org/web/20131113174057/http://www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/monitoring-and-promoting-un-treaties/> accessed 3 January 2018.

[4] Lord Bingham LJ, *Thoburn v Sunderland City Council* [2003] QB 151, as cited in Jana Gajdosova and Judith Zehetner, 'England' in Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union. Volume I: A Comparative Overview* (Cambridge University Press 2010) 146.

[5] See e.g. Thomas DC Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1' (2010) 21 Entertainment Law Review 96; Justin Friedrich Krahé, 'The Impact of Public Law Norms on Private Law Relationships Horizontal Effect in German, English, ECHR and EU Law' (2015) 2 European Journal of Comparative Law and Governance 124, 146-147.

[6] Gajdosova and Zehetner, 'England' (n 4) 150.

of horizontal effect could be said to exist and apply within the framework of the Human Rights Act 1998.

## 7.2 Horizontal Effect in the UK: An introduction to the Human Rights Act 1998

Before the Human Rights Act came into force, many scholars had tried to predict the impact that it would have on private relationships.[7] Debates within Parliament demonstrated that the sponsors and drafters of the (then) Bill certainly envisaged and intended the Statute to have some degree of horizontal effect.[8] It is clear from discussions that the UK courts have an instrumental role in horizontal effect – they are, after all, responsible for interpreting and applying the HRA, whether between public or private actors.

In relation to horizontal effect, the tasks of courts under the Human Rights Act can be summarised as to 'first, determine whether there are any Convention obligations in play at all and, secondly, if so, how it is to give effect to them in domestic law.'[9] This nicely echoes the important distinction raised by Deryck Beyleveld and Shaun Pattinson,[10] and Alison Young[11] between the horizontal applicability and horizontal effect of human rights. Young cautions against equating the two terms. She explains that horizontal

[7] See e.g. Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3); William Wade, 'Horizons of Horizontality' (2000) 116 Law Quarterly Review 217; and Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] Public Law 423.

[8] For a discussion and extracts of the debate relevant to horizontal effect, see e.g. Andrew Clapham, *Human Rights Obligations of Non-State-Actors* (Oxford University Press 2006) 474ff.

[9] Gavin Phillipson, 'Clarity Postponed: Horizontal Effect after Campbell' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 149.

[10] Shaun Pattinson and Deryck Beyleveld, 'Horizontal applicability and horizontal effect' (2002) 118 Law Quarterly Review 623, 664, discussed in Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) Modern Law Review 878, 881.

[11] Alison L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart Publishing 2007) 36; Alison L Young, 'Mapping Horizontal Effect' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 30.

effect is 'the means through which horizontal applicability is achieved'; horizontal applicability simply means that the relevant right is one which allows for obligations to be placed on private actors.[12] In the words of the UN Human Rights Committee, horizontal applicability could refer to those rights which are 'amenable' to application between private parties.[13] In this context Gavin Phillipson and Alexander Williams explain the different kinds of rights within the ECHR: (1) those 'that by their nature can only apply against the state' (Articles 6 and 7); (2) 'the remainder of the absolute and narrowly qualified rights' (Articles 2-5); and (3) 'generally qualified rights', i.e. those upon which legitimate limitations can be placed in certain circumstances (Articles 8-11).[14] According to Phillipson's explanation above, the first question for the court requires it to look at Strasbourg jurisprudence to see whether the ECtHR has interpreted the right as requiring positive measures to be taken by a State vis-à-vis two private actors. If the answer to this is positive, the Human Rights Act will then come into play as the source for determining *how* the court should give effect to the relevant Convention rights.[15]

The same jurisprudence considered under question one should also inform the answer to question two.[16] Indeed, Section 2 HRA requires courts to consider Strasbourg jurisprudence when deciding cases that deal with Convention rights. According to Colin Warbrick, this is easier said than done – it does not mean that Strasbourg case law can simply be *applied* in UK domestic cases. Rather, it requires the national courts to interpret the European Court of Human Rights' case law, particularly when the Court is often not very elaborate in its judgments of 'the law'.[17] Certainly, Warbrick

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[12] Young, 'Mapping Horizontal Effect' (n 11) 30.
[13] UN HRCtee, 'General Comment No. 31: General Legal Obligations Imposed on States Parties to the Covenant' (26 May 2004) CPR/C/21/Rev.1/Add.13, para 8. See for discussion Chapter 5 above.
[14] See Phillipson and Williams (n 10) 895-896.
[15] Phillipson, 'Clarity Postponed' (n 9) 149.
[16] ibid 150.
[17] Colin Warbrick, 'The European Convention on Human Rights and the Human Rights Act: The View from the Outside' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds),

notes that even when the ECtHR follows particular principles in its own interpretation of the ECHR, it does not do so in a 'consistent or transparent' manner, which can be further obfuscated by the injection of moral values into the Court's reasoning.[18]

## 7.3 Types of horizontal effect under the Human Rights Act

Scholars and practitioners have proffered different opinions as to the existence (or lack thereof) of horizontal effect through the HRA. The result of academic discussions has been a 'comprehensive polarization of opinion',[19] although some scholars have changed their minds over time.[20] There now exists a wide scope of understandings of horizontal effect, ranging from direct horizontal effect on one end of spectrum to a 'weak' version of 'weak indirect horizontal effect' on the other.

This section will introduce the main theories of horizontal effect under the HRA, although some scholars believe that the HRA allows for no horizontal effect. Sir Richard Buxton, for example, was initially strongly of the opinion that no horizontal effect could arise from the HRA.[21] Since the Act is an instrument to incorporate the ECHR into UK domestic law, and the ECHR itself does not contain provisions of horizontal effect, Buxton believed that it was impossible for the HRA to do the same.[22] Since his initial rejection, however, Buxton LJ later changed his views on the matter (see below, Section 7.3.1).

Before discussing the different theories of horizontal effect in detail it is important to distinguish between remedial and substantive horizontality. The former requires the courts to act in an ECHR-compliant manner when

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*Judicial Reasoning under the UK Human Rights Act*, (Cambridge University Press 2007) 36.

[18] See ibid.

[19] Phillipson, 'Clarity Postponed' (n 9) 148.

[20] Sir Buxton LJ has been particularly noted for his change in opinion. See e.g. Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 97. See also Phillipson, 'Clarity Postponed' (n 9) 151.

[21] Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 97. See also Phillipson, 'Clarity Postponed' (n 9) 151.

[22] See Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 97.

deciding what remedy to provide in cases concerning a breach of rights or in which legally binding obligations have been breached.[23] Substantive horizontality, on the other hand, refers to the court's obligation to take ECHR rights into account when 'determining the nature of the rights and obligations of the applicant and the defendant.'[24] According to Young, it is only the context of substantive horizontality that the majority of discussions on horizontal effect under the HRA take place.[25]

While discussions on horizontal effect in the UK have focused on several provisions of the HRA, the 'main player' in the dialogue has been Section 6. Two aspects of the provision have been particularly discussed: the first is Section 6(1), according to which '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right', taken together with Section 6(3)(a) which clearly states that courts and tribunals fall within the category of 'public authority'. The second aspect is found in Section 6(3)(b) which extends the category of 'public authority' to 'any person certain of whose functions are functions of a public nature'. Accordingly, the rights contained within the ECHR are given effect not only against the State (and therefore traditionally 'public' actors), but also private persons whose functions are of a public nature.[26] The section does not define 'public functions'. This is partially because the drafters of the Statute were hesitant to create an exhaustive list which would be at risk of being very quickly outdated given the continuing developments in tasks being delegated from public to private bodies (for a discussion on the interpretation of the Section

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[23] Young, 'Horizontality and the Human Rights Act 1998' (n 11) 37.
[24] ibid.
[25] See Young, 'Mapping Horizontal Effect' (n 11) 38, figure 2.2.
[26] The full text of Section 6(1) and 6(3) reads: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
...
(3) In this section "public authority" includes—
(a) a court or tribunal, and
(b) any person certain of whose functions are *functions of a public nature*,
but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.' [emphasis added].

6(3)(b), see below).[27] However, the omission also exists because Parliament thought that leaving the term undefined would lead to a broader approach being taken by the courts (this has not happened in practice, at least consistently).[28] During the parliamentary debates it was stated that since the Act dealt with 'an evolving situation' the test for whether a body is a public authority under the HRA should 'relate to the substance and nature of the act, not to the form and the legal personality' – in order words, the author of the act is less important than the nature of the act itself.[29] While the lack of definition of public authority in the HRA may seem put the courts 'in the driving seat on human rights issues', Keith Ewing cautions against exaggerating their authority – as mentioned above, the power of courts under the HRA has been circumscribed to protect parliamentary sovereignty, notably through Section 4 which does not allow courts to strike down Acts of Parliament that are incompatible with the ECHR.[30] They do, however, seem to have a largely free reign when it comes to applying the HRA in cases in which the relevant law derives from common law, rather than legislation (see Section 7.5 below).

It is interesting to note at this point that the case law of the UK courts concerning horizontal effect been somewhat ambivalent. The legislation itself does not explain how horizontal effect should work, and the courts have made the situation worse by 'a plethora of contradictory statements concerning the scope of horizontal effect, combined with an apparent reluctance on the part of the judiciary to discuss the specific model of

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[27] HC Deb vol. 314, column 433, discussed in Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 287-288.

[28] JUSTICE, 'Public Authorities under the Human Rights Act 1998 - Justice' <https://justice.org.uk/public-authorities-human-rights-act-1998/> accessed 18 August 2017.

[29] ibid.

[30] Keith D Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 The Modern Law Review 79, 92. The limitations on the courts' powers can be found in Section 4(6) which provides that:

> A declaration under this section ("a declaration of incompatibility")—
> (a)does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
> (b)is not binding on the parties to the proceedings in which it is made.

horizontal effect created by the HRA.'[31] David Hoffman has also noted that there is no uniform approach in the courts' reasoning, which although perhaps unsurprising, from the perspective of consistency and clarity, should be clarified.[32] Phillipson also considers the courts' ambivalence to be foreseeable.[33] Nonetheless, the fact that the courts have noted it 'may never be resolved judicially'[34] makes it extremely difficult for a private actors to know the circumstances in which they may be expected to act in an ECHR-compliant manner. It also makes it unclear for individuals who wish to make use of the Human Rights Act to know when they would be able to bring a case directly against a particular body. This would have implications for individuals who wish to take their complaint to the European Court of Human Rights. If the case law were clear, the route for individuals to take may also be clearer, and a proper judicial interpretation of Section 6(3)(b) could preclude the necessity of taking a case to the ECtHR at all.

### *7.3.1 Statutory horizontal effect*

Section 3(1) HRA is the source of what is commonly referred to as 'statutory horizontal effect'. The provision places an obligation on courts to interpret legislation in a way that is compatible with the ECHR.[35] It is important that

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[31] Young, 'Mapping Horizontal Effect' (n 11) 17.
[32] David Hoffman, 'Conclusions' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 379, 381.
[33] Phillipson states that 'to allow what was hitherto an international treaty to penetrate deep into the common law was something about which the judiciary was always likely to feel ambivalent.' [footnote omitted]. Phillipson, 'Clarity Postponed' (n 9) 143.
[34] In the case of *X v Y* the Court of Appeal stated this of horizontal effect, noting that when applying it to individual cases, the 'very general propositions' put forward in legal writings are put into a 'more limited and manageable perspective.': *X v Y* [2004] ICR 1634, para 45, cited in Phillipson, 'Clarity Postponed' (n 9) 156.
[35] The full text of Section 3 reads:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
> (2) This section—
> (a) applies to primary legislation and subordinate legislation whenever enacted;

Section 3 does not *create* rights for individuals or place an obligation on the courts to actually *apply* the ECHR in every case, but rather to try to interpret legislation in a way that affords ECHR protection.[36] The interpretative obligation in Section 3 extends to legislation enacted either before or after the HRA. However, neither Section 3 nor the Statute more generally mention 'ECHR rights in relation to private litigation or to the common law…in particular, the duty placed on courts by Section 3(1) of the HRA to employ ECHR rights as an interpretative guide only applies to legislation and not to common law.'[37] It is for this reason that the concept has been dubbed 'statutory horizontal effect'.[38] Although only applying to legislation, Section 3(1) HRA does, unequivocally, apply to legislation governing private actors as well as that governing public authorities.[39]

An example of horizontal effect through Section 3 HRA can be found in *Ghaidan v Godin-Mendoza*.[40] The case concerned Schedule 1, paragraph 2 of the Rent Act 1977. The provision states that if the spouse of a tenant of a dwelling-house is living in the house at the time that the tenant passes away, the spouse will become a statutory tenant by succession. The protection in the provision also extends to those living 'as [the tenant's] wife or husband'. The case of *Fitzpatrick v Sterling Housing Association Ltd*[41] had previously held that the protection did not extend to couples living together in a same-

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(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

[36] See e.g. Young, 'Mapping Horizontal Effect' (n 11) 37.
[37] Gajdosova and Zehetner, 'England' (n 4) 153. See also Emma Lees, 'Horizontal Effect and Article 8: McDonald v McDonald' (2014) 19 Law Quarterly Review 34; and Section 7.4 below.
[38] Lees (n 37) 34
[39] As held by the UK Court of Appeal in the case of *X v Y* (n 34) para 57(2), cited by Phillipson, 'Clarity Postponed' (n 9) 148.
[40] *Ghaidan v Godin-Mendoza* [2004] UKHL 30. See for discussion, Young, 'Horizontality and the Human Rights Act 1998' (n 11).
[41] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

sex relationship, thus leaving a gap in protection. The gap was directly addressed in the *Ghaidan v Godin-Mendoza* case. The defendant (Mr. Godin-Mendoza) had been living in a stable, monogamous relationship with his partner who died in 2000 for many years. After his partner's death, the landlord of the apartment he had rented tried to claim possession of the property on the basis that Mr. Godin-Mendoza did not succeed his partner's tenancy. The House of Lords used Section 3(1) HRA to interpret the legislation so as to include same-sex partners in the definition of 'spouse', deciding that the interpretation applied in *Fitzpatrick* could not survive in the post-HRA era. Instead, the Lords interpreted the provision to give effect to Mr. Godin-Mendoza's rights to private life and non-discrimination under Articles 8 and 14 ECHR respectively. This seminal case[42] also held that the obligation under Section 3(1) could only require courts to interpret a statute if doing so did not violate a 'fundamental feature' of the legislation in question, or that 'serious practical repercussions' would ensue as a result.[43] If this would be the case, the court is then able to make a declaration of incompatibility under Section 4 HRA. Section 4 is itself of limited effect as, in protection of parliamentary sovereignty, it does not confer upon the courts the authority to actually strike down legislation, but flags the legislation as problematic, allowing Parliament to consider whether to take action to amend the law.[44]

### *7.3.1 Direct horizontal effect*

Thomas Bennett believes that in the UK direct horizontal effect now exists for some rights, namely privacy. His conclusion is partially reached on the basis of the *Campbell v Mirror Group Newspapers Ltd* case, which is generally heralded as having created a new cause of action within the

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[42] Young, 'Mapping Horizontal Effect' (n 11) 18.
[43] As discussed in Young, 'Horizontality and the Human Rights Act 1998' (n 11).
[44] For a full discussion of the meaning and application of Section 3 HRA, particularly in the context of parliamentary sovereignty, see Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009). See also Gajdosova and Zehetner, 'England' (n 4) 110, 46.

common law.[45] In particular, Bennett relies on the fact that 'the creation of new causes of action is a *hallmark* of direct horizontal effect', and that such a creation is not possible under indirect horizontal effect.[46] Although the first point is generally agreed upon,[47] the latter is hotly contested by Gavin Phillipson and Alexander Williams who claim that the House of Lords (and presumably now the Supreme Court) had, as do other constitutional courts, an 'inherent ability' to create new causes of action within common law.[48] Indeed, as Ivan Hare has noted, in the earlier case of *Douglas, Zeta-Jones and Northern and Shell plc v Hello! Ltd*[49] none of the judges in the Court of Appeal excluded the possibility that Section 6 HRA could place courts under a duty to create a new cause of action.[50] Gavin Phillipson and Alexander Williams agree that a *duty* (as opposed to an ability) exists requiring courts to develop common law in compliance with the Convention, but that it only applies to the extent that such compliance can be achieved through 'incremental' changes to the law, rather than creating new causes of action

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[45] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457. This case will be discussed in more detail in Section 7.6.

[46] Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 100, cited in Gavin Phillipson, 'Privacy: The Development of Breach of Confidence – The Clearest Case of Horizontal Effect?' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 147.

[47] That the creation of a new cause of action is central to the direct horizontal effect of common law is widely supported both within and outside of the UK. In South Africa, for example, a judge at the Constitutional Court has stated that 'the courts cannot invent new causes of action, as that would be to embrace direct horizontality'. This echoes statements of Lord Irvine in which he warns that courts are not able to act as legislators to 'fashion' a new law where there is no existing (statutory or common law) cause of action that courts could develop in a way that is ECHR-compatible. See, respectively, *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 at 442 (Kriegler J); and Lord Irvine, HL Deb vol. 583 col 784, 24 November 1997, both cited in Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law (n 3) 831 and 828.

[48] Phillipson uses an example from the New Zealand Court of Appeal which founded a new privacy tort to illustrate this point. See *Hosking v Runting* [2005] 1 NZLR 1, discussed in Phillipson, 'Privacy' (n 46) 147; and in Phillipson and Williams (n 10) 884-885.

[49] *Douglas, Zeta-Jones and Northern and Shell plc v Hello! Ltd* [2001] 2 WLR 992.

[50] Ivan Hare, 'Verticality Challenged: Private Parties, Privacy and the Human Rights Act' (2001) 5 European Human Rights Law Review 526, 530.

outright (the scholars have named this the 'constitutional constraint model').[51] Bennett also uses the case of *McKennitt v Ash*[52] as an instrumental basis for claiming the existence of direct horizontal effect. He notes in particular that Buxton LJ went against his previous vehement opinion against direct horizontal effect to apply Articles 8 and 10 ECHR directly between the private parties to the case.[53]

However, the fact that the HRA is only intended to be directly applicable to public actors can rule out the direct horizontal effect of the Statute. The provisions from which horizontal effect can be derived apply only to 'public authorities', or (in the case of Sections 3 and 12), courts specifically.[54] This is further supported by the fact that Sections 7 and 8 HRA only mention proceedings and remedies in cases concerning *public* authorities (excluding such actions against private actors from the remit of the Act).[55]

Direct horizontal effect has also been rejected by Dawn Oliver in an interesting argument regarding the limited time period within which claimants must file a complaint and the limitations on the amount of damages that courts can grant in cases against public authorities (which must in such cases be treated as discretionary).[56] There is no time limit, however, for proceedings brought against private actors carrying out public functions (under Section 6(3)(b)), and such actors do not enjoy the limitations on

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[51] See e.g. Phillipson and Williams (n 10) 878-879. Pannick and Lester appear to endorse a similar approach. See David Pannick and Anthony Lester, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 Law Quarterly Review 380. See also Section 7.4.1 below.
[52] *McKennitt v Ash* [2002] QB 1334, 1351.
[53] For a discussion of the case and his approach, see Nicole Moreham, 'Privacy and horizontality: relegating the common law' (2007) 123 Law Quarterly Review 373, discussed in Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 99.
[54] Justin Friedrich Krahé also rules out direct horizontal effect of the ECHR within the UK on this ground, as the Convention does not make any reference to private parties Krahé (n 5) 147.
[55] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 826.
[56] These limitations can be found in Sections 7(5) and 8(3) HRA, respectively. See Dawn Oliver, 'The Human Rights Act and Public Law/private Law Divides' [2000] European Human Rights Law Review 343, 346-347.

damages. Oliver's argument rests on the result of upholding these differences while allowing for the direct horizontal effect of the ECHR which would be discriminatory against the private bodies.[57]

*7.3.2 Indirect horizontal effect*

As with the international and regional levels, indirect horizontal effect can be distinguished from direct horizontal effect. However, there is a slight difference in the way the terminology is used at the national level. When talking of indirect horizontal effect of the HRA, little mention is made of States' obligation to protect human rights, or of due diligence of the State. Rather, with the exception of one theory of horizontal effect that takes the same approach and tends to go by the name of 'intermediate horizontal effect' (see Section 7.2.3 below) the emphasis lies on the courts and the different 'strengths' of the impact that they can allow human rights to have on private relationships. Indirect horizontal effect is accordingly divided into 'strong' and 'weak' versions.

Simply put, indirect horizontal effect in general 'means that whilst the rights cannot be applied directly to the law governing private relations and are not actionable *per se* in such a context, they may be relied upon indirectly, to influence the interpretation and application of pre-existing law.'[58] The main argument in favour of indirect horizontal effect through the HRA is that courts are explicitly listed as a 'public authority' in Section 6(3)(a). Taking this together with Section 6(1), Young reads a clear message that it is 'unlawful for courts and tribunals to act in a way that is incompatible with Convention rights'[59] in cases of public and private law alike. It would therefore be unlawful for courts not to act compatibly with the ECHR when deciding upon cases between two private parties.[60] It is also important to bear in mind that even though Section 6(1) is the source of many instances of horizontal effect, it does not *necessarily* involve horizontal effect – it is an

[57] ibid 352.
[58] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 826.
[59] Young, 'Mapping Horizontal Effect' (n 11) 16.
[60] ibid.

obligation which includes, but is not restricted to horizontal effect. Young gives the example of the case of *Sunderland v P. S.*,[61] where it was held that where the court was being asked to make an order for the detention of a vulnerable adult, it must 'mould and adapt' its inherent jurisdiction to make sure that it complies with the ECHR. This case did not therefore involve a private actor, but the basis of the obligation was still Section 6(1).[62]

Unlike statutory horizontal effect, indirect horizontal effect only applies in cases concerning common law, not legislation. As Ian Leigh explains, if the common law is informed by ECHR rights, which could lead to a modification of a common law rule, this is indirect horizontal effect.[63] It becomes direct when the courts are 'required to create appropriate rights and remedies by revising the common law to protect Convention rights subject only to the limitation that a clear statute must prevail'.[64]

'Strong' indirect horizontal effect requires courts to ensure that common law is compliant with the ECHR. Strong indirect horizontal effect, as put forward by Phillipson, means that courts have to act in an ECHR-compliant manner when making decisions regarding *existing* law. Because of this, the only way to override whichever right is at stake would be to use the second paragraph of the provision containing that right within the ECHR.[65] These paragraphs, as seen in Chapter 3, provide interests that may need to be balanced against the claimant's enjoyment of a right, for example the public interest, national security, or the rights of others. The latter is of particular significance to horizontal effect under the HRA. Phillipson goes on to explain that if an interest from outside the Convention could override the Convention right in question, this would automatically breach the court's obligation to

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[61] *Sunderland v P. S.* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, discussed in Young, 'Mapping Horizontal Effect' (n 11) 32.
[62] *Sunderland v P. S.* (n 61) (Munby J), cited in Young, 'Mapping Horizontal Effect' (n 11) 32.
[63] Ian Leigh, 'Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?' (1999) 48 International and Comparative Law Quarterly 57, 86.
[64] Young, 'Mapping Horizontal Effect' (n 11) 20, citing Leigh (n 63) 86.
[65] Phillipson, 'Clarity Postponed' (n 9) 153.

act in compliance with the ECHR.[66] This of course contrasts with weak indirect horizontal effect, whereby the Convention rights may be treated as principles to be balanced against others, not necessarily arising from the Convention itself.[67] There are, according to Young, different ways to understand 'strong indirect horizontal effect'. The first distinguishing factor is whether it would include a duty to create a new cause of action (i.e. to create a new, stand-alone tort that would allow individuals to bring claims regarding the protection of their Convention rights against private actors). The second factor is whether (and to what degree) courts are able to modify common law rules to mirror Convention rights in light of the UK's system of precedence.[68] Taking these factors into account, Young identifies seven possible understandings of strong indirect horizontal effect.[69] Taken together with the four types of weak indirect horizontal effect, the result is that indirect horizontal effect could therefore place as many as 11 different kinds of obligations on the courts, depending on which theory is adopted.

'Weak' indirect horizontal effect requires that the court reflects or complies with convention *values* rather than the rights themselves. The difference between strong and weak indirect horizontal effect is that under the strong strand, rights either apply in full or not at all, but under the weak strand, the ECHR is considered in terms principles which can be given varying weight and may 'compete with' other principles so that they have to be balanced against each other.[70] Young, as Phillipson before her,[71] has further distinguished between weaker and stronger versions of 'weak indirect horizontal effect' which depends on whether the values from the ECHR that are being treated as principles are considered to be 'fundamental' or

[66] ibid.
[67] See Young, 'Mapping Horizontal Effect' (n 11) 40-41; see also Phillipson, 'Clarity Postponed' (n 9) 153.
[68] Young, 'Mapping Horizontal Effect' (n 11) 43.
[69] For reasons of space, all seven models will not be discussed here. For an overview of the models, see figure 2.3 in ibid 46.
[70] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 831; Young, 'Mapping Horizontal Effect' (n 11) 40.
[71] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 832.

'ordinary' in nature.[72] If found to be ordinary, 'the weight attached to these values would depend upon the context of the right in question'.[73] Young concludes that the UK courts have not taken a clear stance, but they have embraced a flexible approach, which would 'sometimes' allow certain values to be the most important in a given case.[74]

Phillipson does not seem to see a great practical difference between strong and weak indirect horizontal effect, and together with Alexander Williams he merges three of Young's theories of indirect horizontal effect together to construct a 'constitutional constraint' model.[75] The model appears to sit between 'weak' and 'strong' indirect horizontal effect, resulting in an approach whereby Convention principles will have to compete with other values, but the duty of the courts to develop common law incrementally (mentioned above) will always succeed.[76]

Nonetheless, in relation to Article 8 ECHR Phillipson rejects the notion of strong indirect horizontal effect. In a discussion of the *Campbell* case, he notes that a duty on the court to act in a manner compatible with Article 8 could not amount to an obligation to ensure a particular outcome.[77] Rather, Article 8 could only 'function in the private sphere' as values or principles (weak indirect horizontal effect).[78] This is because the wording of Article 8 is restricted to the public sphere, making no mention of private

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[72] ibid; and Young, 'Mapping Horizontal Effect' (n 11) 41.
[73] Young, 'Mapping Horizontal Effect' (n 11) 41. Phillipson helpfully envisages the classifications of the rule/principle distinction in a five-tier hierarchical 'pyramid'. The tiers consist of: (1) rules; (2) fundamental mandatory principles (3) ordinary mandatory principles ('mandatory principles' meaning that 'the court would be obliged to have regard to the Convention right where relevant'); (4) permissible principles (which the courts are 'entitled but not obliged to take into account')'; and (5) proscribed principles ('irrelevant considerations, to be excluded from legal adjudication'). Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 832 [emphasis removed].
[74] Young, 'Mapping Horizontal Effect' (n 11) 41, quoting Lord Hoffmann in *Campbell* (n 45) para 43.
[75] See Phillipson and Williams (n 10).
[76] ibid 901-902.
[77] In Phillipson, 'Privacy' (n 46) 139-140.
[78] In ibid 139.

actors, but is broad in both the guarantee and restrictions it contains (i.e. 'respect for private life' and 'the protection of morals' or 'the rights of others').[79] In order to bring Article 8 within the realm of private common law, Phillipson argues, the case law of the ECtHR is required.[80]

Young explains that the HRA itself 'clearly supports' indirect horizontal effect,[81] and outlines examples of several of the approaches being adopted by different judges during various cases,[82] but does not fully determine which approach would be the most appropriate for courts to apply. Phillipson has suggested that it was more likely for courts to accept the kind of weak indirect horizontal effect explained above whereby the courts can choose how much weight to give to a Convention value (treated as a principle) in a particular case.[83] This seems to gel with Young's conclusion above regarding the court's flexible approach, and will be seen in the discussion of the courts' jurisprudence on the matter in Section 7.4.

*7.3.3 'Public liability horizontality': Section 6(3)(b) HRA*

Section 6(3)(b), introduced above, has been instrumental to the UK courts' ability to hold some private actors legally responsible for interfering with Convention rights. As noted, the construction of the provision allows private actors 'certain of whose functions are functions of a public nature' to be classed as public authorities for the purposes of the Human Rights Act. The Section therefore distinguishes between 'core' and 'hybrid' public authorities. Core public authorities include, for example, the judiciary and the police whose acts are inherently public and subject to the HRA.[84] Hybrid

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[79] See ibid 140-141; and Phillipson and Williams (n 10) 896-897.

[80] According to Section 2(1) of the Human Rights Act, ECtHR case law does not have binding effect on UK courts, since the provision requires only that courts take Strasbourg jurisprudence 'into account'. However, in practice the courts have heavily relied on the jurisprudence as authoritative statements of the meaning of the ECHR. See Phillipson, 'Privacy' (n 46) 140-141. See also Phillipson and Williams (n 10) 897-898.

[81] Young, 'Horizontality and the Human Rights Act 1998' (n 11).

[82] Young, 'Mapping Horizontal Effect' (n 11) 46.

[83] Phillipson, 'Clarity Postponed' (n 9) 146.

[84] See Section 6(3) Human Rights Act 1998.

authorities, on the other hand, are only amenable to review under the HRA in relation to acts (or omissions) undertaken by them which can be classified as 'public'.

This idea is somewhat analogous to that of immunities relating to international organisations such as the United Nations under public international law. The 'functional immunities' doctrine dictates that experts of the UN may be immune from prosecution only in so far as it is 'necessary for the independent exercise of their functions'.[85] For example, if an act done or words spoken which contravene a State's domestic laws is committed by (for example) a special rapporteur for the United Nations, they will be afforded immunity for this if carried out as part of their official function.[86] In the case of Section 6(3)(b) HRA, the same is true – the private actions of private actors must remain outside of the scrutiny of the courts, even if they are considered hybrid public authorities; they may only be responsible under the Human Rights Act if and when they are carrying out a public function.

The end result of Section 6 HRA is that ECHR rights are (1) 'directly enforceable against some bodies in respect of all of their activities' (2) 'directly enforceable against some bodies in respect of some but not all of their activities'; and (3) 'not directly enforceable at all against others'.[87] The first result applies to 'core' public authorities. The second result refers to 'hybrid' public authorities, which under Section 6(5) HRA only have to act in an ECHR-compliant manner with respect to private actions. The third result applies to private actors, who fall completely outside of the remit of

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[85] Article VI section 22, Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) UNTS 1, 5 and UNTS 90, 327. However, this is different from the immunity and inviolability of diplomatic agents, which according to the ILC apply in *all circumstances*. See International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Yearbook of the International Law Commission II Part Two (as corrected) A/56/10, Commentary to Article 50, para 14.

[86] This scenario applied in the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) 1999 ICJ Rep 6262.

[87] Ewing (n 30) 90 [footnotes omitted].

the HRA. Young and Williams both refer to the horizontal effect of Section 6(3)(b) as 'public liability horizontality'.[88]

Andrew Clapham has also drawn a comparison between approaches at the international and national levels. Rather than the rules on immunity, Clapham considers the similarities between Section 6(3)(b) and the international law rules on attribution found in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles). The comparison considers the 'functions of a public nature' standard with the 'elements of governmental authority' in the Draft Articles to determine which has a broader definition of 'public actor'.[89] Clapham had concluded that the UK 'public' nature is broader than the international standard because it was intended to cover bodies like private service providers even when they have not had functions delegated to them by the State so they cannot be said to be exercising 'government' functions.[90] However, as will be seen below, the judges have refused to include private service providers as 'public authorities' even when they *had* been contracted by the State to provide a public or privatised service.[91]

Indeed, at the national level it has been repeatedly argued that for an actor to be classed as a public authority, it does not need to be given its 'public' functions through statute (i.e. through statutory delegation).[92] This means that even if an entity is not stated explicitly as having public functions, it can still be classed as a public authority. According to Jack Straw, '[w]hat matters is what you do and how that affects people's rights.'[93] Again,

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[88] Young, 'Mapping Horizontal Effect' (n 11) 19; and Alexander Williams, 'Public Authorities: What is a Hybrid Public Authority under the HRA?' in David Hoffman (ed), *The Impact of the Human Rights Act on Private Law* (Cambridge University Press 2011) 49.
[89] Clapham (n 8) 466-467.
[90] ibid.
[91] See *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 1WLR 163; and *James v London Electricity Plc* [2004] EWHC 3226 (QB), cited in Williams, 'Public Authorities' (n 88) 50.
[92] Such comments have particularly been made in critiques of the House of Lords' ruling in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, discussed below, Section 7.3.3.1.
[93] Jack Straw, Institute for Public Policy Research (IPPR) Conference, 29 March 2000,

Clapham compares this to the international system for establishing indirect State responsibility and the mention in Article 4(2) that includes in the definition of 'State organ' those persons or entities that have status in accordance with the State's internal law (although as Clapham points out, this is not a requirement, so may not actually be more restrictive than the national level).[94] The UK Joint Committee on Human Rights (JCHR) has also endorsed an application of Section 6(3)(b) that does not distinguish between a 'body set up by statute' and 'a body entrusted by the government with a public function by contract'.[95] It has stated that 'the loss of a single step in proximity to the statutory duty does not change the nature of the function, nor the nature of its capacity to interfere with Convention rights'.[96] Therefore, just because the entity is not directly given the obligation by statute but is instead contracted by a party that is a 'pure' public authority, does not mean that it is exempt from acting in a way that is compatible with human rights.

Clapham suggests an understanding of the Section 6(3)(b) test which essentially means that if the individual whose rights have been breached would be able to go to the ECtHR against the State for the action, they are protected at the national level regarding private actors too.[97] It was, after all, the '*raison d'être*' of the HRA that it would allow individuals to have their rights protected at home without having to go to Strasbourg.[98] Young actually contends that there is no consensus as to the purpose of the HRA. She argues that it could be a way of making sure that the UK complies with its international obligations in the ECHR, but it could also be a way for the

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'Human Rights Act – Standing up for Britain and for Corporate Citizenship', Keynote address, cited in Clapham (n 8) 469.

[94] Clapham (n 8) 469.

[95] House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act Seventh Report of Session 2003–04' (2004) <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf> accessed 18 August 2017, para 41, cited in Clapham (n 8) 475-476.

[96] ibid.

[97] Clapham (n 8) 466-467.

[98] Thomas DC Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 2' (2010) 21(4) Entertainment Law Review 145, 148.

courts to grant stronger protection to human rights than the ECHR itself does.[99] The following section will discuss how these issues have played out in practice, focusing on the definition of 'hybrid' public authorities applied by the courts.

#### 7.3.3.1 Judicial application of Section 6(3)(b)

Before delving into the jurisprudence of English courts regarding horizontal effect under Section 6(3)(b) HRA, a brief comment on the attitude of the judges must be made. It seems that although explanation as to what kind of bodies should fall within the provision's remit was provided during the parliamentary debates on the HRA, the Court of Appeal and the House of Lords have declined to use the debates to aid their interpretation.[100] The reasoning of the courts has been explained by Lord Nicholls:

> it is not the minsters' words, uttered as they were on behalf of the executive, that must be referred to in order to understand what Parliament intended. It is the words used by Parliament that must be examined in order to understand and apply the legislation that it has enacted.[101]

The first judgments arising from cases obliging the UK courts to deal with the meaning of a 'hybrid' public authority have been criticised for their reluctance to actually apply the (functional) test envisaged by Parliament and included in Section 6(3)(b).[102] Instead, the Courts seemed to see the Section as some kind of continuation of the institutional test used to determine

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[99] Young, 'Mapping Horizontal Effect' (n 11) 17.

[100] Such reliance is allowed, as explained in *Pepper v Hart*, to 'identify the mischief the statute was intended to cure, rather than the "meaning of the words used by Parliament to effect such cure."' See Michael P Healy, 'An American Lawyer's Reflections on *Pepper v. Hart*' (1997) 572 University of Kentucky Law Faculty Scholarly Articles 1, discussing *Pepper v Hart* [2003] AC 593. See also Clapham (n 8) 474.

[101] *Pepper v Hart* (n 100) cited in Clapham (n 8) 474. Gavin Phillipson and Alexander Williams endorse the courts' attitude on this, viewing reliance on the statements of ministers during the passing of the HRA to support a particular model of horizontal effect as a weakness. Phillipson and Williams (n 10) 879.

[102] Hallo de Wolf (n 27) 289, citing Ruth Costigan, 'Determining Functions of a Public Nature under the Human Rights Act 1998: A New Approach' (2006) 12 European Public Law 577.

whether or not a particular body's actions were amenable to judicial review by the Courts.[103] This is understandable given the Home Secretary's advice that courts look to the tests when defining 'public authority' under Section 6.[104] However, in today's environment of privatisation and the 'shrinking of the state owing to the shedding of many governmental functions', it is 'no longer feasible or even useful to conceptualize the public-private divide in terms of an institutional distinction between state and nonstate entities.'[105] Early consideration of the judicial review test did seem to grant more importance to an institutional test. This involves looking at whether the body in question had been granted its powers relating to the act in question through statute,[106] rather than looking at the definition of a function of a 'public nature' (something which the Courts have only 'scratched the surface of').[107]

The test for amenability to judicial review was developed in the case of *R v Panel on Take-Overs and Mergers, ex parte Datafin*,[108] which despite being a significant case has been blamed for the 'inherently unstable' nature of the distinction between public and private in the case law on judicial review.[109] Lloyd LJ started by emphasising the importance of the *source* of the actor's power to carry out a particular function, rather than the nature of the function itself (i.e. an institutional test).[110] He went on to introduce the 'public functions test', holding that several factors could contribute to finding

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[103] This may not of itself detrimental, since the HRA was drafted with reference to this test (as enunciated in *R v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] QB 815). However, Hallo de Wolf has highlighted the problematic fact that 'amenability to judicial review' and amenability to review of bodies under the HRA have very different goals. The former 'is grounded in procedural concerns', whereas the latter aims to 'secure the rights enshrined in the ECHR'. See Hallo de Wolf (n 27) 288.
[104] HC Deb vol. 314 cols 408-410 (17 June 1998), cited in Nicholas Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' (1999) 58(1) Cambridge Law Journal 159, 160.
[105] Stephanie Palmer, 'Public Functions and Private Services: A Gap in Human Rights Protection' (2008) 6(3-4) International Journal of Constitutional Law 585, 589.
[106] For a full discussion of this, see Hallo de Wolf (n 27) 289-303.
[107] ibid 303.
[108] *Datafin* (n 103).
[109] Palmer (n 105) 600.
[110] *Datafin* (n 103) (Lloyd LJ), discussed in Bamforth (n 104) 161.

that a body was a hybrid public authority;[111] while the source of the body's power is still one of these factors, the Court emphasised the need to look at, for example, the *nature* of the power as well. Unfortunately, the Court nevertheless failed to provide any determinative guidance for future courts.[112] The ambiguity has bled into the case law on Section 6(3)(b) HRA.

For example, although the wording of Section 6(3)(b), which explicitly mentions 'any person certain of whose *functions* are *functions* of a public nature',[113] the composition of bodies and their ties to the State have been used by courts when deciding whether a body falls under the scope of the provision.[114] This happened in the case of *Poplar Housing and Regeneration Community Association Limited v Donoghue*.[115] The Court of Appeal found that the charity in question, which as a housing association was seeking to evict a tenant, was carrying out a 'public function' in doing so. However, despite the outcome in this particular instance the Court's reasoning was quite restrictive and placed much importance on the proximity of the charity to the local authority. Specifically, the Court required a 'public character or stamp' to be imposed on the body's actions through certain characteristics, which were deemed to include 'statutory authority for the task carried out; the degree of control exercised by the public body over the exercise of the function; and how closely the acts in question were "enmeshed in the activities of the public body"'.[116] In other words, the determinative factors seemed (despite the apparent focus on the body's actions themselves) to be the relationship between the private and public bodies involved. Stephanie Palmer understands the reasoning to effectively reject the notion

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[111] *Datafin* (n 103) (Lloyd LJ), discussed in Jonathan Blunden, 'The Availability of Judicial Review against Bodies Exercising "Public Functions"' Kingsley Napley Blog (2016) <https://www.kingsleynapley.co.uk/insights/blogs/public-law-blog/the-availability-of-judicial-review-against-bodies-exercising-public-functions> accessed 18 August 2017.
[112] Hallo de Wolf (n 27) 295.
[113] Emphasis added.
[114] See Young, 'Mapping Horizontal Effect' (n 11) 19.
[115] *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2002] QB 48.
[116] ibid para 65v, as cited in Palmer (n 105) 590-591.

that the State contracting out a public function to a private actor could be enough to consider the private actor's performance of that function to fall within the scope of Section 6(3)(b).[117] This concern was certainly brought to bear in the case of *R (Heather) v Leonard Cheshire Foundation*,[118] which is largely responsible for a loop-hole and gap in human rights protection stemming from the finding that State-funded patents in a privately-owned care home cannot rely on the HRA because the provision of care is not a 'public function'.[119]

The *Leonard Cheshire* case was brought by appellants whose local authority had placed them in a private care home run by the defendant, Leonard Cheshire Foundation (a charity). The defendant had been contracted by the State to carry out the public service of running the care home, which it intended to close. Despite the circumstances, the Court of Appeal nonetheless found that the charity's actions were private and that the closing of the home would not constitute a violation of the applicants' rights under Article 8 ECHR.[120] The reasoning of the case was that even if a private body is carrying out a public function that has been delegated by a public body, it can only be considered to be a 'hybrid' public authority if the 'function itself has a "public flavour"'.[121] The Court's conclusion seems at odds with the fact that had the local authority that had contracted the service been carrying it out itself, the function would have been considered to be 'public'.[122] The reasoning here is unpersuasive; as Paul Craig succinctly observed, 'it is difficult to see why the nature of a function should alter if it is contracted out, rather than being performed in house'.[123]

The decision, as well as the subsequent case law affirming the Court

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[117] See Palmer (n 105) 591.
[118] *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] HRLR 30.
[119] ibid, discussed in JUSTICE, 'Public Authorities under the Human Rights Act 1998' <https://justice.org.uk/public-authorities-human-rights-act-1998/> accessed 18 August 2017.
[120] See Williams, 'Public Authorities' (n 88) 50.
[121] JUSTICE (n 119).
[122] *Leonard Cheshire* (n 118) para 15, discussed in Williams, 'Public Authorities' (n 88) 50.
[123] Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 Law Quarterly Review 551, 556.

of Appeal's approach[124] have been severely criticised by scholars for the 'incongruity and arbitrariness' that they cause.[125] The reasoning in *Leonard Cheshire* came under heavy fire by JUSTICE, which has identified three shortcomings of the decision regarding consistency. First, it went against the apparent intention of Parliament in enacting the HRA.[126] Second, the decision is not consistent with the distinction found in Section 6 HRA between hybrid and 'pure' public authorities which the House of Lords reiterated in the *Aston Cantlow* case,[127] which reiterated that whether a body can be considered a hybrid public authority is dependent upon the function it is carrying out, whereas the test for determining whether a body is a 'pure' public authority depends upon the public nature of the body itself.[128] In other words, the test for identifying 'core' public authorities is institutional, whereas the test for identifying 'hybrid' public authorities is functional.[129] Third, JUSTICE claimed that the decision was inconsistent with the European Court of Human Rights' jurisprudence, which has repeatedly upheld that a State, through delegating certain public tasks or functions, cannot absolve itself of or delegate its own responsibility to respect, protect and fulfil human rights.[130] The decision appeared to be so problematic, in fact, that Parliament stepped

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[124] *YL* (n 92).

[125] See e.g. Williams, 'Public Authorities' (n 88) 50; Alexander Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998: Private Contractors, Rights-Stripping And "chameleonic" horizontal Effect' [2011] Public Law 139; Palmer (n 105); and Craig (n 123).

[126] I.e. to protect individuals who can 'establish violations' of human rights by UK public authorities at the national level as well as before the European Court of Human Rights (as explained by Lord Bingham in the case of *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No. 2))* [2001] EWHC 1174, para 22, cited in JUSTICE (n 119).

[127] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2003] All ER 360.

[128] ibid para 41, cited in JUSTICE (n 119).

[129] Hallo de Wolf (n 27) 288.

[130] See e.g. *Costello Roberts v United Kingdom*, App No. 13134/87 (25 March 1993), para 26, discussed in Chapter 6 above. The same principle is upheld at the international level, see e.g. UN HRCtee, *B. d. B. et al. v The Netherlands* (273/1989) UN Doc. Supp. No. 40 (A/44/40) 286 (30 March 1989); and UN CteeESCR, 'General Comment No. 5: Persons with Disabilities' (9 December 1994) E/1995/22, para 12, discussed in Chapter 5 above.

in to effectively reverse the effects of *Leonard Cheshire* through the adoption of the Health and Social Care Act 2008. Under the new Statute, private actors that have been contracted by a local authority to deliver residential care services *could be* classed as a hybrid public authority if its residents were being publicly funded.[131] Williams warns that the replacement in this specific circumstance does not have general applicability – the reasoning of the case could still be applied to situations in which a private actor has been contracted to perform a public service.[132] The fact that the new Act did not unequivocally hold contracted or privatised private care home providers to fall within the scope of Section 6(3)(b) also left room for future courts to take a restrictive view in some situations.

The Lords did take a broader approach in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another*[133] although this case did not involve contracting out of public functions to private actors. In *Aston Cantlow* the House of Lords adopted a more functional approach. Lord Nicholls explained that the test is not about looking at every function of an entity to see if any of them are public, but looking at the act that is said to have interfered with human rights enjoyment to see whether that particular act was a public function.[134] This is not to say that the Court considered *only* the nature of the function being carried out as relevant to Section 6(3)(b). Indeed, the judges still included factors such as whether the body was empowered by statute to carrying out the function and whether it was receiving public funding for doing so. The list of factors in *Aston Cantlow*, which included whether the private body was 'taking the place of central government or local authority in providing the function, or was providing a public service', was actually relied on in subsequent, more

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[131] Quality Compliance Systems, 'Whose Rights - The Care Act and the Human Rights Act' (25 July 2014) <https://www.qcs.co.uk/whose-rights-care-act-human-rights-act/> accessed 24 August 2017.
[132] See Williams, 'Public Authorities' (n 88) 50.
[133] *Aston Cantlow* (n 127) 37.
[134] ibid para 16, in Clapham (n 8) 479.

restrictive cases, such as *YL v Birmingham City Council*.[135] It at first seemed as though lower courts and even the Court of Appeal were following the broader approach taken in *Aston Cantlow*,[136] with one case even including a privatised water provider as a hybrid public authority in the case of *Marcic v Thames Water Utilities Ltd*.[137] However, the Court of Appeal and House of Lords then reverted back to the approach in *Leonard Cheshire* concerning privately run care homes, in the case of *Johnson and Others v London Borough of Havering*.[138] By holding that a private care home did not fall under the scope of Section 6(3)(b), the Court of Appeal again allowed a protection gap to form, holding public bodies carrying out a function to ECHR standards whilst allowing private bodies carrying out the same function to act in a non-ECHR compliant manner.

The same, limited approach towards contracted out and privatised services was solidified in the case of *YL v Birmingham City Council*. In the case, which has received much criticism, Birmingham City Council had contracted with Southern Cross Healthcare, a private body, in order to fulfil its duty under the National Assistance Act to 'make arrangements for providing residential assistance' to an elderly woman suffering from Alzheimer's. The body tried to end the agreement following disputed accusations about the conduct of the woman's family during visits, but they could only terminate the agreement 'for good reason'.[139] One criticism of the case is that the House of Lords' distinction between 'public' and 'private', in stating that the performance of functions for commercial gain 'point[ed] against' those functions being public', was not intended by the drafters of the

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[135] Palmer (n 105) 593.
[136] See Hallo de Wolf (n 27) 295-296, citing *R (on the Application of A) v Partnerships in Care Limited* [2002] EWHC 529; and *Hampshire County Council v Graham Beer (T/A Hammer Trout Farm)* [2003] EWCA Cib 1056.
[137] *Marcic v Thames Water Utilities Ltd* [2001] All ER 698, cited in Hallo de Wolf (n 27) 296.
[138] *Johnson and Others v London Borough of Havering* [2007] EWCA Civ 26. See for discussion Hallo de Wolf (n 27) 297-298.
[139] Alexander Williams, 'YL v Birmingham City Council: Contracting out and "Functions of a Public Nature"' (2008) 6(3) European Human Rights Law Review 524 525.

Statute.[140] Stephanie Palmer similarly raises concerns over the Lords' focus on the actors' motivation.[141] Because private actors will typically act for private gain whereas public actors would act in the public interest,[142] it makes it very unlikely that an ostensibly private body which carries out public functions for profit would fall within the ambit of 'hybrid' public authority. Palmer further notes that using motivation as a factor will help to determine the nature of the actor itself, but not the nature of the function it is carrying out.[143]

The dissentients in the case, Lady Hale and Lord Bingham, viewed the private actor as a hybrid public authority. They looked at the degree of responsibility that the State had taken on for the performance of the task in question, as well as the degree of recognition the State had given to the public interest or importance of the task being carried out.[144] Palmer has noted that the majority decision in *YL* seems to follow the distinction between public and private actors made in cases concerning judicial review, mentioned above. However, she also points out that the HRA has similarly had an impact on the development of that strand of case law.[145]

The outcome and reasoning of *YL* led the JCHR to suggest that the UK judiciary has failed to grant indirect horizontal effect to the extent that Parliament envisaged during the drafting of the HRA.[146] The upset from the case, as with *Leonard Cheshire* before it, led Parliament to adopt new legislation to remedy the loophole in human rights protection. In 2014, the Care Act was adopted, which reiterates the approach taken in the Health and

[140] Williams, 'Public Authorities' (n 88) 52.
[141] Palmer (n 105) 601.
[142] Williams, 'Public Authorities' (n 88).
[143] Palmer (n 105) 601.
[144] Williams, 'YL v Birmingham City Council' (n 139) 525-526. For discussion, see also Stephanie Palmer, 'Public Functions and Private Services: A Gap in Human Rights Protection' (2008) 6(3-4) International Journal of Constitutional Law 585, 592-598.
[145] Palmer (n 105) 599.
[146] House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act - Ninth Report of Session 2006-07' (2007) HL Paper 77 HC 410, 12; see for further discussion of the case, Hallo de Wolf (n 27) 298-301.

Social Care Act 2008 but includes in the definition of hybrid public authorities those private care homes whose care for an individual has been 'arranged by and/or paid for' by a public authority.[147]

#### 7.3.3.2 Possible solutions to the interpretative issues of Section 6(3)(b) Human Rights Act 1998

In its ninth report in 2006-2007 on 'The Meaning of Public Authority under the Human Rights Act',[148] the JCHR identified three possible avenues that could be taken to try to remedy the problems caused by the inconsistent and over-restrictive application of the HRA by UK Courts.

One possibility would be to adopt legislative solutions such as listing or 'scheduling' public authorities through amendment of the HRA or extending application of the HRA by sector. However, this could lead to inconsistency in the application of the HRA; unless a more general solution is achieved, 'it will be necessary for any Bill that provides for the contracting-out of public functions to identify clearly that the body which performs those functions will be a public authority for the purposes of the Human Rights Act.'[149] Another legislative solution would be to amend the HRA to clarify the meaning of 'functions of a public nature', but this is seen as the most radical option. In light of the reluctance during the drafting stages of the HRA to include a definition as this may restrict the Act's ability to adapt as time goes on,[150] amending the Act in this way does not seem very promising.

Because the HRA has such great constitutional importance, direct amendment should be a last resort. However, a case can be made for a separate, supplementary and interpretative statute, specifically directed at clarifying the interpretation of functions of a public nature. The JCHR has suggested the following: 'a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform the

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[147] Sections 73(2) and (3) Care Act 2008, discussed in Quality Compliance Systems (n 131).
[148] House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act - Ninth Report of Session 2006-07' (n 146).
[149] ibid 44.
[150] As explained in Section 7.2 above.

function'."[151] More than one Bill has been introduced in the House of Commons to this end, the latest of which was introduced in 2009-2010, listing factors to be considered in determining whether a body should be considered a public authority for the purposes of the Human Rights Act.[152] The 'Human Rights Act 1998 (Meaning of Public Authority) Bill 2009-10' did not make it further than its first introduction to the House of Commons, and any attempts to introduce a similar bill seem to have been dropped.

*Repealing* the Act, however, may be a real option. The UK's Conservative Party has repeatedly advocated the repeal of the Human Rights Act, in order that the UK domestic courts would no longer be bound to make their judgments compliant with the jurisprudence of the European Court of Human Rights. Although now the Conservative party has delayed any repeal of the HRA while Britain's exit from the European Union is still underway, it still expects to review the current framework for human rights within the UK once Brexit has occurred.[153] If the Act is repealed, it may be possible for the Conservative party to subdue the inevitable political fallout by adopting a new Statute safeguarding human rights that could tackle the issue of the horizontal effect of human rights more coherently. The Party has indeed mentioned a replacement 'Bill of Rights' on several occasions,[154] although no details have been given regarding the possible horizontal effect of the

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[151] House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act - Ninth Report of Session 2006-07' (n 146) 46.
[152] Human Rights Act 1998 (Meaning Of Public Authority) Bill 2008-09 <http://services.parliament.uk/bills/2008-09/humanrightsact1998meaningofpublicauthority.html> accessed 18 August 2017.
[153] Samuel Osborne, 'Conservative Manifesto: Theresa May Announces UK Will Remain Part of European Convention of Human Rights' *The Independent* (18 May 2017) <http://www.independent.co.uk/news/uk/politics/conservative-manifesto-uk-echr-european-convention-human-rights-leave-eu-next-parliament-election-a7742436.html> accessed 24 August 2017.
[154] See Jon Stone, 'Plans to Replace Human Rights Act with British Bill of Rights Will Go Ahead , Justice Secretary Confirms' *The Independent* (22 August 2016) <http://www.independent.co.uk/news/uk/politics/scrap-human-rights-act-british-bill-of-rights-theresa-may-justice-secretary-liz-truss-a7204256.html> accessed 24 Augsut 2017. See also, for a discussion of the possible consequences Brexit and the Bill of Rights, Alison L Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017) 298-306.

rights included and there has been conjecture that such plans will be discarded.[155] Nonetheless, the possibility is an interesting one, and any developments in this regard should not be ignored.

In an earlier report on the meaning of public authority, the JCHR suggested a concrete definition that should be adopted through primary legislation. Finding support from the National Secular Society in a memorandum to the JCHR's more recent report, the body suggested amending the definition of public authority to include 'when a public body delegates functions that would otherwise be the response of that body, those functions and the private body delivering them are considered public or the purpose of the Human Rights Act'.[156]

The second solution identified by the JCHR is the protection of human rights through the terms of contracts between public authorities and private providers of public services. This could be a very effective method, as many of the cases requiring an interpretation of Section 6(3)(b) involve private actors who have been delegated the function of providing public services (i.e. privatised services such as water, and to some extent, prisons).[157] Indeed, it could be very useful in protecting individuals' rights in situations where public services have been contracted out to private actors, in which the judges have been very reluctant to consider the private actors as hybrid public authorities.[158] A related idea advocated by the JCHR would be the publication of 'authoritative guidance' on what kinds of organisations would fall within the scope of the HRA. Interestingly, a document to provide public authorities with guidance detailing how they can comply with human

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[155] Steven Swinford, 'Theresa May is Preparing to Abandon Plans for a British Bill of Rights, Sources Suggest' *The Telegraph* (26 January 2017) <http://www.telegraph.co.uk/news/2017/01/26/theresa-may-preparing-abandon-plans-british-bill-rights-sources/> accessed 24 August 2017.

[156] See National Secular Society, 'Memorandum from the National Secular Society', para 31, in House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act - Ninth Report of Session 2006-07' (n 146) Written Evidence 35.

[157] For a discussion of such services see Hallo de Wolf (n 27).

[158] See Section 7.3.3.1, above.

rights standards in their daily operations was adopted by the Department of Constitutional Affairs (now the Ministry of Justice) in 2006.[159] However, the guidance failed to offer a concrete understanding of what a public authority actually is.[160]

Finally, the JCHR identified the possibility of achieving more consistent and comprehensive protection of human rights through judicial decisions via government intervention as a third party in cases where they would rather the respective court adopt a broader interpretation of Section 6(3)(b) that would be more in line with the intentions of Parliament.[161] However, this could be seen as an unwelcome encroachment upon the authority of judges to interpret and apply the law. It would further require consistent intervention by Parliament, which has not shown a consistent impetus to intervene in this issue so far.

Perhaps the most realistic solution would be for Parliament to continue to legislate as it did in the Health and Social Care Act 2004 and the Care Act 2008 to close loopholes in specific circumstances. The commentary of academics and civil society could help to flag up instances in which this should be done. The fact that it has been done in the past, however, does not indicate in itself that Parliament would be willing to do the same in other contexts, where individuals are perhaps less vulnerable. Unless and until that occurs (or indeed the HRA is amended or appealed), we remain at the mercy of the UK judiciary to adopt a broader interpretation of Section 6(3)(b).

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[159] Department of Constitutional Affairs, 'Human Rights, Human Lives: A Handbook for Public Authorities' (2006) <http://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/hr-handbook-public-authorities.pdf> accessed 18 August 2017.

[160] The document simply says that it is applicable for people working in a public authority, 'whether you are in central or local government, the police or armed forces, schools or public hospitals, or any other public authority': ibid 2.

[161] House of Lords House of Commons Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act - Ninth Report of Session 2006-07' (n 146) 8.

#### 7.3.3.3 Public liability horizontality and the rights of 'hybrid' public authorities

Section 6 HRA is not interesting only regarding the definition of 'functions of a public nature'. As Alexander Williams has repeatedly noted, a deeper issue deserves a close analysis: whether or not hybrid public authorities enjoy Convention rights themselves when performing public functions.[162] It is assumed that hybrid public authorities maintain their ECHR rights when carrying out private functions, since (remembering Section 6(5) HRA) they are not classed as a public authority in this respect.[163] The same assumption has not been welcomed by some commentators and judges in relation to their public functions, whose arguments Williams rejects as lacking sufficient analysis to support claims that hybrids cease to enjoy their own rights.[164]

Academic discussions of this issue start with the (correct) claim that if a body could not be considered to be a 'victim' under Article 34 ECHR, they do not enjoy Convention rights pursuant to the Human Rights Act. Under Section 7(1) HRA, to be classed as a rights-holder an actor must fall within the scope of 'non-governmental organisation' within Article 34.[165] There is also agreement that 'core' public authorities cannot fall within Article 34, since they are 'inherently governmental'.[166] However, some commentators (and judges) then argue that hybrid public authorities would not be included in this definition when performing public functions. The

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[162] See Williams, 'Public Authorities' (n 88); Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998' (n 125); and Alexander Williams, 'The Scope of Section 6 HRA Revisited' (*UK Constitutional Law Association*, 2013) <https://ukconstitutionallaw.org/2013/10/28/alexander-williams-the-scope-of-section-6-hra-revisited/> accessed 23 August 2017. Williams also draws attention to the issue of what 'private' act is in the context of Section 6(5).

[163] See Hallo de Wolf (n 27) 294.

[164] For example, Buxton LJ has stated unequivocally that when a hybrid public authority is carrying out its public functions it does not enjoy any Convention rights of its own. See *YL* (n 92) para 75, cited in Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998' (n 125) 141; and Williams, 'Public Authorities' (n 88) 52.

[165] Williams, 'The Scope of Section 6 HRA Revisited' (n 162).

[166] This conclusion was reached in the case of *Aston Cantlow* (n 127) 37. See Williams, 'The Scope of Section 6 HRA Revisited' (n 162).

jurisprudence from Strasbourg on this and on State responsibility can be helpful in 'debunking' the stripping of rights argument, since it 'cannot convincingly' be regarded as viewing hybrid public authorities as governmental organisations for the purposes of Article 34.[167]

Williams points out that under liberal theory, it is usually possible to distinguish between public and private actors by looking at their motives – public actors have to act in the public interest but private actors can act to their own ends as long as they stay within the confines of the law.[168] Williams goes on to argue that for the scholars and judges taking this approach to be persuasive (and indeed to show that the Strasbourg jurisprudence is actually relevant here),[169] they would have to find case law that treated a 'self-serving private organisation', when carrying out a particular public task, to fall outside of the scope of Article 34. However, a clear enough example does not exist. If anything, the ECtHR has decided to the contrary, ruling that if an actor has 'predominantly self-serving commercial motives' it will not be considered a governmental organisation for Article 34.[170]

Williams points out that it is not actually difficult to allow 'hybrids' to enjoy their human rights. It would simply mean that they could still make a claim against a public authority themselves, or that they could use them as a 'defence' when accused of violating someone else's rights (using the second paragraph of the relevant Convention right).[171] This defence would of course be difficult for them to use – the justifications found in the second paragraph of Convention rights has been restricted to 'matters relevant to a government body and not of any non-public body'.[172] It would most of all be difficult for hybrids to rely on the 'protection of the rights of others'

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[167] Williams, 'Public Authorities' (n 88) 54-55.
[168] ibid 55. Palmer, as mentioned above, does not find this to be a persuasive test for considering the public/private nature of a body's function. See Palmer (n 105) 601.
[169] Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998' (n 125) 143.
[170] Williams, 'Public Authorities' (n 88) 55.
[171] ibid 58.
[172] *Leonard Cheshire* (n 118) (Stanley Burnton J); cited in Williams, 'Public Authorities' (n 88) 59.

justification, since they would be trying to argue that they were doing this by 'advancing' their own right.[173] This means that the 'horizontal' nature of the case should be taken into account to some extent, otherwise it wouldn't be possible for the hybrid to rely on their own rights in practice.

To avoid any non-protection of the rights of hybrids, the same approach should be taken as under the common law in a case of indirect horizontal effect whereby the *court* is under an obligation to act compatibly with the ECHR and can thereby use the defendant's human rights as a 'defence' for a private actor (on the basis that to develop the common law in another way would require the court to breach its own obligations under Sections 6(1) and 6(3)(a) HRA).[174] This would result in the court balancing the rights of both parties. It should be at this later stage of balancing that the impact of upholding one party's rights against the other party's rights should be discussed, rather than at the earlier stage of deciding whether a party is a hybrid public authority or not.[175]

Under this approach, which Williams has dubbed the 'chameleonic model', a case starts as a vertical one against a public authority but then the hybrid's rights come into play and the dispute actually changes 'to take on a more horizontal character.'[176] In this sense, chameleonic horizontal effect is 'neither a purely "vertical" nor "horizontal" framework of rights protection against hybrid public authorities.'[177]

Taking this approach, the horizontal effect arising from section 6(3)(b) HRA is actually quite in line with indirect horizontal effect as explained above and applied in the case law of the UK courts in cases regarding common law disputes between two private actors.[178] The difference between them, as Williams explains, is that under indirect

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[173] Williams, 'Public Authorities' (n 88) 59.
[174] ibid 59-60.
[175] ibid 65.
[176] ibid 60.
[177] Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998' (n 125).
[178] Williams, 'Public Authorities' (n 88) 60.

horizontal effect, 'Convention rights [are applied] to the *law* rather than generating a cause of action directly against the defendant itself, as the hybrid scheme does.'[179] There is also a difference in the scope of cases in which an individual could claim a violation of their rights. Under the common law approach, the individual has to prove that if the court did not take their rights into account in a case, the court would be liable before Strasbourg. This is not the case under the chameleonic model, because the hybrid scheme creates new Convention remedies that are not available against the State itself (these are already allowed for elsewhere in the HRA, according to the two ways of establishing State responsibility in Strasbourg).[180] Under the hybrid scheme, as long as the claim falls within the scope of one of the ECHR rights, the claimant does not need to prove that the State would be liable for breach of rights at Strasbourg.

Williams ultimately uses chameleonic horizontal effect as an argument for adopting a broader interpretation of Section 6(3)(b) – if being considered a 'hybrid' public authority would strip a private actor of their rights, this would be a good impetus for courts to take a narrow perspective. If, however, their rights are unaffected by the fact that they carry out public functions, there would be less reason to adopt a restrictive interpretation of public functions.[181]

### *7.3.4 Other types of horizontal effect in the HRA*

As well as those discussed, other theories of horizontal effect deriving from the HRA have been put forward. One of these has been labelled 'intermediate horizontal effect' by Ian Leigh,[182] and is the most similar theory so far to indirect horizontal effect at the international and regional levels. While stemming from Section 6 HRA, it does not depend on the classification of a private actor as a 'public authority' by reason of it carrying out public

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[179] ibid 60.
[180] ibid.
[181] ibid 52. See also Williams, 'A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act 1998' (n 125) 143.
[182] Leigh (n 63).

functions. Rather, it 'occurs where an individual is able to bring an action against a public body for failing to protect Convention rights, when this failure stemmed from the actions of a private individual.'[183] If successful, an argument of intermediate horizontal effect may indirectly impose an obligation on a private actor to act in an ECHR-compliant manner.[184] Ian Leigh's intermediate horizontal effect is very similar, if not the same, as what Stefan Somers terms 'system responsibility', which amounts to 'the responsibility of the state to protect human rights in horizontal relationships'.[185] This type of horizontality seems to have been adopted by Sir Terence Etherton in the recent case of *Watts v Stewart*.[186]

Alison Young contrasts intermediate horizontal effect with indirect horizontal effect. Under intermediate horizontal effect, the 'primary legal obligation rests with the state', and private parties cannot be subject to legal action requiring them to act compatibly with ECHR rights,[187] whereas under indirect horizontal effect the cause of action is directly against the private actor. With intermediate horizontal effect, the consequence of a successful claim is that the private party is still required to act in a way that is ECHR-compliant, which the State has to ensure (i.e. obligation to protect at the international level).[188]

Young also explains that the nature of the obligation imposed on the private actor is different under intermediate and indirect horizontal effect. Under indirect horizontal effect the private actor is placed under an obligation to act in an ECHR-compliant manner vis-à-vis the claimant. This creates a 'Hohfeldian claim right', which entails a correlative duty on behalf of the

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[183] Young, 'Mapping Horizontal Effect' (n 11) 19.
[184] ibid, discussing Ian Leigh's identification of types of horizontal effect.
[185] Stefan Somers, 'European Human Rights Law Review Protecting Human Rights in Horizontal Relationships by Tort Law or Elaborating Tort Law from a Human Rights Perspective' [2015] European Human Rights Law Review 149, 158.
[186] *Watts v Stewart* [2016] EWCA Civ 1247. See Susan Pascoe, 'The End of the Road for Human Rights in Private Landowners' Disputes ?' (2017) 4 The Conveyancer and Property Lawyer 269, 281.
[187] See Young, 'Mapping Horizontal Effect' (n 11) 27.
[188] See ibid.

private actor.[189] With intermediate horizontal effect, there is legislation to make sure that private actors do not act in a certain way, but the claimant is not capable of bringing an action against the actor. Instead, they are reliant on the State to prosecute the private actor. If there were an instance where rights (e.g. privacy) were interfered with but the State did not prosecute the private actor, then the individual would be able to bring a case against the State for failing to protect their right to privacy.[190] The obligations under intermediate horizontal effect are placed on the State but there is no claim right – it is more that the State has the power which creates liability to prosecution for the private actor. Ian Leigh describes the duty on the State as a fencing duty.[191]

Even more forms of horizontal effect have been said to exist by virtue of the HRA. Thomas Raphael identifies a theory that does not derive from a particular provision within the HRA, but exists simply because the Act does. It is labelled 'developmental influence' and is similar to 'indirect horizontal effect' but means simply that the HRA as a whole will be considered by the courts when they are developing rules of common law (as happens with other legislation as well).[192] The same theory is considered by Alison Young under the label of 'background horizontality'. Under this theory, it is the HRA itself that motivates the courts to develop common law compatibly with the ECHR, although there is no obligation for them to do so.[193]

## 7.4 Importing human rights into private law

The second context in which horizontal effect of the Human Rights Act has been heavily discussed relates to the importation of human rights into private common law. There has been a distinction made between the function of human rights values in public and private law disputes.[194] In public law cases,

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[189] See ibid
[190] ibid 25, using Leigh's example of intermediate horizontal effect.
[191] See ibid 28.
[192] ibid 20, discussing Thomas Raphael, 'The Problem of Horizontal Effect' [2000] European Human Rights Law Review 493, 494-495.
[193] Young, 'Mapping Horizontal Effect' (n 11) 21-22.
[194] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in

human rights defend inferiorly positioned individuals against the powerful State, whereas in private law cases, the invocation of human rights is more of an argumentative tool. In private law, human rights arguably act as 'diamonds to be traded with others or discarded by choice'.[195] In this sense, an argument that human rights should not have direct application between private individuals is understandable. However, the use of this analogy also suggests that the rights in question merely function as tools with which to strengthen arguments. Treating human rights only as an argumentative tool assumes that the presumed formally equal relationship between the individuals party to the dispute exists in fact. In reality, many instances in which individuals wish to invoke their rights in private law disputes involve a factually 'superior' actor that has the ability to abuse its own power, thereby infringing the rights of the more vulnerable individual. There is therefore a growing need to 'counterbalance excessive dominances by private powers to the detriment of less powerful private actors'.[196] Through the construction of the Human Rights Act and their obligations to act compliantly with the ECHR, it has fallen to judges in private law litigations to fill the resulting gap in governance and human rights protection. The result, particularly when the competing rights of two private actors must be balanced, can be termed 'judicial governance'[197] and has led to the assertion by Justin Friedrich Krahé that direct horizontal effect is rendered 'superfluous' – the ability of judges to apply rights through the common law makes it unnecessary for the ECHR rights themselves to bind private actors.[198]

The way that the judiciary could, should and has imported human

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Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 27-28.

[195] ibid 36.

[196] Aurelia Colombi Ciacchi, 'Concluding Remarks' in Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union: Vol. I and II* (Cambridge University Press 2010) 428.

[197] Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law and Judicial Governance' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 124-25.

[198] Krahé (n 5) 147.

rights into private common law has resulted in a plethora of scholarly opinions on the matter. Within the discussions and suggestions can be found many of the theories of direct and indirect horizontal effect explained above. Before the Human Rights Act came into force in 2000, its potential impact on common law rules applicable between two private parties was expected to be its 'area of greatest obscurity'.[199] In this context, Susan Pascoe has warned that because of 'increased recognition that human rights norms…affect the private sphere, the borders between public and private law are becoming progressively blurred.'[200] A similar statement could be made in relation to the Section 6(3)(b) HRA. This section of the present chapter will take examples from some of the most prevalent legal scholars and examine the approach that the courts have taken towards developing private common law in compliance with the ECHR.

The scholarly debate was started by Sir William Wade QC, who believed that the HRA would have direct horizontal effect for two reasons. The first was on a literal reading of Section 6(1) HRA, which he understood to include a categorical duty for courts to comply with the ECHR in all cases, regardless of whether the parties were public or private entities.[201] Gavin Phillipson has rejected this argument, particularly by using the reasoning that in order to bring a case against another private actor, an individual must be able to allege that the defendant has 'acted, or are threatening to act, unlawfully'.[202] However, using the simple (and logical) reasoning of the Court of Appeal, an applicant has no HRA cause of action 'if the applicant did not assert any cause of action against the [private actor] under the HRA.'[203] The second part of Wade's argument is based on the 'spirit' of the law, rather than a literal reading. Taking this approach, Wade understood

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[199] Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 825.
[200] Pascoe (n 186) 281-282.
[201] Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 97.
[202] Phillipson, 'Clarity Postponed' (n 9) 151.
[203] *X v Y* (n 34) para 54(2), cited in Phillipson, 'Clarity Postponed' (n 9) 151. For a more detailed critique of Sir Wade's point of view see Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3).

human rights to be universal values, which 'ought…to be operative *erga omnes*'; he believed there to have been recent developments in the Western world which gave citizens a legitimate expectation that they could uphold their rights against each other, as well as against public actors.[204] While many scholars have tended to favour indirect horizontal effect, Wade has received some support for his views.[205]

Sir Wade further believed that drawing a distinction between public and private authorities was actually unnecessary. Since the courts are obliged, as a public authority themselves, to act compatibly with the ECHR in *all* cases, it made no practical difference whether the parties themselves were public authorities.[206] This view has been heavily criticised by David Pannick and Anthony Lester for Wade's self-pronounced 'simple' interpretation of the impact of the HRA on private law,[207] particularly as he relied on an apparently erroneous understanding of their own position on the matter.[208] Pannick and Lester take further issue with Wade's argument because it 'makes nonsense of' the clear distinctions made in Sections 6, 7 and 8 HRA between private actors and public authorities mentioned above.[209]

Nevertheless, other scholars believe that the HRA has given direct horizontal effect. For example, Bennett claims this in relation to privacy, and to some extent also defamation.[210] He explains the establishment of the 'new tort' of misuse of private information (discussed below), starting with *Campbell v Mirror Group Newspapers Ltd*,[211] followed by several other cases regarding the protection of individuals' privacy from the press.[212] He

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[204] Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 97, citing Wade (n 7) 224.
[205] See e.g. Jonathan Morgan, 'Questioning the "True Effect" of the Human Rights Act' (2002) 22 Legal Studies 159; and Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) 62 Cambridge Law Journal 444, cited in Phillipson, 'Clarity Postponed' (n 9) 153.
[206] Wade (n 7) 223-224, discussed in Pannick and Lester (n 51) 381.
[207] Wade (n 7) 220.
[208] Pannick and Lester (n 51).
[209] ibid 383.
[210] Bennett, 'Horizontality's New Horizons: Part 1' (n 5).
[211] *Campbell* (n 45).
[212] ibid; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 20

then examines the *McKennitt v Ash* case and the case of *Applause Store Productions Ltd v Raphael*, both of which concerned two private individuals.[213] Through the case law he sees a definite move away from breach of confidence towards a new tort on misuse of private information, which has become broader and is based on Articles 8 and 10 ECHR.[214] The final result for Bennett is that the Convention rights are directly applicable between two private parties where there is a reasonable expectation of privacy. The views of other scholars on this point will be addressed through an examination of the relevant case law.

*7.4.1 Importing human rights into common law: jurisprudence*

The courts began importing human rights into the common law at an early stage after the entry into force of the Human Rights Act. In *Douglas v Hello! Ltd (No. 1)*[215] Sedly LJ stated that even if there is no direct horizontal effect or *carte blanche* for individuals to claim a breach of rights by others, once there is an existing cause of action against another individual (i.e. in private law), the relationship between the private parties can be directly affected if the Convention rights are invoked.[216] While this gives an indication that some form of indirect horizontal effect would be favoured by the courts, much more indication was given in the *Campbell* case.

In *Campbell* the judges seemed to favour indirect horizontal effect,[217] modifying a rule of common law so as to protect Convention rights, which put an obligation on a private actor to act in a specific way.[218] Phillipson has examined the individual opinions of the judges in the case. For the majority, Lady Hale appeared to endorse strong indirect horizontal effect, stating that

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(QBD); *Murray v Express Newspapers Plc* [2008] EWCA Civ 446; [2009] Ch 481 (CA (Civ Div)).

[213] *McKennitt v Ash* (n 52); and *Applause Store Productions Ltd v Raphael* [2008] EWHC 1781 (QB); [2008] Info TLR 318 (QBD).

[214] See Bennett, 'Horizontality's New Horizons: Part 1' (n 5).

[215] *Douglas v Hello! Ltd (No. 1)* [2001] 2 WLR 992.

[216] Gajdosova and Zehetner, 'England' (n 4) 110, 155.

[217] ibid; see also Phillipson, 'Clarity Postponed' (n 9).

[218] Young, 'Mapping Horizontal Effect' (n 11) 25.

'the court as a public authority must act compatibly with both parties' Convention rights'.[219] This finding corresponds with a statement of the Lord Chancellor in the parliamentary debates on the HRA that according to the government that 'it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between citizens'.[220]

Lord Hope also seemed to favour strong indirect horizontal effect, but only in so far as it required compliance by the courts with Article 10 ECHR, rather than the ECHR more generally.[221] Interestingly, each judge in the Campbell case took a different approach towards horizontal effect, how and whether it should apply. While they all referred to Strasbourg jurisprudence in coming to their conclusions, this is not enough on its own to be able to say that it has 'settled' the issue of horizontal effect arising from the HRA.[222] Interestingly, in the subsequent case of *Douglas v Hello! Ltd (No. 3)*,[223] the Court of Appeal conflated the views of Lady Hale and Lord Nicholls in *Campbell*.[224] The former had, as mentioned, endorsed strong indirect horizontal effect, while Lord Nicholls favoured weak indirect horizontal effect, opting to see Section 6(1) as placing a duty on the court to take account of the values found in the ECHR rather than a duty to amend existing common law to bring it in line with the Convention rights.[225] Phillipson's conclusions on how the courts have treated horizontal effect match the views of Young referred to above – that the courts have left themselves the '*ability* to bring Convention principles into private law' but have not accepted themselves to be bound to act compliantly with them.[226] A primary way in which this has been achieved has been by effectively dodging any concrete

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[219] *Campbell* (n 45) 546 (Lady Hale), quoted in Phillipson, 'Clarity Postponed' (n 9) 158.
[220] Lord Chancellor, HL Deb vol. 583 col 783 24 November 1997, cited in Ewing (n 30) 89.
[221] See *Campbell* (n 45) para 114, cited in Phillipson, 'Clarity Postponed' (n 9) 158-159.
[222] Phillipson, 'Clarity Postponed' (n 9) 158-167.
[223] *Douglas v Hello! Ltd (No. 3)* [2005] EWCA Civ 595, [2006] QB 125.
[224] See Phillipson, 'Clarity Postponed' (n 9).
[225] See for discussion, ibid.
[226] ibid 172. See also Young, 'Mapping Horizontal Effect' (n 11).

discussion of the abundance of academic literature on the topic.[227]

According to Thomas Bennett, the significance of the *Campbell* case lies in its creation of a new tort of misuse of private information.[228] However, when the wording of the Lords in the decision is examined more closely, they appeared to be intending to build on previous developments in the common law; Phillipson notes that the Lords may have played down or been unaware of the significance of the development they brought about in *Campbell* and they can by no means be said to have intended to create a new, separate cause of action, whatever its effects in practice.[229] Indeed, the Lords seem to have agreed with Pannick and Lesters' suggestion that 'instead of creating a free-standing private law cause of action for breach of article 8, the courts should further develop the law protecting confidences incrementally'.[230] In making this suggestion, the scholars reject Sir William Wade's approach (similar to that of Bennett), which would have allowed the former, more drastic judicial action. The tort, described by the Court of Appeal in *Douglas v Hello! Ltd (No.3)* as 'the action previously known as breach of confidence' has subsequently been accepted by the UK courts. [231] The view of Pannick and Lester regarding an incremental development of the law aligns well with Phillipson and Williams' constitutional constraint model, mentioned above.[232] Incremental development was also predicted in Oliver's statement that, 'as anticipated by the Lord Chancellor…[the courts will] develop the common law and equity incrementally to protect parties against what would be breaches' of the ECHR had they been carried out by public authorities.[233]

The case law of English courts regarding the importation of the HRA into private common law disputes still appears to be relatively open. Certainly, the judges have been less concrete than scholars in this area, who

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[227] Phillipson, 'Clarity Postponed' (n 9) 172.
[228] See Bennett, 'Horizontality's New Horizons: Part 1' (n 5) 100, cited in Phillipson, 'Privacy' (n 46) 147.
[229] ibid 149-150.
[230] Pannick and Lester (n 51) 383.
[231] *Douglas v Hello! Ltd (No. 3)* (n 223) para 53, cited in Phillipson, 'Privacy' (n 46) 136.
[232] See Phillipson and Williams (n 10).
[233] Oliver (n 56) 351.

have provided significant guidance in the hopes that the courts will follow a particular model. It does seem, at least in relation to privacy, that the judiciary has taken on an incremental development approach, even though some developments appear quite radical when taken at face value. An example of recent jurisprudence from a different context will be examined in the following section.

### *7.4.2 A recent example: McDonald v McDonald*

At the time of writing, the most significant recent case heard in the United Kingdom that dealt with horizontal effect in private law was that of *McDonald v McDonald*, in 2016.[234] This case is also a good example of the practical effect that Section 6(3)(b) HRA can have, when private entities in a similar position to public authorities are not classed by the court as public authorities for the purposes of the Human Rights Act. The case was appealed to the UK Supreme Court and involved a woman (the claimant) who had suffered from psychiatric and behavioural problems since she was a child. The claimant, now in her forties, was renting a house from her parents, who had bought the house with a mortgage from Capital Home Loans Ltd. When the parents' mortgage payments went into default, the claimant was served with a notice that her tenancy would be terminated. She filed a complaint against the possession order, which was ultimately dismissed by the Supreme Court.

The Supreme Court, as the Court of Appeal before it, did not reject the applicant's claim that Article 8 ECHR was relevant to the case, since the possession order would have a large impact on her ability to enjoy her home. It did not find, however, that the right was *applicable* to the situation at hand, which would have allowed the claimant to use Article 8 as a 'proportionality defence' against the mandatory possession order under Section 21(4) Housing Act 1988.[235] However, according to Sarah Nield, if an infringement of an ECHR right is to be justified (possible, e.g., through the second

[234] *McDonald v McDonald* [2016] SC 28, para 2.

[235] See e.g. ibid paras 22, 73. For a discussion of 'proportionality defences' see e.g. Andrew Dymond, 'McDonald - Private Landlords and Article 8' [2016] Journal of Housing Law 93.

paragraph of Article 8), 'the principle that no individual should bear an excess burden' is of paramount importance.[236] To this principle, an assessment of proportionality of the infringement is fundamental.[237] Indeed, the Supreme Court in *McDonald* explicitly referred to two previous cases when stating that 'it is, in principle, open to an occupier to raise' the issue of proportionality of an order for possession against them, and 'to incite the court to take that into account when deciding what kind of order to take' (having already explained that there are several options open to the court other than granting a possession order).[238] The cases referred to, however, concerned possession orders on behalf of public authorities under Section 6 of the Human Rights Act rather than the private entity that was involved in *McDonald*.[239]

In the case of *Manchester City Council v Pinnock* in particular, the decision was made by the Supreme Court to follow the Strasbourg jurisprudence on the matter to allow (albeit it in limited circumstances) assessments of proportionality to be made regarding public authorities.[240] This was possible because of the 'clear and constant' Strasbourg jurisprudence on the matter. The jurisprudence did not extend to cover cases in which the landlord was a private entity, in relation to which the Supreme Court found that 'clear and authoritative' jurisprudence was lacking.[241] Nield, however, provides examples of cases that could have been relied upon to allow the Supreme Court to read a proportionality assessment into the *McDonald* case. In doing so, she criticises the Supreme Court's lack of engagement with intermediate horizontal effect, which can be found in the

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[236] Sarah Nield, 'Shutting the Door on Horizontal Effect : McDonald v McDonald' [2017] The Conveyancer and Property Law 60, 68.
[237] ibid.
[238] *McDonald* (n 234) para 34.
[239] The cases mentioned are *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441; and *Hounslow London Borough Council v Powell* [2002] 2 AC 186, cited in *McDonald* (n 234) para 34. See also --, 'Human rights: McDonald v McDonald', (2014) Journal of Housing Law 17(6), D107-D108.
[240] *Manchester City Council v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441, discussed in *McDonald* (n 234) paras 34-37.
[241] *McDonald* (n 234) para 40.

case law of the ECtHR.[242] The first example that Nield gives is the fairly recent case of *Zehentner v Austria*.[243] Like *McDonald*, this case concerned a claimant who had suffered from a mental health condition, which had resulted in her being detained in hospital. While in hospital, she was unable to meet a deadline for contesting the forced sale of her home. Because of the lack of safeguards available for individuals placed in such a vulnerable position, Austria was found responsible for a breach of its positive obligation under Article 1 Protocol 1 ECHR (the right to property) to 'safeguard the mentally disabled embroiled in enforcement proceedings'.[244] Nield suggests that similar reasoning, which in *Zehentner* focused on the vulnerability of the claimant due to her health, could have been adopted in *McDonald* which would have led to a proportionality assessment. The Supreme Court, however, used the facts of the case to decline to follow it in *McDonald*, relying on the fact that the dispute in *Zehentner* was not about a possession order.[245]

In *McDonald*, the Supreme Court reiterated this, noting that the respondent in the case could not be considered a public authority under Section 6 HRA.[246] At no point in the judgment did the Court delve into further details on the distinction between public authorities and private actors, or whether the private landlord could be treated as a 'functional' public authority under Section 6 (3)(b). Significantly, in contrast to the cases discussed above, the Court refrained from discussing theories of horizontal effect altogether.[247] While Susan Pascoe notes that this is understandable in light of the 'plethora of models' of horizontal effect, the lack of clarity in approach does seem to have left lower courts without clear guidance on the horizontality of Article 8.[248]

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[242] Nield (n 236) 68.
[243] *Zehentner v Austria,* App No. 20082/02 (16 July 2009), discussed in Nield (n 236) 68.
[244] Nield (n 236) 68.
[245] *McDonald* (n 234) para 51; see also Nield (n 236).
[246] *McDonald* (n 234) para 38.
[247] See for discussion, Pascoe (n 186) 270.
[248] See ibid 280-281, discussing the case of *Watts v Stewart* (n 186).

When discussing the claimant's argument that the protection afforded in *Pinnock* should equally apply vis-à-vis private landlord, the Court raised the point that unlike public authorities, private landlords are entitled to their own protection under the ECHR in such cases – notably under Article 1 Protocol 1 (the right to property).[249] The issue of an individual bearing an 'excess burden' raised by Nield came into play here, as the Supreme Court examined the correct balance to be struck between the two private actors' human rights. The Court concluded that the balance was not theirs to make, but rather had already been judged and implemented accordingly by Parliament through the Housing Act 1988. Since the parties were in a contractual relationship regulated by legislation, it would be for Parliament, not the courts, to amend the protection of both parties' rights within the relationship;[250] as Murray Hunt has stated, 'private relationships are left undisturbed insofar as they are not [already] regulated by law'.[251]

Other cases from the ECtHR, two of which even involved possession orders and private landlords, were similarly rejected by the Supreme Court.[252] The judges in *McDonald* were of the opinion that should they come to a different conclusion regarding the proportionality assessment, they would make the ECHR 'effectively…directly enforceable as between two citizens direct so as to alter their contractual rights and obligations', i.e. give direct horizontal effect to Article 8 in this case. The Court strongly believed that this was not the intention behind the Convention. Susan Pascoe takes issue with the conclusion of the Supreme Court, claiming it to be 'incongruous to

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[249] *McDonald* (n 234) para 39.

[250] ibid para 46.

[251] Hunt (n 7) 434, as cited in Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law' (n 3) 831. This view is also taken by Pannick and Lester, who (as Hunt did) follow the methodology of Kriegler J in the case of *Du Plessis v De Klerk* 1996 (3) SA 850, CC according to which human rights only come into play between private actors where the State owes a positive obligation to protect one individual's human rights from harm by the other. See Pannick and Lester (n 51) 384-385.

[252] See *Zrilić v Croatia*, App No. 46726/11 (3 October 2013); *Brežec v Croatia*, App No. 7177/10 (18 July 2013); and *Belchikova v Russia*, App No. 2408/06 (25 March 2010), discussed in *McDonald* (n 234) paras 51-54.

use the ground of contract and statute' (referring here to the Court's finding that Parliament had already struck a balance within the applicable legislation, which continued to reflect Parliament's views on the matter) regarding private landlords, when housing associations classed as 'public authorities' for Section 6 HRA would also rely on the contract and statute.[253]

Although the ECtHR cases mentioned thus far would seem to lead to a conclusion contrary to that of the Supreme Court, Andrew Dymond has brought attention to a case decided *after McDonald* by the European Court which 'echoes that of the Supreme Court in *McDonald*.'[254] The case, *Vrzić v Croatia*, dealt with mortgage possession proceedings that had been brought by a private individual.[255] The Court considered previous cases in which it had held that anyone whose right to respect for their home was at risk of interference 'should in principle be able to have the proportionality of the measure determined by an independent tribunal' in line with Article 8 ECHR.[256] However, a distinction could be drawn in *Vrzić* because the proceedings were instigated by a private actor (as in *McDonald*) and did not concern a 'State-owned or socially-owned' dwelling; the Court's findings of a right to a proportionality defence in previous cases had not required a consideration of another private interest, which was at stake in *Vrzić* (as in *McDonald*).[257] Pascoe nonetheless claims that *Vrzić* only supports *McDonald* to an 'extremely limited' degree.[258] She bases this on the fact that the outcome in *Vrzić* depended heavily on the fact that judicial procedural safeguards (the existence of which the State is obliged to afford) available to the claimants, who had failed to make use of them.[259] This contrasts with *McDonald*, where no safeguards were open to the claimant (as in *Zehentner v Austria*).[260]

Ultimately, the decision in *McDonald* leaves future judges in

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[253] Pascoe (n 186) 271-272.
[254] Dymond (n 235) 96.
[255] *Vrzić v Croatia*, App No. 43777/13 (12 July 2016).
[256] ibid para 64.
[257] ibid para 66. See also Dymond (n 235) 96; and Pascoe (n 186) 272.
[258] Pascoe (n 186) 272.
[259] ibid.
[260] ibid.

somewhat of a 'straightjacket', as it leaves very little room for a finding that Article 8 allows individuals a proportionality defence against private landlords pursuing possession orders. Pascoe suggests that the case could 'reflect the biases of the judges' who may act as private landlords. Rather than seeking a judicial solution to provide increased protection for vulnerable individuals in the position of Ms. McDonald as well as private landlords whose property is at risk, Pascoe suggests that such action should come directly from the Government.[261]

## 7.5 Concluding reflections on the horizontal effect of international human rights within the United Kingdom

Any conclusions drawn on the (future of) horizontal effect of human rights within the UK must be made lightly in the face of possible change in the legislative framework. While Brexit may have bought the Human Rights Act a grace period, it is likely that it will be either amended or repealed by the Conservative party once the Brexit process has been concluded. That being said, the effect of even a repeal of the HRA may not actually be that drastic in relation to some areas of law. It would remove any possibility of the ECHR rights having direct horizontal effect in the UK, since the courts would no longer be under an obligation to interpret legislation in a way that is compatible with ECHR rights.[262] However, the indirect horizontal effect of human rights in common law proceedings may not be under immediate threat. The common law that has already been modified so as to comply with the ECHR (which the court is obliged to do under Section 6(1)) has the effect of creating an obligation for a private actor equating in practice to an obligation to respect the human rights of others through the common law. These modifications would continue to exist after repeal of the HRA, at least until future cases challenged the precedent that had been set by the cases

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[261] She suggests several ways in which this could be achieved, including more flexible options than possession orders, financial compensation for private landlords in cases of delays in obtaining possession, etc. See ibid 286.

[262] Young, 'Mapping Horizontal Effect' (n 11) 37.

establishing the obligations.[263]

Conclusions can of course be drawn on the basis of the legislation itself and existing jurisprudence on the matter. There does not seem to be a viable argument that there is direct horizontal effect by virtue of the HRA. Even in those cases in which Section 6(3)(b) can be invoked to categorise a private actor as a hybrid public authority, no true horizontal effect is achieved – it still does not hold non-State actors responsible for human rights standards as *private actors*. The test for determining whether a private actor is one 'certain of whose functions are functions of a public nature' has been inconsistently applied by the courts, and has in some instances led to such severe consequences for the protection of human rights that Parliament has felt the need to intervene. Many calls have been made for the courts to adopt a purely functional test for Section 6(3)(b), which would echo the distinctions made in the provision itself. A test completely reliant upon the functions of an actor would rather not mention whether the actors would be public or private in nature at all. The HRA goes beyond this distinction, which is a very positive step in terms of broadening the scope of potential human rights protection, but it still *contains* this distinction. The fact that it is still framed so strongly in terms of 'private' or 'public' actors makes it easier for courts applying it to be more conservative in their application, as the extremely strong historical connotations accompanying the public/private divide are very hard to dispel. Unfortunately, despite claims that the public/private distinction is becoming outdated, coming up with an alternative in the context of the HRA would be a formidable task.

The situation does not, unfortunately, seem much more hopeful in relation to indirect horizontal effect and the application of the Human Rights Act in private common law cases. While there now exist many different theories of indirect horizontal effect, giving judges a plentiful supply from which to choose an approach, they seem to prefer not to engage with the considerable scholarly expertise to come to a concrete approach. It was seen on the one hand that the courts have taken a somewhat more open approach

[263] ibid 38.

in cases concerning the tort of 'misuse of private information', having developed the previous tort of breach of confidence in the *Campbell* case to bring it into conformity with the Human Rights Act. On the other hand, though, the courts took a very restrictive approach in *McDonald v McDonald* which resulted in a gap in human rights protection. While the approach of the Supreme Court was commendable from the perspective that it gave considerable deference to Parliament and did not encroach on parliamentary sovereignty, the Lords were quick to reject jurisprudence from Strasbourg that could have aided in providing a vulnerable individual with human rights protection.

It also seems that, like at the regional and international level, the UK domestic courts treat horizontal effect differently in relation to different rights. In particular, they have used the Human Rights Act to substantially (although incrementally) develop the protection of privacy in the common law. Phillipson and Williams suggest that this is for several reasons, in particular that there was an 'embarrassing' gap in the protection of privacy prior to the HRA, and that it seemed very unlikely that Parliament would bridge the gap by adopting legislation.[264] The reason for greater developments in privacy could also be because it is regulated by common law. From the case law examined above (particularly the *Campbell* and *McDonald* cases) it appears that the UK courts adopt a much stricter perspective when dealing with issues that are regulated by statute, as opposed to issues arising under the common law. Perhaps in order to protect parliamentary sovereignty in this area, the courts have refused to carry out any balancing exercise of their own between the rights of two private individuals, claiming that a balance has already been struck within the relevant legislation. In light of this, and in order to correctly find the balance between the protection of rights and protection of the common law, it would be wise to heed Young's words when she states that 'the extent to which

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[264] Gavin Phillipson, 'The Common Law, Privacy and the Convention' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 215, 218.

Convention rights should create obligations for private parties [is] best resolved within the particular framework of each Convention right.'[265]

Overall, the judges in the UK courts have seemed reluctant to delve too far into theories of horizontal effect of human rights in recent cases, at least in terms of endorsing a particular theory as being generally applicable. Instead, the case law shows that judges have often tended to avoid the language of horizontal effect entirely (e.g. in *McDonald*). They also seem to have favoured different approaches according to the circumstances of a case – in relation to privacy and the common law, for example, the judges have been instrumental in developing the new tort of misuse of private information, which allows for a degree of indirect horizontal effect. In the context of housing and possession orders that are regulated by statute, the courts have taken a much stricter stance. Taken together with the inconsistencies of the jurisprudence on hybrid public authorities, while the law on privacy is becoming clearer, substantial problems of consistency and clarity remain in relation to the horizontal effect of human rights in the United Kingdom. Any replacement or amendment to the Human Rights Act – on pause for the moment – should carefully take these issues into consideration.

Finally, the findings of this chapter must be seen in light of the present book as a whole. The chapter has provided an example of how domestic legal systems may deal with the impact of non-State actors on the enjoyment of human rights. While the Human Rights Act is particular to the UK, and the common law system is found in relatively few states, the matters discussed in this chapter highlight challenges that could be faced by many different national legal systems. These include the point at which private actors conducting public functions should, or could, be placed under a legal obligation to act in the human rights-compliant manner expected of State actors and the role of human rights in private law disputes. Further, this chapter has shown that the aforementioned reluctance of the judiciary to engage with theories and scholarly debates on horizontal effect can lead to challenges of conceptual clarity at the national level similar to those at the

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[265] Young, 'Horizontality and the Human Rights Act 1998' (n 11).

regional, and especially international level. As will be seen in Chapter 8, the findings of the theories and particularly the use of horizontal effect in the United Kingdom also constitute helpful points of comparison with the uses of horizontal effect at the regional and national levels.

# Part 4

# Horizontal Effect of International Human Rights Beyond Law: A Multi-Level Governance Approach

Chapter 8

# A critical analysis of the current horizontal effect of international human rights law at the international, regional and national levels[1]

## 8.1 Preliminary remarks

The previous five chapters of this book (3-7) addressed whether, how and to what extent the horizontal effect of international human rights occurs at the international, regional and national levels. With the exception of a handful of treaty provisions at the international and regional levels that could be viewed as applying to non-State actors, the analysis has shown a lack of direct horizontal effect in these systems. Even considering the exceptions found in human rights treaties, the current constraints of the international human rights framework mean that the provisions cannot actually be applied against non-State actors. More examples were provided in Chapter 3 regarding developments towards the direct horizontal effect of international human rights law outside of binding, international human rights law (e.g. within soft-law instruments, adjudicatory bodies outside of human rights law and some recent domestic case law and legislation). However, within the field of human

[1] Parts of this chapter have been published in: Lottie Lane, 'The horizontal effect of international human rights law in practice: A comparative analysis of the general comments and jurisprudence of selected United Nations human rights treaty monitoring bodies' (2018) 5(1) European Journal of Comparative Law and Governance 5.

rights and in the work of human rights adjudicatory bodies, the findings demonstrated that overwhelmingly, indirect rather than direct horizontal effect features on all three levels examined. Unquestionably, within the jurisprudence of human rights monitoring bodies and courts on each level, there has been no direct horizontal effect of human rights. The extent to which the results provide further protection for individuals against the harmful actions of non-State actors varies, however. Several different bases and methods of indirect horizontal effect can be identified within the systems examined. This chapter will critically analyse the findings of the previous chapters, starting with a more general critique of indirect horizontal effect before identifying and explaining three main models of indirect horizontal effect: (1) diagonal indirect horizontal effect; (2) categorical indirect horizontal effect; and (3) value-driven indirect horizontal effect.

## 8.2 General critical remarks on indirect horizontal effect

It should be quite clear by now that indirect horizontal effect has different consequences at the national, regional and international levels. While, as explained below, the methods used and bases relied upon at the regional and international level are very similar, indirect horizontal effect at the national level can be very different. Chapter 7 analysed horizontal effect within the United Kingdom, in relation to the HRA 1998. One of the most problematic aspects of indirect horizontal effect in this context, when applied in private law cases, has been highlighted by Hugh Collins. He points out that bringing human rights into private law cases blurs the traditional boundaries between public law, which governs State-citizen relationships, and private law, which governs inter-citizen relationships.[2] Collins admits that blurring the distinction between the two kinds of law in itself may not be problematic, but underlines the importance of the boundaries and the reason that they were established in the first place.[3] While public law, and human (or fundamental)

[2] Hugh Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 34.
[3] ibid 35.

rights in particular evolved to protect individuals from the potential abuse of power by the State, private law evolved with much more economic interests at its centre – although still protecting individuals from harms, and to some extent dealing with human rights, Collins states that the specific rights mentioned in private law (predominantly property and liberty-related) discourse diverge from those found in public law discourse.[4] Additionally, he notes, 'the rights mentioned in the discourses of private law, if referred to at all, appear to weigh less heavily than those protected in the context of public law.'[5] His main point here is that to bring human rights into private law cases would be to use them for a 'function outside their original scope and purpose.'[6] However, this appears to be quite a narrow perspective – while the scope and purpose of rights must be considered, it is clear from the (private) case law in which indirect horizontal effect has been applied that using rights in this way has been able to fill gaps by providing protection for individuals' interests that would not otherwise be afforded.[7] In addition, the use of indirect horizontal effect in the UK private law has not had extremely drastic results – although admittedly a new cause of action can be said to have been created following the case of *Campbell v Mirror Group Newspapers Ltd*,[8] individual modifications to the law have been incremental. The blurring of the boundaries between public and private is exacerbated not necessarily by the use of indirect horizontal effect in itself, but in the way that (as seen in Chapter 7 and mentioned below) the judiciary has not been particularly clear in explaining the theoretical reasoning behind it using human rights to modify rules of common law, avoiding meaningful engagement with the plethora of scholarly opinion on the matter. The distinction has been further blurred by the ways in which the UK courts have defined 'hybrid' public authorities in

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[4] ibid.
[5] ibid.
[6] ibid.
[7] Overall, the horizontal application of fundamental and human rights in this manner should be considered a 'positive phenomenon'. See Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law and Judicial Governance' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 136.
[8] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457.

Section 6(3)(b) HRA.[9] By treating some actors as private and falling outside of the scope of protection afforded by the HRA because of a restrictive approach as to what constitutes 'a person certain of whose functions are functions of a public nature' (although the same actions fall within the HRA when carried out by a public authority), as occurred in the case of *YL v Birmingham City Council*,[10] the courts have made it difficult to see what the distinction between public and private really is. As Stephanie Palmer has pointed out, the situation is reminiscent of 'Dicey's premise that the Rule of Law admits of no separation between public and private law'.[11]

However, while a lack of distinction between public and private *law* may be problematic, one has to question the extent to which the boundary between public and private *per se* remains useful in a society where many 'private' actors carry out 'public' tasks and where many 'private' actors are placed in a similar position to 'public' actors in terms of their ability to negatively impact (and in some situations even to *realise*) the enjoyment of human rights. Such considerations have called into question whether the public-private divide is useful or unhelpful as a construct,[12] particularly for deciding which actors should be subject to human rights obligations. While it is evidently well-entrenched in the United Kingdom, it may be possible to base an argument that a particular actor should have human rights obligations on a factor other than their public nature, for example their capacity, resources, or the level of impact that they can have on the enjoyment of

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[9] For an interesting discussion of this, see Stephanie Palmer, 'Public, Private and the Human Rights Act 1998: An Ideological Divide' (2007) 66(3) Cambridge Law Journal 559.
[10] *YL v Birmingham City Council* [2007] EWCA Civ 26; [2008] QB 1.
[11] Palmer (n 9), citing Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959).
[12] Such criticisms, based on the normative consequences of the divide, have been made in the context of domestic and international law. See e.g. Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10(2) European Journal of International Law 387; Catherine Moore, 'Women and Domestic Violence: The Public/Private Dichotomy in International Law' (2003) 7(4) The International Journal of Human Rights 93; and William Lucy and Alexander Williams, 'Public and Private: Neither Deep nor Meaningful?' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press 2013).

human rights. A discussion of this falls outside the scope of the present book, but has been the subject of several academic studies.[13]

Indirect horizontal effect can also be criticised for its lack of precision. Thomas Bennett, for example, has declared it to be 'an inexact method for the supposed protection of what are meant to the basic, fundamental rights of individuals'.[14] Stated in the context of indirect horizontal effect as seen in the UK legal system, Bennett considers indirect horizontal effect to be 'weakened by the fact that it tries to please everybody'.[15] This criticism should be given due credit, although it certainly should not be considered to nullify the significance of indirect horizontal effect. On the one hand, the consequence of successful indirect horizontal effect cases can be to further human rights protection and (especially at the regional and international levels which use States' obligation to protect human rights) to require the State to adopt more effective measures to protect individuals from harm by non-State actors. This goes further than a simple case-by-case impact, resulting in broader, and perhaps more institutional improvements for human rights protection. On the other hand, the positive impacts of indirect horizontal effect are constrained by the restrictions of the powers of courts to interpret international human rights law in a legitimate

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[13] The present study has been conducted to assess and suggest proposals for improving the respect, protect and fulfilment of human rights and human dignity in light of the impact of non-State actors, rather than to argue that (and why) non-State actors should be subject to legal human rights obligations. Andrew Clapham, for example, has discussed how human rights obligations have on occasion been placed on non-State armed groups because of their capacity and willingness to fulfil them. See Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 International Review of the Red Cross 491. The idea that some non-State actors should have human rights obligations because of the authority that they exercise in society is suggested by the Icelandic Human Rights Centre. See Icelandic Human Rights Centre, 'The Role of Non-State Entities' <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/the-role-of-non-state-entities> accessed 27 September 2017.

[14] Thomas DC Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1' (2010) 21 Entertainment Law Review 96.

[15] ibid.

way. Certainly within international law there are accepted limits to interpretation, laid down in the Vienna Convention on the Law of Treaties.[16] Courts, in abiding by these limits, are often unable to provide victims of human rights interference with effective remedies (or even hear cases concerning non-State actors) which would otherwise be available had the perpetration been done by a State actor. Herein lies the crux of the inadequacy of indirect horizontal effect in practice.

Courts within national legal systems must also be very mindful of their role as appliers, rather than *makers* of law. Within the United Kingdom, for example, it was seen in Chapter 7 that the courts have been very careful to respect the separation of powers and avoid usurping the role of Parliament to make law (e.g. in the case of *McDonald v McDonald*).[17] In respecting these boundaries, courts are often unable to provide victims of human rights interference with effective remedies that would otherwise be available had the perpetration been done by a public actor. Nonetheless, the large amount of case law and general comments entailing a degree of indirect horizontal effect at least draws attention to the fact that different kinds of non-State actors can have a huge and potentially negative impact on individuals' enjoyment of their rights. As well as the use of indirect horizontal effect in case law, the attention paid to non-State actors in general comments in particular demonstrates that the international human rights treaty monitoring bodies are aware of and aim to address human rights interference by non-State actors. Indirect horizontal effect in this context could thus even be said to have an awareness-raising role, as well as providing more concrete protection.

The implications of indirect horizontal effect also compensate to some extent for the fact that only States may ratify human rights treaties.

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[16] See Articles 31 and 32 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UNTS vol. 1155, 331. For an in-depth discussion of the rules of interpretation under the Convention, see Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010).
[17] *McDonald v McDonald* [2016] SC 28. See Chapter 7.4.2.

Indirect horizontal effect allows individuals the opportunity to access remedies for interferences of their human rights by non-State actors. However, the method used varies across the different legal systems studied. At the international and regional levels, wherein the human rights provisions are directly applied by the adjudicating bodies, individuals are granted access to redress by virtue of States' positive obligation to protect human rights. At the national (UK) level on which the international and regional treaties containing the human rights provisions are not directly applicable (due to the UK's dualist system), indirect horizontal effect is applied in a different manner and with different results, discussed below. The use of indirect horizontal effect at the regional and international levels showed that it has enabled scholars, law-makers and adjudicatory bodies to consider how different kinds of non-State actors interfere with the enjoyment of human rights and how States should address this, focusing on States' obligation to protect. Especially in general comments, which have a broader scope than individual complaints against a State Party to a human rights treaty, the human rights treaty monitoring bodies have been able to consider the treaties as 'living instruments' to afford the widest possible protection of human rights and consider how the treaties should apply in light of the particular threats brought by today's society. Nonetheless, as explained in Chapter 5, some non-State actors are left completely outside the application of indirect horizontal effect. At the national level, legislation has widened the definition of a public actor (thereby extending the amount of cases between public and private actors). In addition, courts have been able to bring human rights considerations into play in cases between two private actors by applying indirect horizontal effect. The three models of indirect horizontal effect identified below are based on these findings.

Before explaining the models, a few final comments need to be made regarding indirect horizontal effect from the point of view of different actors. First, indirect horizontal effect featured prominently in scholarly works on the national, regional and international levels. What is interesting, though, is that it was only at the national level that scholars actually used the terminology 'indirect horizontal effect'. While a few examples can be found

at the international level, most studies are coined in terms of positive obligations, 'horizontality', or 'horizontal effect' more generally. At the national level the discussion of theories of indirect horizontal effect threatens to become overwhelming, given the large number of theories of indirect horizontal effect identified. Although explained very clearly by scholars such as Alison Young and Gavin Phillipson, the complex and competing theories of indirect horizontal effect, which are not all applied in practice, make it perhaps less surprising that the judiciary at the national level has refrained from actively engaging with scholarly opinion on the matter.

At the international and regional levels, too, there was very little discussion of the more theoretical aspects of indirect horizontal effect by the human rights treaty monitoring bodies and courts. While most invoked States' positive obligations when applying indirect horizontal effect, some bodies did not mention, for example, the duty of due diligence, despite clearly using the language and elements of the duty. Similarly, while most bodies did mention 'private' actors, the vast majority did not use the language of 'horizontal effect' in views or general comments. The main exception to this was the HRCtee in its statement that the ICCPR does not in general have horizontal effect.[18] However, the lack of engagement with horizontal effect terminology has failed to prevent the monitoring bodies from looking closely at the way that States, and in some instances even 'actors other than States' should act in order to prevent violations of or interference with the enjoyment of human rights.[19]

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[18] See UN HRCtee, 'General Comment No. 31: General Legal Obligations Imposed on States Parties to the Covenant' (26 May 2004) CPR/C/21/Rev.1/Add.13, para 8, discussed in Chapter 5.2.1.

[19] Action that States should take in relation to non-State actors was seen very clearly in the CteeESCR's general comment on business and human rights. UN CteeESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) E/C.12/GC/24. Suggestions as to how non-State actors should act were found, for example, in General Comment Nos. 14 and 15 of the UN CteeESCR, which both included sections entitled 'Obligations of actors other than States'. See UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, Section 5; UN CteeESCR, 'General Comment No. 15: The Right to

## 8.3 The types of horizontal effect applied at the international, regional and national levels

Although the previous chapters of this book discussed many different theories of indirect horizontal effect, not all of them have been applied in the jurisprudence of the monitoring bodies and courts. The following analysis demonstrates the three main models of indirect horizontal effect that were applied on the international, regional and national levels: (1) diagonal indirect horizontal effect; (2) categorical indirect horizontal effect; and (3) value-driven indirect horizontal effect.

(1) Diagonal indirect horizontal effect

The first and most simple of the three models of indirect horizontal effect is 'diagonal' indirect horizontal effect, so-called because of the diagonal trajectory of responsibility for the violation of human rights under this method (see Figure 8.1). Diagonal indirect horizontal effect refers to what is quite a clear-cut method of acknowledging the harmful effects that non-State actors can have on human rights enjoyment. This model of indirect horizontal effect was actually explained in Chapter 3.3.1, and holds States responsible for the actions of non-State actors under the State's positive obligation to protect human rights. As seen in Chapters 5 and 6, the model is extremely widely applied in jurisprudence at the international and regional levels. Indeed, within the European human rights system, 'the establishment and development of the horizontal effect of the Convention is…in its entirety, a consequence of the theory of positive obligations'.[20] The reason for this is logical – only States can be party to the relevant human rights treaties, and only States can be the subject of complaints brought by individuals about violations of their rights, even if the harm that occurred was actually directly caused by a non-State actor. Therefore, the only way for human rights courts

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Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11, Section VI. This discussion took place in Chapter 5.3.

[20] Jean-François Akandji-Kombe, 'Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights' (2007) Human Rights Handbooks No. 7, 15.

and monitoring bodies on these levels to address the harmful actions of the non-State actors is to find a way to hold the State responsible for them. In essence, cases in which diagonal indirect horizontal effect is applied have the immediate consequence of invoking the international responsibility of the *State*, whilst their outcomes can require a *direct* standard of behaviour to be imposed on the non-State actor at the *national* level (for example, through the adoption of appropriate legislative measures by the State), thereby rendering them directly responsible at the national level. The non-State actors can be said to be *indirectly* responsible (although perhaps not in a legal sense) at the international level through the acknowledgement that their actions have interfered with the enjoyment of human rights and led to a human rights violation. Figure 8.1 depicts the diagonal relationship between actors and obligations that occurs in diagonal indirect horizontal effect.

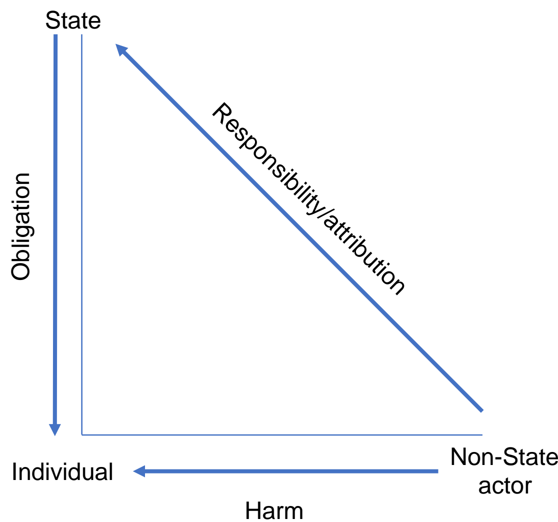


**Figure 8.1**: Diagonal indirect horizontal effect (source: the author)

The analysis in Chapter 5 showed that diagonal indirect horizontal effect is consistently applied by the different human rights treaty monitoring bodies, but is sometimes expressed in different manners. One of the main tenets of the obligation, applied by all of the bodies, is an obligation to take

legal, administrative or other appropriate measures to protect individuals from non-State actors – to adopt an appropriate framework within the State capable of preventing, investigating and punishing instances of non-State actor interference with human rights. In other words, the monitoring bodies uphold the standards of due diligence. This was found across the range of treaty bodies examined and in relation to different kinds of non-State actors, including private individuals (i.e. spouses), private companies and private providers of public services. This has not been made explicit by each of the bodies every time that they appear to apply the obligation (especially for the CteeESCR) although the actual standards upheld do appear to be consistent. The same outcome was found at the regional level, where different terminology was used in the three systems analysed to reflect very similar content of obligations and standards.

The obligation of due diligence has often been applied when the non-State actor interfering with human rights operates in the purely private sphere. At the international level this was particularly true of those monitoring bodies dealing with issues of discrimination (i.e. the CteeEDAW and CteeERD), which very commonly occurs in purely private relationships between two individuals. The jurisprudence from the regional human rights systems again showed a lot of congruence with the international bodies in this respect (e.g. in the case of *Jessica Lenahan (Gonzales) v United* States).[21] As explained in Chapter 1.3.3, the duty is one of conduct, rather than result, meaning that the test for whether due diligence has been taken rests not on the positive outcome of due diligence measures but on the nature and extent of measures taken in a particular situation. This has led the international monitoring bodies to take an approach of listing possible action to be taken in their general comments, although it is not possible to create an exhaustive checklist of protective measures to combat every circumstance of human rights interference by non-State actors. The general comments have by now provided quite an extensive array of measures that States should be taking in

[21] *Jessica Lenahan (Gonzales) v United States*, IACHR Report No. 80/11 Case 12.626 (21 July 2011).

different subject-areas (e.g. regarding employment, or the provision of services) or in relation to specific rights within their respective conventions.

As well as the duty of due diligence (or perhaps even part of it, as the bodies' practice is not clear on this point), diagonal indirect horizontal effect can be applied where States have not fulfilled an obligation to regulate private actors. The obligation has been upheld in the jurisprudence of each of the UN monitoring bodies except for the CteeAT, and is particularly elucidated in the context of privatisation or the delegation of 'public' tasks to non-State actors, as well as in the 'quasi-public sphere', such as employment. The same can be said of the regional human rights courts (and commissions) which have also upheld a State obligation to regulate non-State actors alongside a clear due diligence obligation. Examples at the regional level include the well-known case of *Fadeyeva v Russia*[22] at the European Court of Human Rights and the case of *Ximenes-Lopes v Brazil* at the Inter-American Court of Human Rights.[23]

What is less clear about the interpretation and application of human rights by the UN monitoring bodies is to what extent they actually engage with the concept of attribution, at least from the perspective of State responsibility within international law. Although some of the bodies have mentioned that non-State actors' conduct can be attributed to the State, with the exception of the CteeESCR in its general comment on business and human rights, none of the bodies have explicitly engaged with the International Law Commission's DASR.[24] This begs the question whether the UN human rights treaty monitoring bodies view 'attribution' as simply another word for describing the way in which the obligation to protect works in practice, thus enabling the 'attribution' of non-State conduct to States in

[22] *Fadeyeva v Russia*, App No. 55723/00 (9 June 2005).

[23] *Ximenes-Lopes v Brazil*, IACHR (Ser. C) No. 149 (4 July 2006).

[24] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Vol. II Part Two Yearbook of the International Law Commission (as corrected) A/56/10, 30-143. Of course, this would only be possible in their practice after the publication of the DASR in 2001, but is still striking in light of the importance the DASR have now gained in international law.

the situations where the obligation to protect has not been fulfilled. If so, the language used could create confusion amongst international law scholars, aggravated by the explicit reference to DASR in the CteeESCR's General Comment No. 24.

At the regional level the situation is in one sense clearer, in that the human rights jurisprudence contains more direct explanations of how the conduct of non-State actors is being attributed to the State (although still not consistently following the international law rules on attribution). This included the case of *Fadeyeva v Russia* within the European system and the *Ogoni* case in the African system.[25] In the *Ogoni* case, for example, the fact that the Nigerian State had 'given the green light' to the private company whose actions had interfered with the enjoyment of human rights led the African Commission on Human and Peoples' Rights to conclude, in relation to some complaints, that the State was responsible for the non-State actors' activities and had violated the human rights.[26] In another sense, however, the use of 'attribution' arguments by the regional human rights courts is less clear – the continued use of attribution in connection with an obligation to regulate and a broader obligation to protect human rights makes it harder to differentiate between the two approaches, if indeed the bodies consider them to be different approaches.

It could be concluded that there are actually two types of diagonal indirect horizontal effect – the first based on the obligation to protect human rights (including due diligence and an obligation to regulate) and the second based on rules of attribution, or at least the finding of a sufficient nexus between the State and non-State actor. These could be named (1) protection--based diagonal indirect horizontal effect; and (2) attribution-based diagonal indirect horizontal effect. The two are closely related in that they both ultimately hold the State responsible at the international level for harmful activities conducted by non-State actors that interfered with the enjoyment of

[25] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No.155/96 (27 October 2001).
[26] ibid, discussed in Chapter 6.3.2.

human rights. The legal basis of each type is distinct, however. The possible confusion around attribution is caused by cases in which a combined approach is taken, looking both at the State's protective obligations *and* looking for a manner in which to connect the non-State actor's conduct to the State, but without using the language of attribution (as explained above). As was seen in the *Ogoni* case, it is even possible to use the two strands separately within one case that deals with violations of multiple rights. Although slightly different, both kinds of diagonal indirect horizontal effect can be said to place non-State actors under an indirect obligation to act in a particular way. Under the protection-based model, seen in cases such as *Habassi v Denmark*[27] and *B. d. B. v The Netherlands*[28] the conduct of the non-State actor will be further regulated through administrative, legislative or other measures that are adopted on a more general basis. Those actors whose behaviour is attributed to the State under the second model, such as in the cases of *Fadeyeva v Russia*,[29] *Ximenes-Lopes v Brazil*[30] and *Jessica Lenahan (Gonzales) v United States*[31] may, depending on the closeness of the relationship between the State and the non-State actor, be subject to more direct and/or specific oversight or supervision by the State.

Another aspect of the obligation to protect was briefly examined in Chapters 3 and 6, involving the balancing of one individual's rights against another's, leading to the restriction of the enjoyment of the first individual's rights in favour of the enjoyment of the second individual's rights. Although this has been treated as a separate approach by some authors,[32] the cases involving a balancing of rights (allowed pursuant to the 'legitimate limitations' clauses found in some provisions) arguably also fall under the

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[27] UN CteeERD, *Habassi v Denmark* (10/1997) UN Doc. CERD/C/54/D/10/1997 (17 March 1999), discussed in Chapter 5.6.2.
[28] UN HRCtee, *B. d. B. et al. v The Netherlands* (273/1989) UN Doc. Supp. No. 40 (A/44/40) 286 (30 March 1989), discussed in Chapter 5.2.2.
[29] *Fadeyeva v Russia* (n 23) discussed in Chapter 6.2.2.
[30] *Ximenes-Lopes v Brazil* (n 23) discussed in Chapter 6.4.2.
[31] *Jessica Lenahan (Gonzales) v United States* (n 21) discussed in Chapter 6.4.2.
[32] For example by Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)

obligation to protect human rights. Within the European human rights system, these cases (e.g. *Appleby v United Kingdom*) have certainly been discussed within the context of positive obligations under the ECHR.

(2) Categorical indirect horizontal effect

The second type of indirect horizontal effect that can be identified is 'categorical indirect horizontal effect'. The word 'categorical' is used here to reflect the adjudicatory bodies' re-categorisation of actors (i.e. the categorisation of private actors as public actors) for the purposes of human rights. This refers to cases in which human rights provision are being applied to what is ostensibly a private actor who is being treated, for the particular instance at hand, as a special kind of public actor – a 'quasi-public actor'. At first sight, this may appear similar to direct horizontal effect, in that the claimant of a human rights violation is able to obtain redress against the non-State actor themselves. However, the fact that the responsible actor is deemed to be a public actor in the particular circumstances of the case means that this method is actually a form of indirect horizontal effect – the redress is against a 'public' actor.

There are several ways in which this can be achieved. The first is by using a functional test, treating the non-State actor as a public actor because they are carrying out certain 'public' functions. Chapters 5 and 7 showed that this approach has been taken by the CteeAT, and can be found in Section 6(3)(b) of the HRA 1998, although the judiciary has not consistently *applied* the provision in this way.[33] The second way to achieve categorical indirect horizontal effect is by using an institutional test. This entails looking at whether the public actions that the non-State actor has taken have been institutionally delegated to them by a public actor, i.e. through a statute.

[33] The CteeAT applied this model in *Sadiq Shek Elmi v Australia v Australia* (120/1998) UN Doc. CAT/C/22/D/120/1998 (25 May 1999). Section 6(3)(b) HRA provides that 'any person certain of whose functions are functions of a public nature' falls within the definition of 'public authority', meaning that under Sections 6(1) and 6(5) they must act compatibly with the ECHR, in so far as they are carrying out public functions. Chapter 7.3.3.1 discussed the inconsistency in the application of Section 6(3)(b) by the UK judiciary.

Under a functional test, the kind and extent of public functions required to be carried out by the non-State actor in order for them to be classed as a public actor may vary. Taking the example of the Human Rights Act, no explanation is provided in Section 6(3)(b) of what a public function actually is – the provision simply extends the scope of the Act (and therefore the ECHR) to 'any person certain of whose functions are functions of a public nature'. As discussed in Chapter 7, the UK judiciary has struggled to apply Section 6(3)(b) in a consistent way, and has sometimes applied a mixed approach which has unfortunately failed to provide much coherent guidance on what kinds of functions are of a public nature. It has been repeated that the mere fact that a function being carried out by a non-State actor used to be conducted by a State actor does not suffice to render it a public function, creating some confusion between a functional and an institutional test (particularly in cases such as *R (Heather) v Leonard Cheshire Foundation*[34] and *YL v Birmingham City Council*[35]). However, other cases such as *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another*[36] took a more functional approach, and Antenor Hallo de Wolf has noted in the context of privatised water and sewerage utilities, at least the lower courts appear to assume that the body providing a privatised public service is carrying out public functions for the purposes of the HRA.[37]

At the international level the CteeAT has dealt with categorical indirect horizontal effect in relation to non-State armed groups. Given the nature of the groups and the fact that they are usually engaged in an armed conflict with the State in a particular territory, the public functions that they carry out are not delegated from a 'pure' public authority. Instead, the groups take up the responsibility for carrying out the public functions of their own accord. To be categorised as 'public' actors at the international level, a non-

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[34] *R (Heather) v Leonard Cheshire* Foundation [2002] EWCA Civ 366, [2002] HRLR 30.
[35] Palmer (n 9) 593.
[36] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2003] UKHL 37.
[37] See e.g. *Marcic v Thames Water Utilities Ltd* [2001] All ER 698, cited in Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 296.

State actor has to reach a higher threshold than at the national level. The CteeAT applied categorical indirect horizontal effect in the case of *Sadiq Shek Elmi v Australia*.[38] This case was discussed in depth in Chapter 5, in which it was explained that the group in question, vying for control of territory in Somalia, had 'prescribed its own laws and law enforcement mechanisms and [having] provided their own education, health and taxation system',[39] and was 'exercising certain prerogatives that [were] comparable to those normally exercised by legitimate governments'.[40] This was sufficient for the CteeAT to determine that the group was carrying out 'quasi-governmental' tasks and could be capable of committing torture despite the requirement in Article 1 CAT that a public official be involved in order to consider something torture. Nonetheless, Chapter 5 also stressed that the case is not likely to be followed in the future (as shown by subsequent cases) because of its very particular circumstances. The fact that the CteeAT's opinion did not lead to a finding that the group *had* violated a human right, but rather that Australia, a State Party to the CAT, *would* violate the Convention if it carried out its intention to extradite the claimant to Somalia also plays a role in the limited precedential value of the case (which is naturally exacerbated by the fact that the CteeAT does not have a system of precedence). To date, although *Sadiq Shek Elmi v Australia* is significant, it remains one of very few examples of categorical indirect horizontal effect at the international level. Nonetheless, it opens the door for future general comments and case law to apply a similar approach, which was arguably done by the CteeEDAW in its General Recommendation No. 30.[41]

The advantage of categorical indirect horizontal effect lies in the fact that (at least at the national level) victims are able to get redress directly against the actor responsible for the interference with the enjoyment of their human rights. However, it has been applied in very limited situations and it

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[38] *Sadiq Shek Elmi v Australia* (n 33).
[39] ibid para 5.5.
[40] ibid para. 6.5.
[41] UN CteeEDAW, 'General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' (1 November 2013) CEDAW/C/GC/30.

does further blur the distinction between what constitutes a public and a private actor. This may make it difficult for both victims and the 'quasi-public' actors themselves to know when a particular actor and the conduction of certain functions would need to comply with the standards found in human rights provisions. That being said, the fact that the United Kingdom does have a system of precedence has not particularly helped the consistency, clarity or coherence of applications of categorical indirect horizontal effect. Indeed, on more than one occasion, the outcome of cases has led to such negative results that Parliament has had to intervene and enact additional legislation to provide wider protection of human rights (see Chapter 7.3.3.1).

(3) Value-driven indirect horizontal effect

'Value-driven indirect horizontal effect' is the third and final method of indirect horizontal effect found in the analyses of the human rights jurisprudence at the international, regional and national levels. It does not concern the application of human rights provisions between private parties, but it does apply in cases between two private individuals. Put simply, value-driven indirect horizontal effect involves adjudicatory bodies invoking the values that are protected by human rights in order to determine the way in which relevant private laws should be interpreted. The role for human rights in cases in which value-driven indirect horizontal effect is applied is thus an interpretative tool. To explain further, value-driven indirect horizontal effect refers to the application of existing law (which is not human rights law) 'in light of the *values* represented by any applicable [human rights], in recognition that the actions by private individuals can produce similar or identical effects or harms to those of governmental bodies'.[42]

In the analyses in Chapters 3-7, clear examples of value-driven indirect horizontal effect were only found in the jurisprudence at the national level, within the United Kingdom, although a similar approach was briefly

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[42] As will be explained below, value-driven indirect horizontal effect therefore mirrors Gavin Phillipson's 'weak' indirect horizontal effect discussed in Chapter 7.3.2. Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper ?' (1999) 62(6) 824, 830.

discussed in Chapter 6 in the practice of the ECtHR. The discussion of the case of *Pla and Puncernau v Andorra*,[43] suggested that the influence of the ECHR on private relationships that occurs through an assessment by the ECtHR of the interpretation of a private act (in that case, a will) is similar to the influence that the ECHR has on private relationships in private, common law cases within the UK. It is such cases that demonstrate value-driven indirect horizontal effect.

If there is no possibility that a private body can be classed as a 'hybrid' public authority for the purposes of Section 6(3)(b), the possibility that the *basis* of a claim could be against the ostensibly private actor is excluded. However, it has been possible for the ECHR to come into play against a private actor once an action has already been brought before a national court. This is made possible by arguing that the court, as a public authority, must apply the Convention standards in its interpretation and application of the law.

Value-driven indirect horizontal effect actually encompasses Gavin Phillipson's 'weak' indirect horizontal effect, discussed in Chapter 7.3.2. Phillipson's theory was that indirect horizontal effect could be either 'strong' or 'weak', depending on whether the ECHR is considered in interpretation as *rights* (the 'strong' model) or as *principles/values* (the 'weak' model). This distinction is useful and has been widely adopted, but it is possible that using the terminology 'weak' and 'strong' could encourage an assumption as to whether the practical effects of each model are 'better' or 'worse' than the other.

As mentioned above, value-driven indirect horizontal effect, which was seen to feature almost exclusively in domestic cases between two private actors, regards the application of laws that are not human rights laws. The role of human rights as an interpretative tool explains why value-driven indirect horizontal effect is not witnessed in cases before the UN human rights treaty monitoring bodies, since they concern only the application of international human rights law. The UK judiciary, on the other hand, is

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[43] *Pla and Puncernau v Andorra*, App No. 69498/01 (13 July 2004).

actually obliged to take the ECHR into account when it is making a decision in a private, common law case. Sections 6(1) and 6(3)(a) HRA 1998*require* that courts act compatibly with the ECHR. As explained in Chapter 7.3.2, this could mean several different things, but the case law of the courts shows an inclination towards value-driven horizontal effect. It also appears to limit itself to what Phillipson and Alexander Williams label the 'constitutional constraint model', meaning that while the courts have an obligation to develop the common law in a way that renders it compatible with the ECHR, the obligation only applies to the extent that the courts can modify the common law incrementally – there is no obligation on the courts to simply create new causes of action that would allow for horizontal effect of the Convention.[44]

However, value-driven indirect horizontal effect, particularly as currently applied within the United Kingdom, lacks clarity. As demonstrated in Chapter 7, the way in which the courts have dealt with their obligation under Section 6 HRA has not been fully consistent, and the judiciary seems (for the most part) to have been reluctant to fully engage with theories of horizontal effect and explain the approach that it is taking in a specific case. If applied outside of the United Kingdom, which has a strong system of precedence, the transparency of this model could be even more problematic, unless judges become more explicit about the way in which they are applying indirect horizontal effect in specific cases.

It cannot be said that under value-driven indirect horizontal effect the UK courts are actually able to place human rights obligations on private actors, although they do indirectly require non-State actors to abide by human rights standards by using human rights values to alter the standards of conduct required in the private law in question. There is actually much to be said, in relation to some rights (following the findings in Chapters 5 and 7 that a right-by-right approach is often taken), for placing obligations only on public entities, or at least only on entities which are carrying out a public

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[44] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 Modern Law Review 878.

function; purely private entities simply do not have the capacity to fulfil some human rights obligations to the same extent as States (e.g. the right to a fair trial).

The approach of the UK in private common law disputes remains, in Phillipson's words, quite 'weak', but this is not surprising in light of the human rights law framework (the HRA). Given that, as Phillipson explains, there is actually no direct implementation of the ECHR into domestic law through the HRA, the rights contained in the instrument can only amount, in the private sphere, to 'legal values and principles', in contrast to the 'clear entitlements' the rights afford when they are invoked against public authorities.[45] This differs from other States, such as the Netherlands, which allow for the direct incorporation of the ECHR in their national jurisdiction.[46] Doing so removes the limit that is placed on which individuals can submit a claim to the ECtHR through the requirements relating to the *ratione personae* of the case.[47] Andrew Clapham has (correctly) questioned arguments that in such cases the rights contained in the ECHR have direct horizontal effect because the judges in the national courts are bound to ensure their respect.[48] He does, however, acknowledge that in some cases this may be true, especially given Frédéric Sudre's evidence that the French Cour de Cassation does in fact apply the Convention between private parties.[49] This is a rather rare situation, although it may be preferable to that of the United Kingdom since there would be no limitation of requiring the classification of a non-State actor as a public authority. However, in most cases, Clapham points out, there would still be limitations in place through the terms of incorporation of the Convention,[50] thus not in reality immediately offering this wider scope of protection.

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[45] Phillipson (n 42) 837.
[46] See Chapter 6.2.3, footnote 92.
[47] This refers to the criteria found in Article 34 ECHR and was discussed in Chapter 7.3.3.3. See Clapham, *Human Rights Obligations of Non-State Actors* (n 32).
[48] ibid 350.
[49] Frédéric Sudre (2000) 1369, cited in Clapham, *Human Rights Obligations of Non-State Actors* (n 32) 349.
[50] Clapham, *Human Rights Obligations of Non-State Actors* (n 32) 350.

## 8.4 Concluding reflections on indirect horizontal effect

There are many examples demonstrating that human rights treaty monitoring bodies and courts do not shy away from engaging with harmful conduct by non-State actors that interfere with the enjoyment of human rights. The many theories of horizontal effect discussed in Chapters 3-7 can actually, in practice, be boiled down to three main types of indirect horizontal effect. While each type is different and has a different (legal) basis, they all open the way for individuals to gain redress for human rights interference caused by non-State actors. Similarly, to differing degrees they each uphold human rights standards vis-à-vis non-State actors, whether by: (1) requiring States to take measures to ensure that this happens (diagonal indirect horizontal effect); (2) re-categorising certain non-State actors as public actors for the purposes of a particular complaint (categorical indirect horizontal effect); or (3) modifying (the interpretation of) rules of private law to ensure that human rights values are protected, even if this requires a private actor to comply with human rights standards (value-driven indirect horizontal effect). All three therefore go some way towards closing the gap in human rights protection that is left by the current international human rights law framework.

However, the analyses show that the application/use of each model by monitoring bodies and courts on all levels examined are inconsistent and sometimes incoherent. Sometimes the inconsistency stems from the language used by the relevant body, despite the concrete standards and outcomes of the cases being very similar to one another (e.g. the use or non-use of the terms 'due diligence' and the 'obligation to protect' human rights). On other, more worrisome occasions, the inconsistency or incoherence stems from the content of the standards applied (e.g. the test used to determine whether an actor is a hybrid public authority under the Human Rights Act 1998). A general lack of willingness and ability (in the sense that both monitoring bodies and courts must act within the confines of their mandates and legal systems in which they operate) to actively engage with theoretical concepts and scholarly opinion relating to horizontal effect and to use particular terminology further obfuscates the clarity that such cases could bring to the issue of horizontal effect. As it stands, although the three models of indirect

horizontal effect can be clearly seen in jurisprudence, it remains unclear for individuals, non-State actors and to some extent also States, exactly what conduct can be and is expected of different kinds of non-State actors vis-à-vis human rights. Indeed, the majority of practice at the international and regional levels focused almost exclusively on the standards of behaviour expected of States without explaining the standard of conduct expected of non-State actors. This has the effect that individuals may not be aware of when their human rights have been violated, or whether they are able to file a complaint against the State for the harm they have suffered. Additionally, at least at the international and regional levels, non-State actors may not be aware of the conduct that is expected of them. It also seems as though monitoring bodies and courts have actually gone as far as they can do within the confines of their mandates and legal frameworks in individual cases to achieve more protection for human rights. The methods being used to achieve indirect horizontal effect have not actually changed much over the years in which they have been applied, although the CteeESCR seems to be considerate of the current developments regarding businesses and human rights.

Perhaps human rights law has reached a stalemate with this issue – further progress in holding non-State actors responsible for the harm they cause to human rights may not be made in international human rights law as it currently stands. Much progress remains to be made, however, especially considering the inability of indirect horizontal effect to provide consistent, comprehensive protection for individuals from the harmful conduct of non-State actors. This leaves us with two main avenues for moving forwards – expanding the scope of international human rights law to apply to non-State actors, or looking outside of the legal framework to improve the conduct of non-State actors for what concerns human rights. To an extent, both of these are already being done. For example, a binding treaty on business and human rights, as mentioned before, is now being negotiated, although its success remains to be seen. Measures are being taken outside of the international human rights law framework (certainly outside of *binding* human rights law) to encourage non-State actors to abide by human rights standards, but efforts

are currently quite fragmented and have very different rates of success. The following chapter will suggest a way to strengthen efforts being taken beyond (but including) the legal framework by taking a governance approach to international human rights.

Chapter 9

# A proposal to move beyond achieving horizontal effect of human rights through international human rights law

## 9.1 Preliminary remarks

The previous chapters of this book have shown that international human rights law still struggles to give non-State actors a direct (legal) role in the protection and realisation of human rights. Substantial gaps remain in the legal framework despite the progress made towards bringing non-State actors into the system, through indirect horizontal effect by international treaties, courts and treaty bodies, the balancing of different rights against each other, the limitation of human rights etc. Consequently, non-State actors often cannot be held responsible for causing violations of human rights.

This chapter suggests that a broader, governance approach be taken to international human rights. Specifically, a multi-level governance approach is suggested, which would utilise the strengths of both the legally binding and the soft-law and other, extra-legal mechanisms already existing in a coordinated governance system that adheres to principles of good governance. Multi-level governance regimes involve taking a multi-stakeholder approach, accepting different State and non-State actors' role in the performance of governance activities on different levels, namely the local, national, regional and international levels.

The chapter is divided into three main parts. The first, Section 9.2, discusses some current understandings of governance and provides the definition of governance that is used throughout the rest of the study. In

particular, the notion of 'governance beyond government' is explained, as well as the current governance of international human rights and its placement within global governance are explained in Section 9.2. The concept of 'good governance' and its close relationship with human rights and human rights-based approaches are then discussed in Section 9.3. Examples from the governance of international human rights are used throughout Sections 9.2 and 9.3. The third part of the chapter, Section 9.4, introduces the theory of multi-level governance and brings each aspect and theory of governance adopted in the chapter together. This lays down the foundations for Chapters 10 and 11, in which the multi-level governance approach to international human rights suggested by this study is applied to the case studies of the World Bank and non-State armed groups. Overall, the chapter aims to answer the research question: 'Moving beyond horizontal effect through human rights *law*, how can a *governance* approach to human rights be envisaged?'.

## 9.2 What is governance?

This section begins by providing a definition of governance more broadly, before highlighting the aspect of governance that is key to this study – governance beyond government. Pinning down a universally acceptable definition of governance is notoriously difficult, and by now many different formulations have been given and used in various contexts. Indeed, governance has been described as 'many things, including a buzzword, a fad, a framing device, a bridging concept, an umbrella concept, a descriptive concept, a slippery concept, an empty signifier, a weasel word, a fetish, a field, an approach, a theory and a perspective'.[1] The current study uses governance as both an approach and a concept. Governance as a concept is used to describe a system of governing international human rights, whereas governance as an approach is used as an alternative to a legal approach. The difference between legal and governance approaches, and indeed law and

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[1] David Levi-Faur, 'From "Big Government" to "Big Governance"?' in David Levi-faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012) 3.

governance, must be clarified before embarking on an in-depth discussion of governance as a concept. This is particularly important in light of the research question answered by this chapter and the intended audience of this book (primarily legal scholars). Nowadays, there is a clear distinction between 'law' and 'governance' approaches to societal issues. A legal approach focuses, as the first 8 chapters of this book, on the laws in place to solve a particular societal issue. In contrast, a governance approach includes extra-legal and less formal activities by a variety of actors. Thus, while a governance approach includes legal measures, it is a much broader and more inclusive approach that allows regulations, policies and guidelines to contribute to solving an issue. Studies that address societal issues from both a law and a governance perspective, of which the current book is one, are considered to take a 'law *and* governance' approach and are becoming more common within academia.[2]

The concept of governance will now be defined and explained. 'Governance' has been practiced for many, many years and can be traced back to classical Latin and Greek as a reference 'to the action or way of managing or coordinating interdependent activities'.[3] Over time, numerous different definitions of governance have been offered, but many scholars support the assertion that governance can be said to exist to 'steer' the behaviour of different actors in order to achieve a common purpose.[4] The

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[2] This can be seen, for example, in the establishment of law and governance institutions, such as the 'Netherlands Institute for Law and Governance', or law and governance departments/research centres within universities. See Aurelia Colombi Ciacchi, 'Comparative Law and Governance: Towards a New Research Method' in Aurelia Colombi Ciacchi and others (eds), *Law and Governance: Beyond the Public-Private Law Divide* (Eleven International Publishing 2013) 223.

[3] W Andy Knight, 'Global Governance as a Summative Phenomenon' in Jim Whitman (ed), *Palgrave Advances in Global Governance* (Palgrave Macmillan 2009) 166.

[4] This belief is held, for example, by Stephen Bell and Andrew Hindmoor, W Andy Knight, Marie-Claude Smouts and James N Rosenau. See Stephen Bell and Andrew Hindmoor, *Rethinking Governance: The Centrality of the State in Modern Society* (Cambridge University Press 2009) 1; Knight (n 3) 178; Marie-Claude Smouts, 'The Proper Use of Governance in International Relations' (1998) 50(155) International Social Science Journal 81, 82; and James N Rosenau, 'Governance in the Twenty-First Century' in Jim Whitman (ed), *Palgrave*

notion that governance is a system that deals with the management and coordination of activities is also very common. This is visible in the World Bank's definition of governance as 'the manner in which power is exercised in the management of a country's economic and social resources for development',[5] as well as in the definition provided by the United Nations Development Programme (UNDP). The UNDP considers governance to be:

> the exercise of political, economic and administrative authority in the management of a country's affairs at all levels. It comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences. Governance encompasses, but also transcends, government. It encompasses all relevant groups, including the private sector and civil society organizations.[6]

This definition is particularly relevant for the context of the current study. This is because, as will be shown in Section 9.2.2, the governance of international human rights comprises activities taken on multiple levels, consists of various mechanisms, processes and institutions and encompasses different groups and actors, including the private sector and civil society organisations. Of course, international human rights also concern the exercise of legal rights (afforded to citizens through international human rights law) and obligations. For these reasons, the UNDP's definition of governance will be followed by the present study.

According to this definition, the management of affairs can be considered to be the *purpose* of governance, which can be said to comprise the tasks of drafting, adopting, implementing and enforcing rules, or standards, and the mechanisms, processes and institutions that exist to

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*Advances in Global Governance* (Palgrave Macmillan 2009) 8.

[5] Carlos Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality' (2001) 7(1) The Georgetown Public Policy Review 1, 3.

[6] UN Development Programme (UNDP), 'Disaster Risk Reduction, Governance & Mainstreaming' <http://www.preventionweb.net/files/17429_4disasterriskreductiongovernance1.pdf> acessed 21 September 2017.

achieve these tasks. As the UNDP's definition goes on to suggest, governance involves many different actors, including State actors and different kinds of non-State actors. Together with the assertion that governance 'transcends' government, this suggests that different actors may conduct the various governance tasks. This relates very strongly to the notion of 'governance beyond government', which is central to this study's definition of governance and will be explained in detail in the following sub-section.

### *9.2.1 Governance beyond government*

Whether governance means something equal to, less than, or more than 'government' has been a topic of hot debate in governance literature. While there are still disagreements as to what the distinction between governance and government is, this study takes the stance that governance includes, but is not restricted to, governmental activity and governmental actors.

Governance is understood in this study as referring to 'activit[ies] independent of the numbers and kinds of actors carrying [them] out.'[7] Indeed, a crucial characteristic of governance is that 'the state increasingly depends on other organizations to secure its intentions, deliver its policies, and establish a pattern of rule', i.e. to draft, adopt, implement and enforce standards and rules.[8] Awareness is certainly growing of the fact that non-State actors have been able to establish patterns of rule 'in the absence of state activity'.[9] In the context of international human rights, examples of State dependency on non-State actors to implement standards can be seen in the delegation by States of certain public functions (for example the provision of public services) to private actors in order to fulfil the State's international obligations. This was seen on several occasions in Chapters 5 and 6 of this study in relation to privatised services such as water or healthcare, where, due to lack of resources, States delegate the *de facto* fulfilment of a human right

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[7] Michael Zürn, 'Global Governance as Multi-Level Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012) 730.
[8] Mark Bevir, 'Governance' in Mark Bevir (ed), *Encyclopedia of Governance* (SAGE Publications 2007).
[9] ibid.

to private actors. An example of the ability of non-State actors to establish patterns of rule without the State is the self-regulation of several types of non-State actors for what concerns human rights. Business enterprises and NGOs have been especially active in this respect, particularly within certain topic areas. Many businesses in the garment industry have now adopted codes of conduct regarding worker's rights,[10] while several large NGOs have developed and adopted standards and guidelines in relation to the protection of human rights during disasters.[11] Ultimately, although nation-States remain the primary *legal* actors, they are by no means the only relevant or capable entities for drafting, adopting, implementing and enforcing international standards.[12]

To succinctly describe the growth of governance beyond government,

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[10] An example is the company Tommy Hilfiger (owned by PVH Corp.) which includes standards concerning non-discrimination, forced labour, child labour, health and safety and hours of work, among others. The code is available at <http://www.pvh.com/responsibility/policy/shared-commitment> accessed 2 January 2018. Many codes of conduct that contain provisions regarding workers' rights focus on forced labour and child labour. See e.g. the code of conduct of H&M, Section 2 <http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/codeofconduct/Code%20of%20Conduct_en.pdf> accessed 2 January 2018; the 'Topshop Code of Conduct' <http://eu.topshop.com/pdf/tscodeofconduct.pdf> accessed 2 January 2018; and the Code of Conduct of America Today, available online at <https://www.america-today.com/fr/code-of-conduct> accessed 2 January 2018.

[11] A well-known self-regulatory initiative by NGOs is the Sphere Project, 'Humanitarian Charter and Sphere Minimum Standards in humanitarian Response' (2011) <http://www.sphereproject.org/handbook/> accessed 2 January 2018. This document is grounded in the core international human rights law treaties. Other such initiatives have been taken by NGOs working together with other actors (such as UN organisations). See e.g. the Inter-Agency Standing Committee, 'Operational Guidelines on the Protection of Persons in Situations of Natural Disaster' (2011) <http://www.ohchr.org/Documents/Issues/IDPersons/OperationalGuidelines_IDP.pdf> accessed 2 January 2018. Both initiatives are discussed in Marlies Hesselman and Lottie Lane, 'Disasters and Non-State Actors – Human Rights-Based Approaches' (2017) 5(6) Disaster Prevention and Management 526, 533.

[12] As David Levi-Faur puts it: 'The idea of a sovereign state that governs society top-down through laws, rules and detailed regulations has lost its grip and is being replaced by new ideas about a decentered governance based on interdependence, negotiation and trust.' See Levi-Faur, 'From "Big Government" to "Big Governance"?' (n 1) 10.

the language of 'shifts' in governance can be used. There are three kinds of shifts of governance functions that were traditionally done by the State and are now being taken over by or delegated to other actors.[13] The first is an 'upward' shift, with governance activities moving from the national to the regional, transnational, intergovernmental, and global spheres.[14] In the context of international human rights, the upward shift has led to governance by (for example) regional and international organisations, such as the United Nations and the World Bank. The second is a shift 'downward', to the local, regional and metropolitan levels within a State. The third shift is horizontal, which is the shift 'to private and civil spheres of authority'.[15] In the context of international human rights this has led in particular to governance activities being undertaken by non-governmental organisations, international organisations and the private sector.

The shifts in governance, and the move from government to governance more broadly, an umbrella term for which is the 'hollowing out of the State', raise questions of the continued role and relevance of the State. This is particularly true in the context of human rights, where according to the current legal framework the State retains a central role. Some scholars believe that non-State actors usurp State authority and leave a weakened and less authoritative State behind,[16] or even render the State irrelevant to governance.[17] However, as evident in the example provided above regarding

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[13] ibid 7.
[14] ibid.
[15] ibid. Samantha Jones and others, who also use the notion of shifts of governance, describe this kind as an 'outwards' shift. See Samantha Jones and others 'Governance Struggles and Policy Processes in Disaster Risk Reduction: A Case Study from Nepal' (2014) 57 Geoforum 78, 79.
[16] For discussion of the 'hollowing out' of the State, see e.g. Roderick A W Rhodes, 'The Hollowing Out of the State - the Changing Nature of the Public-Service in Britain' (1994) 65(2) Political Quarterly 138; Vasudha Chhotray and Gerry Stoker, *Governance Theory and Practice: A Cross-Disciplinary Approach* (Palgrave Macmillan 2009) 86-87; Janet Newman, *Remaking Governance: Peoples, Politics and the Public Sphere* (Policy Press, University of Bristol 2005), discussed in Bell and Hindmoor (n 4) 1-19; and Samantha Jones and others (n 15) 78.
[17] Eva Sørensen and Jacob Torfing, 'The Democratic Anchorage of Governance Networks'

the delegation of public services, it is often the case that States intentionally delegate certain tasks or even authority to non-State actors. Ultimately, the end result and consequence for the State is that while it retains a central role, 'it no longer monopolizes the governing of the general well-being of the population in the way that it used to do.'[18] In other words, and bringing us back to the definition of governance provided by the UNDP and adopted by this thesis, the role of the State in international human rights governance can be said to be limited to 'steering', whereas the 'rowing' should be left to other actors.[19] When this occurs through shifts in governance to non-State actors, it can be considered to be an expansion, rather than decline of the State, which is trying to govern better rather than govern less.[20]

A potential risk of governance beyond government lies in the fact that there does not appear to be a limit to the number of actors that can be involved in governance. This may lead to a situation of fragmentation or duplication of standards and governance activities pertaining to a particular subject area or actor, while gaps exist in relation to other areas. In the context of the present study, the questions are therefore raised of how the governance of international human rights can be organised and tasks distributed, and how the system can maximise the achievement of its purpose.

A second, and related concern is that there is no general standard of how formalised activities need to be in order to be described as governance. This issue, together with the first risk of governance beyond government, can lead to questions of legitimacy of a governance system, which are often not

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(2005) 28(3) Scandinavian Political Studies 195, 195-196, cited in Levi-Faur, 'From "Big Government" to "Big Governance"?' (n 1) 10.

[18] ibid, cited in Levi-Faur, 'From "Big Government" to "Big Governance"?' (n 1) 10.

[19] Claus Offe, 'Governance: An "Empty Signifier"' (2009) 16(4) Constellations 550, 555, cited in Levi-Faur, 'From "Big Government" to "Big Governance"?' (n 1) 2.

[20] Bell and Hindmoor (n 4), discussing Tabatha Wallington, Geoffrey Lawrence and Barton Loechel, 'Reflections on the Legitimacy of Regional Environmental Governance: Lessons from Australia's Experiment in Natural Resource Management' (2008) 10(1) Journal of Environmental Policy & Planning 3. See also Barton Loechel, Geoffrey Lawrence and Lynda Cheshire, 'Multi-sectoral collaboration in Central Queensland: bringing the state back in? (2005) Paper presented at the United National International Conference on Engaging Communities, August 14-17, Brisbane, Australia.

answered, or even considered in governance literature.[21] These two challenges will be addressed in the remaining sections of this chapter. In particular, the issue of legitimacy will be dealt with in relation to the particular governance theory suggested by this chapter – multi-level governance – in Section 9.4.

*9.2.2 The governance of international human rights*

The definition of governance as explained above will now be applied to the context of international human rights. In this section, the main governance actors in the protection of international human rights are introduced. The explanation is not exhaustive, but intends to provide an overview of what is meant by the governance of international human rights. This overview will feed into the remaining sections of this chapter.

The governance of international human rights occurs on several levels and by many different actors. The purpose of the governance of international human rights is to steer relevant actors (including non-State actors) in order to achieve better respect, protection and fulfilment of human rights. Bearing in mind the purpose of human rights themselves as enabling a life of dignity, as explained in the introduction to this book, it could ultimately be said that the purpose of the governance of international human rights is to further human dignity.

At the international level, the United Nations human rights system can be taken as the starting point for human rights governance. This system consists of instruments, mechanisms, procedures and processes for improving human rights protection throughout the world. These are of both a binding nature (i.e. the UN human rights treaties and relevant customary international law) and a non-binding nature (e.g. the UN Guiding Principles on Business and Human Rights, and the individual complaints procedures before the UN human rights treaty monitoring bodies). As well as institutions

[21] This has led to criticisms of scholars' use of governance theories, particularly for what concerns legitimacy. This will be discussed below, in Section 9.4.3.4. See, in the context of multi-level governance, Yannis Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13(4) European Law Journal 469.

and organs established under the auspices of the United Nations themselves that play a large role in the governance of international human rights (e.g. the General Assembly, the Human Rights Council and the UN treaty monitoring bodies), other actors contribute to the drafting, adoption, implementation and enforcement of international human rights standards. A key actor, of course, is States. As explained in Chapter 2 of this book, States are the primary subjects of international law. They therefore have a predominant role in the drafting and adoption of legal standards at the international and regional levels, as well as implementation at the national level. Beyond legal standards, States also play a large role in extra-legal governance activities, such as the adoption of policies, memoranda of understanding and aspirational instruments such as the Sustainable Development Goals,[22] at the sub-national, national, bilateral, regional and international levels.

Additionally, a variety of non-State actors participate in many different ways and to different extents in all aspects of human rights governance, on different levels. For example, NGOs commonly lobby governments and international organisations, provide shadow reports on the implementation of human rights in practice (for example to the human rights treaty monitoring bodies), submit amicus curiae briefs on behalf of individuals (e.g. the Social and Economic Rights Action Center and the Center for Economic and Social Rights on behalf of the Ogoni people in Nigeria[23]), provide free legal assistance, draft guidelines for various actors regarding human rights protection,[24] provide other non-State actors with guidance on how they can better respect/protect human rights (e.g. the NGO Bettercoal in relation to coal companies[25]), take human rights-based

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[22] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No.155/96 (27 October 2001).

[23] This was seen in Chapter 6 in the discussion of the African system of human rights protection. See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Communication No.155/96 (27 October 2001).

[24] An overview of guidelines on human rights prepared by NGOs, for example, can be found on the Business and Human Rights Resource Centre Website <https://www.business-humanrights.org/principles/guidelines-prepared-by-ngos> accessed 2 January 2018.

[25] Bettercoal is an NGO that helps coal suppliers improve their corporate responsibility,

approaches themselves,[26] participate in and contribute to the drafting of international human rights treaties, etc. NGOs operate at the sub-national, national, regional and international levels, and often constitute a crucial link between the levels and between different actors (this will be further discussed in Chapters 10 and 11 in relation to recommendations for moving towards a multi-level governance approach to international human rights).

By now, there are also several non-State dispute settlement bodies that operate internationally and deal with human rights issues (even if they are not human rights mechanisms *per se*). Examples here are the bodies briefly discussed in Chapter 3, which dealt with investment arbitration (the International Centre for Settlement of Disputes and the World Intellectual Property Organization). Arguably, though, it would also include bodies such as the Court of Arbitration for Sport (CAS), which constitutes the international dispute resolution body for sports. This body applies non-State regulations (e.g. FIFA's regulations), which increasingly include human rights provisions.[27]

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including regarding human rights, by using a 'reinforcing loop of improvement'. See <www.bettercoal.org/about> accessed 12 November 2017.

[26] Human rights-based approaches will be discussed in Section 9.3.2 below.

[27] For example, the April 2016 edition of the 'FIFA Statutes: Regulations Governing the Application of the Statutes' includes the provision that 'FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights' <https://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf> accessed 2 January 2018. FIFA also now has a Human Rights Policy and requires 'bidding member associations, the government and other entities involved in the organisation of the tournament' to implement human rights and labour standards. See respectively, 'FIFA's Human Rights Policy' (2017) <http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf> accessed 2 January 2018; 'FIFA Regulations for the selection of the venue for the final competition of the 2026 FIFA World Cup' <https://resources.fifa.com/mm/document/affederation/administration/02/91/60/99/biddingregulationsandregistration_neutral.pdf> accessed 2 January 2018; and FIFA, 'Guide to the Bidding Process for the 2026 FIFA World Cup' <http://resources.fifa.com/mm/document/affederation/administration/02/91/88/61/en_guidetothebiddingprocessforthe2026fifaworldcup_neutral.pdf> accessed 2 January 2018. For discussion of similar developments regarding the international Olympic Committee and

Other non-State actors involved in human rights governance include bodies such as the International Organization for Standardization (ISO), which has undertaken a lot of work concerning corporate social responsibility. ISO has, for example, adopted 'ISO 26000' in 2010, a multi-stakeholder initiative that 'provides guidance on how businesses and organizations can operate in a socially responsible way', including human rights.[28] ISO also helps organisations with the implementation of these standards, having organised initiatives such as a workshop to help organisations understand how they can operationalise ISO 26000.[29]

On a regional level, regional organisations have a huge role in the governance of international (or regional) human rights. The Organization of African Unity, the Organization of American States and the Council of Europe have adopted several instruments containing human rights standards, as discussed in Chapter 6. As also mentioned in Chapter 6, the European Union has become more active in relation to human rights over time, having initially focused on economic issues within the Union.[30] The Association of Southeast Asian Nations has also taken action for the protection of human rights, including the establishment of the ASEAN Intergovernmental Commission on Human Rights and the adoption of the ASEAN Declaration

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UEFA, see Tomáš Grell, 'Human Rights as Selection Criteria in Bidding Regulations for Mega-Sporting Events – Part 1: IOC and UEFA', Asser International Sports Law Blog (20 December 2017) <http://www.asser.nl/SportsLaw/Blog/author/Antoine%20Duval> accessed 2 January 2018.

[28] Negotiations that led to ISO 26000 involved government representatives, NGOs, industry, consumer groups and labour organisations. See the website of ISO <https://www.iso.org/iso-26000-social-responsibility.html> accessed 22 December 2017. The full ISO 26000 guidelines are available at <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>. For discussion of ISO 26000, particularly in the context of partnerships between public and private actors, see Rebecca Schmidt, 'The ISO 26000 Process as a Model for Public-Private Cooperation in a Fragmented Transnational Regulatory Space' (2013) IRPA Working Paper – GAL Series No. 5/2013.

[29] See the website of ISO <https://www.iso.org/iso-26000-social-responsibility.html> accessed 22 December 2017.

[30] This is evident in the Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, 391–407.

of Human Rights.[31]

Private companies, as seen in Chapters 5, 6 and 7, can also have a role in the governance of international human rights, particularly in the implementation of standards. This is evident in the fact that States often delegate the *de facto* fulfilment of certain human rights (e.g. the right to health, the right to water) to private or privatised companies.[32] The UN CteeESCR's general comment on business and human rights also demonstrates this, as well as the fact that business enterprises sometimes have more or better resources for fulfilling human rights, which the State may not have.[33] As well as this, many private companies, particularly multinational corporations, have adopted self-regulatory instruments that include provisions for the respect or protection of human rights, very often in the form of corporate codes of conduct or 'policy statements'.[34] A list of all companies that are known to have adopted codes of conduct or policy

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[31] For information on the work of the Commission, see <http://aichr.org/about/> accessed 22 December 2017. The Declaration was adopted on 18 November 2012 and is not legally binding. The text of the Declaration is <http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf> accessed 22 December 2017.

[32] For a thorough discussion, see Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011). In the context of the right to freedom of expression, see also Lottie Lane, 'Private Providers of Essential Public Services and *de jure* Responsibility for Human Rights' in Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge 2017).

[33] See UN CteeESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', 10 August 2017, E/C.12/GC/24, para 4, in which the Committee suggests that States should mobilise private resources as part of their obligation to fulfil human rights.

[34] For discussion of codes of conduct, see Rhys Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy' (2001) Technology, Business and Society Programme Paper Number 2, United Nations Research Institute for Social Development; Annegret Flohr, *Self-Regulation and Legalization: Making Global Rules for Banks and Corporations* (Palgrave Macmillan 2014); Alex Wawryk, 'Regulating Transnational Corporations through Corporate Codes of Conduct' in Jedrzej George Frynas and Scott Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan 2003) 53; and Orly Lobel, 'New Governance as Regulatory Governance' (2012) Legal Studies Research Paper Series Research Paper No. 12-101, 3. See also Lane, 'Private providers of essential public services and *de jure* responsibility for human rights' (n 32).

statements that include human rights provisions has been compiled by the Business and Human Rights Resource Centre, and includes banks, food and beverage companies, oil companies, supermarkets, law firms, electric companies, and many more.[35] As well as companies, some NGOs have adopted codes of conduct that include human rights provisions.[36]

Finally, it is important to highlight the role of local communities and individuals in the governance of international human rights. As human rights-holders, these actors are most often the victims of human rights violations and they often have a large role in the enforcement of human rights standards. This is not to say that local communities and individuals have the ability to enforce a standard *per se*, but under the international human rights law framework, at least, individuals are the only actors capable of being party to a complaint regarding a human rights violation (as discussed in Chapter 1 of this book) and thus trigger various human rights accountability mechanisms. Local communities may be victims of human rights violations arising from, for example, pollution caused by industrial plants, or the phenomenon of 'land grabbing', consequent to which the communities may find themselves being forcibly resettled or losing their homes.[37] Human rights accountability mechanisms have also been used in relation to the rights of local (indigenous) communities to own their ancestral lands.[38] Further, to a more limited extent, local communities and individuals may play a role in the implementation of human rights. This is certainly the case in times of disasters that have a negative effect on the enjoyment of human rights, where individuals and local

[35] See Business and Human Rights Resource Centre, 'Company policy statements on human rights' <https://business-humanrights.org/en/company-policy-statements-on-human-rights> accessed 22 December 2017.

[36] See e.g. Inter-Agency Standing Committee (n 11) discussed in Hesselman and Lane (n 11) 533.

[37] See e.g. European Parliament Think Tank, 'Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union' (2016) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_STU(2016)578007> accessed 22 December 2017.

[38] This occurred in the case of *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACHR (Ser. C) No. 79 (31 August 2001).

communities are often the first responders and take upon themselves the responsibility to provide human rights-related assistance.[39]

While the above discussion only provides an overview of the governance of international human rights, it is evident that many actors are involved in different governance activities, and on different levels. This is significant for the multi-level governance approach suggested in this chapter and will be revisited in Section 9.4.4.

*9.2.3 International human rights governance as part of global governance*

It is worth noting at this point that the governance of international human rights can be considered to be a subset of global governance. Global governance itself can be 'broadly understood as a term of reference for the various and collected ways in which life on this planet is managed'.[40] Functioning as an umbrella term, global governance comprises 'the sum of myriad...control mechanisms driven by different histories, goals, structures, and processes',[41] of which international human rights is one. Global governance therefore constitutes 'summative governance', or in other words, the amalgamation of lots of different governance systems that together give us an idea of how the world is actually governed (as opposed to constituting one single definable governance system).[42]

Global governance can also be described as a form of governance beyond government. Although there is no centralised global government, in the context of global governance the term 'governance beyond government' can be used to refer to the participation of non-State actors such as international and inter-governmental organisations, multinational

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[39] See for discussion, Lane and Hesselman (n 17) and Hesselman and Lane (n 11).

[40] Rorden Wilkinson, 'Global Governance' in Mark Bevir (ed), *Encyclopedia of Governance* (SAGE Publications 2007) 345-349.

[41] Rosenau, 'Governance in the Twenty-First Century' (n 4) 11.

[42] See e.g. Knight (n 3) 160-188. This is evident in the distinction between governance as a whole and governance 'sectors' or 'silos' which could also be seen as coming together to make global governance. See Jim Whitman, 'Global Governance as Sector-Specific Management' in Jim Whitman (ed), *Palgrave Advances in Global Governance* (Palgrave Macmillan 2009).

corporations and international civil society, the global market and citizens' movements, as well as States, in international governance systems.[43] Indeed:

> a wide range of actors…are engaged in numerous governing-related activities, structuring and directing the behaviour of interdependent actors and resulting in some relatively novel modes of governance such as public-private partnerships, coalitions of subnational governments, informal groups of like-minded government officials, and private regulatory schemes.[44]

The different actors involved, often of a transnational nature, have 'come together in different combinations to attempt to address specific problems with varying degrees of success',[45] and sometimes resemble a governance network.[46] It can be argued that two 'worlds' exist in global governance – the traditional, State-centric world (of which international human rights is certainly part), and a 'dynamic multi-centric source of authority'.[47] This raises concerns regarding the loss of State authority (for example to international organisations), but as with governance beyond government

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[43] Chhotray and Stoker (n 16) 93.

[44] Jan Wouters and others (eds), *Global Governance and Democracy: A Multidisciplinary Analysis* (Edward Elgar Publishing 2015) 1. For discussions of global governance in different contexts and from different perspectives, see the work of the Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/publications> accessed 2 January 2018.

[45] Thomas G Weiss, D Conor Seyle and Kelsey Coolidge, 'The Rise of Non-State Actors in Global Governance: Opportunities and Limitations' [2013] One Earth Future Discussion <http://acuns.org/wp-content/uploads/2013/11/gg-weiss.pdf> accessed 22 September 2011, 12. This also highlights the purposive nature of global governance, which is again seen as a tool for steering actors and communities. Knight, for example, states that 'the purpose of global governance…is to steer and modify the behaviour of actors who operate on the global stage in such a manner as to avoid deadly conflicts and control intense socioeconomic and political competition. In that sense of the term, global governance implies a purposive activity, in the absence of world government, that could involve a range of actors besides states': Knight (n 3) 178.

[46] Knight (n 3) 184.

[47] James N Rosenau and JP Singh, *Information Technologies and Global Politics: The Changing Scope of Power and Governance* (State University of New York Press 2002) 36, cited in Stephen Welch and Caroline Kennedy-Pipe, 'Multi-Level Governance and International Relations' in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford University Press 2004) 131.

more generally, the fact that the authority of the 'alphabet soup' of organisations has increased is not necessarily to the detriment of the authority of States.[48] In the governance of international human rights, States remain the only entities capable of creating binding international standards for what concerns human rights, thus retaining a crucial role within the legal aspects of human rights governance.[49] Caution should be taken, however, as non-State actors also have a role to play in the adoption of binding norms; there is now a tendency for rules to be adopted by States with the participation of non-State actors, which are then implemented by a decentralised system of various actors at different territorial levels.[50]

### *9.2.4 Summary of findings in the context of international human rights*

The discussions above have laid down the current study's definition of governance and highlighted its most crucial characteristics for the context of this study. The findings can be summarised into four main points:

1. Governance is purposeful in nature, in the sense that it functions to steer communities towards a common goal. In the context of the present study, the purpose of governance is the better respect, protection and fulfilment of international human rights, or to enable individuals to live a life of dignity;
2. The purpose of governance is achieved through various kinds of governance activities, which in the context of the present study can be summarised as the drafting, adopting, implementation and

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[48] Craig N Murphy, 'Global Governance: Poorly Done and Poorly Understood' (2000) 76(4) International Affairs 789, cited in Chhotray and Stoker (n 16) 79.
[49] The State is still viewed by many scholars as 'central' to global governance – despite the growing power and capabilities of non-State actors globally, States are still crucial cogs in the global governance machinery. See e.g. Chhotray and Stoker (n 16) 87-88, discussing Peter Evans, 'Introduction: Development Strategies across the Public-Private Divide' (1996) 24(6) World Development 1033; Peter Evans, 'Government Action, Social Capital and Development: Reviewing the Evidence on Synergy' (1996) 24(6) World Development 1119; Peter Evans, 'The Eclipse of the State? Reflections on Stateness in an Era of Globalization' (1997) 50(1) World Politics 62; and Michael Mann, 'Has Globalization Ended the Rise and Rise of the Nation-State?' (1997) 4(3) Review of International Political Economy 472.
[50] See Tony Porter, 'Global Governance as Configurations of State/Non-State Activity' in Jim Whitman (ed), *Palgrave Advances in Global Governance* (Palgrave Macmillan 2009) 90.

enforcement of standards/rules;
3. A variety of actors can conduct governance activities and be considered as governance actors, including State and non-State actors; and
4. International human rights governance is conducted by many different actors on multiple levels and constitutes one subset of global governance.

These findings form the basis of the approach suggested in Section 9.4 and applied in Chapters 10 and 11.

## 9.3 Good governance

The following sections will answer the question of how the achievement of the international human rights governance system's purpose can be maximised. It is argued in this section that due to its close relationship with human rights, 'good governance' should be followed throughout international human rights governance. First, a definition of good governance is provided, focusing on the principles of good governance. The relationship between good governance and human rights is then described, and a good governance approach to human rights through human rights-based approaches is suggested and explained. Together with the definition of governance provided in Section 9.2 and the multi-level governance approach suggested in Section 9.4 (below), good governance will be applied to the case studies in Chapters 10 and 11.

### *9.3.1 A definition of good governance*

The term 'good governance' first emerged as part of the international drive for development, especially within the context of international development institutions such as the World Bank and the United Nations Development Programme. The first use of 'good governance' can be traced to a 1989 report published by the World Bank, which has been a primary proponent of the concept.[51] In 1992, the Bank stated in a subsequent report that good governance is 'the *manner* in which power is exercised in the management

[51] Welch and Kennedy-Pipe (n 47) 128.

of a country's economic and social resources for development'.[52] Good governance thus relates to the way in which governance activities are performed.[53] The concept can be said to reflect the World Bank's aspirations for a better world',[54] and has now been defined and applied by many ways and in many contexts.

The International Development Association, the lending arm of the World Bank Group, has identified four criteria against which to review governance, which can be summarised as: (1) accountability; (2) transparency; (3) the rule of law; and (4) participation.[55] Very similar criteria have been put forward by several international organisations, including the UNDP,[56] the Office of the United Nations High Commissioner for Human

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[52] The World Bank, 'Governance and Development' (1992) <http://documents.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf> accessed 2 January 2018 [emphasis added], cited in Carlos Santiso, 'Good Governance and Aid Effectiveness: The World Bank and Conditionality' (2001) 7(1) The Georgetown Public Policy Review 1, 3.

[53] As Jilles Hazenberg explains, governance itself refers to a 'move away from the state' whereas *good* governance has 'a much stronger tie to government *performance'* and the quality of governance activities [emphasis added]. See Jilles LJ Hazenberg, 'Good Governance Contested: Exploring Human Rights and Sustainability as Normative Goals', in Ronald Holzhacker, Rafael Wittek and Johan Woltjer (eds), *Decentralization and Governance in Indonesia: Development and Governance Vol. 2* (Springer International 2016) 33-34.

[54] Bevir (n 8). The World Bank's treatment of good governance will be dealt with in more detail in Chapter 10.

[55] The full criteria listed by the IDA are: 'good public sector management with accountable public institutions that give priority to productive social programs and to policies designed to reduce poverty and support sound fiscal choices; transparent policy making and implementation; clarity, stability, and fairness in the rule of law; and openness to the participation of affected citizens in the design and implementation of policies and programs that impact them'. International Development Association, 'Additions to IDA Resources: IDA12 Replenishment, Executive Summary' <http://ida.worldbank.org/financing/replenishments/ida12-replenishment> accessed 22 September 2017, cited in International Fund for Agricultural Development, 'Good Governance: An Overview', EB 99/67/INF.4 (1999) paras 7-10.

[56] The UNDP takes a broader definition, requiring eight elements to be fulfilled. These include: participation, responsiveness, rule of law, transparency, equity, consensus orientation, effectiveness and efficiency and strategic vision. See UNDP, 'Governance for Sustainable Human Development - Human Development Report 1997' (1997) UNDP Policy Paper <pogar.org/publications/other/undp/governance/undppolicydoc97-e.pdf> accessed 22

Rights,[57] the former UN Commission on Human Rights[58] and other international financial institutions.[59] The common elements between definitions appear to be accountability, transparency and participation,[60] which can be considered to be the core principles of good governance. The discussions in the following sections of this chapter and Chapters 10 and 11 of this book will not test current legal and governance systems against these standards *per se*, but argue that all governance activities should be transparent, accountable and participatory. An explanation of the criteria is therefore necessary. The following definitions draw heavily on those of institutions that advocate good governance, in particular those of the World Bank.[61]

#### 9.3.1.1 Transparency

A transparent governance system is one in which the applicable rules and regulations are followed when decisions are being made and enforced, as well as being made available to those affected by them.[62] In this respect,

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September 2017.

[57] The UN OHCHR defines good governance as entailing 'full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions [or] an efficient and effective public sector'. Office of the United Nations High Commissioner for Human Rights, 'Good Governance and Human Rights' <http://ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> accessed 22 September 2017.

[58] The Commission identified the following criteria: 'transparency, responsibility, accountability, participation and responsiveness (to the needs of the people)'. See United Nations Commission on Human Rights, 'The role of good governance in protecting human rights', Resolution 2000/64 (2000).

[59] For an overview of the definitions used by the different institutions, see International Fund for Agricultural Development (n 55). For a broader overview of different definitions of good governance, see Naveed Ahmed, 'Reinforcement of Good Governance in the International Financial Institutions' (2015) 2(11) Law, Social Justice & Global Development.

[60] The UNDP also focuses on these three criteria in particular, despite its more inclusive set of standards. See UNDP, 'Governance for Sustainable Human Development (n 56).

[61] See Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons from International Organizations' (2004) Working Paper No. 54 University of Leuven Institute for International Law 2.

[62] See United Nations Economic and Social Commission for Asia and the Pacific

transparency is closely related to access to information (and therefore, from a human rights perspective, freedom of expression);[63] governance actors should make information regarding their decision-making, including information on which rules and regulations were followed and what information was considered in the decision-making process, available to the public in an accessible manner.[64] Further, transparency means that organisations should show how their decisions can be justified in relation to previous decisions[65] (therefore also to some extent referring to 'predictability', which is a good governance requirement promulgated by the Asian Development Bank).[66] According to the UNDP, transparency also requires that '[p]rocesses, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.'[67] In this sense, and as mentioned by the World Bank,[68] transparency is related to the second element of accountability.

#### 9.3.1.2 Accountability

A definition of accountability offered by the World Bank explains that 'accountability exists when there is a relationship where an individual or

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(UNESCAP), 'What Is Good Governance?' (10 July 2009) <http://www.unescap.org/resources/what-good-governance> accessed 6 October 2017.

[63] The links between good governance and human rights will be examined in detail below, in Section 9.2.7.

[64] See the 'What is Good Governance', which forms part of the 'Good Governance Guide' adopted by a group of local government organisations from Victoria, Australia <http://www.goodgovernance.org.au/about-good-governance/what-is-good-governance/> accessed 6 October 2017; and UNESCAP (n 62).

[65] Michael D Mehta, 'Good Governance' in Mark Bevir (ed), *Encyclopedia of Governance* (SAGE Publications 2007) 361.

[66] Asian Development Bank, 'Governance: Sound Development Management' (1995) <https://www.adb.org/sites/default/files/institutional-document/32027/govpolicy.pdf> accessed 6 October 2017, cited in International Fund for Agricultural Development (n 55) para 13.

[67] UNDP, 'Governance for Sustainable Human Development (n 56) 14.

[68] The World Bank, 'Governance - the World Bank's Experience (English)' (*Development in Practice*, 1994) 29 <http://documents.worldbank.org/curated/en/711471468765285964/Governance-the-World-Banks-experience> accessed 6 October 2017.

body, and the performance of tasks or functions by that individual or body, are subject to another's oversight, direction or request that they provide information or justification for their actions.'[69] This seems quite broad in terms of who should be subject to accountability, although the Bank often appears to focus on public officials as the subjects of accountability. The UNDP, however, mentions that non-State actors such as the private sector and civil society organisations must also be accountable to stakeholders.[70] The accountability of both State and non-State actors is crucial in a system which understands governance as referring to the actions of both kinds of actor.

The World Bank has identified two stages of accountability as a criterion of good governance: answerability and enforcement.[71] Answerability requires that actors explain and justify their reasons for taking certain decisions and actions both to the public and to bodies conducting oversight of each actor. It is thus linked to transparency. Enforcement, according to the Bank, relates to the ability of oversight bodies to sanction actors for not complying with norms to which they are expected to conform, and to provide a remedy for individuals suffering as a result of the non-compliance.[72] The Bank's definition of accountability coincides somewhat with that of Mark Bovens, although enforcement or sanctions are not necessarily a prerequisite for Bovens – as Carol Harlow and Richard Rawlings note, he views sanctions as transforming 'thin' accountability to 'thick' accountability. Bovens' 'thin' accountability refers to '(i) giving an account, in the attenuated sense of narration; (ii) questioning or debating the issues; and (iii) evaluation of passing judgment.'[73] Interestingly, Harlow and

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[69] Rick Stapenhurst and Mitchell O'Brien, 'Accountability in Governance' (World Bank Institut*e*) <https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> accessed 22 September 2017, 1.

[70] UNDP, 'Governance for Sustainable Human Development (n 56) 15.

[71] See Stapenhurst and O'Brien (n 69) 1.

[72] ibid.

[73] Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13 European Law Journal 542, 545 citing Mark Bovens,

Rawlings are also of the opinion that enforceability is not essential to accountability, as it could 'even act as an obstacle to accountability by creating incentives to deny responsibility'.[74] Due to the links between accountability and the right to an effective remedy, however, this book will adopt the World Bank's 'thick' notion of accountability.[75]

Although it will not be discussed here, it is also important to note that there are many different kinds of accountability, including legal, political, horizontal, vertical, social and diagonal accountability.[76] Each kind of accountability requires different mechanisms to be put in place and achieves the end result of holding actors accountable through different methods.

#### 9.3.1.3 Participation

The third element of participation requires that each actor involved in or affected by the governance mechanism have a voice during the adoption and implementation of norms. The World Bank favours a definition of participation as 'a process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them'.[77] The Asian Development Bank takes a similar perspective,

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Andreas Follesdal and Simon Hix, 'Analysing and Assessing Public Accountability: A Conceptual Framework' (2006) European Governance Papers No. C-06-01 <http://www.ihs.ac.at/publications/lib/ep7.pdf> accessed 1 August 2017.

[74] Harlow and Rawlings (n 73).

[75] The right to an effective remedy is found, for example, in Article 13 European Convention on Human Rights, which provides that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'. It is connected to accountability particularly through the mechanisms in place – a complaint against a human rights violation at the national level provides an individual with an avenue for receiving an effective remedy whilst simultaneously providing a mechanism through which to hold the State accountable for violating a right found in the Convention. For further discussion, see Section 9.2.7.

[76] See Stepenhurst and O'Brien (n 69). For detailed discussion of accountability and its different forms, see Mark Bovens, Robert E Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014).

[77] The World Bank, 'The World Bank Participation Sourcebook' (1996) xi <http://documents.worldbank.org/curated/en/289471468741587739/pdf/multi-page.pdf> accessed 6 October 2017, citing the Bank's Learning Group on Participatory Development.

defining participatory development as a 'process through which stakeholders can influence and share control over development initiatives, and over the decisions and resources that affect themselves.'[78] The key thus seems to lie in empowering shareholders; the UNDP emphasises that participation results in individuals being 'closely involved in the economic, social, cultural and political processes that affect their lives'.[79] Crucially, according to the UNDP, although the level of control that people possess may differ,[80] this involvement should extend to *all* areas of life, and give rise to 'constant access to decision-making and power.'[81]

Participation essentially requires that within a governance system, each actor involved in or affected by a particular activity have a voice during the adoption and implementation of norms. In the context of development banks in particular, the importance of participation has been highlighted because:

> [w]hen citizens develop a sense of ownership of development efforts as a consequence of their engagement in decision making about selecting, planning, managing, and monitoring project activities, results are typically enhanced and impact more sustained. Similarly, when relevant institutional stakeholders are involved in designing programs or policy changes and planning their implementation, the outcomes are usually improved. At the same time, capacities are built, social capital enhanced, and partnerships between government, civil society, and the private sector improved as people learn by working together in a

[78] Asian Development Bank, 'Framework for Mainstreaming Participatory Development into Bank Operations' (1996), cited in Richard S Ondrik, 'Participatory Approaches to National Development Planning' (1999) <http://siteresources.worldbank.org/INTEASTASIAPACIFIC/Resources/226262-1143156545724/Brief_ADB.pdf> accessed 6 October 2017.
[79] UNDP, *Human Development Report 1993* (Oxford University Press 1993) 21.
[80] People may have 'direct' or 'indirect' control, depending, for example, on whether they are participating through an elected representative, or are representing themselves directly. See ibid.
[81] ibid.

supportive milieu.[82]

It is evident, then, that participation is not only about the involvement of affected actors, but also the building of relationships between actors with different roles and positions within a governance system. This view of participation corresponds to a large degree to participation as a human rights principle, substantiated most evidently through the right to equal participation in public affairs (found, for example, in Article 25 ICCPR).[83] The significance of participation is increased in light of its positive effect on the enjoyment of many human rights.[84]

It is important to note that whether governance is 'good' or not pervades the entirety of a governance system. This means that every stage of governance, from the drafting and adoption of standards, to the implementation and enforcement of applicable rules, must be done in a transparent, participatory and accountable manner.[85]

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[82] Asian Development Bank, *Poverty and Social Development Papers No. 6* (2003), cited in Habib Mohammad Zafarullah and Ahmed Shafiqul Huque, *Managing Development in a Globalized World : Concepts, Processes, Institutions* (CRC Press 2012) 318.

[83] UN General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNTS vol. 999, 171 (ICCPR).

[84] The UN OHCHR has stated that the right to equal participation in public affairs is 'inextricably linked to other human rights such as the rights to peaceful assembly and association, freedom of expression and opinion and the rights to education and to information.' Office of the United Nations High Commissioner for Human Rights, 'Equal Participation in Political and Public Affairs', <ohchr.org/EN/Issues/Pages/EqualParticipation.aspx> accessed 16 December 2016.

[85] This has been emphasised by the World Bank, which has identified six areas, or 'dimensions' in which the 'goodness' of a country's governance should be assessed: (1) voice and accountability; (2) political stability and absence of violence; (3) government effectiveness; (4) regulatory quality; (5) rule of law; and (6) control of corruption. The Bank has further developed individual governance 'indicators' for over 200 countries to assess good governance in each of these dimensions. See World Bank, 'Worldwide Governance Indicators' <http://info.worldbank.org/governance/wgi/index.aspx#home> accessed 2 January 2018, discussed in Hazenberg (n 53). Because of the country-specific contexts in which they have been developed, the present study will not use the indicators or dimensions, but rather refer to the stages of governance outlined in this chapter.

*9.3.2 Good governance and human rights: Human rights-based approaches*

This section discusses the relationship between good governance, human rights and human rights-based approaches, building on the definition of good governance provided above.

In recent years, more and more connections have been made between good governance and human rights. Some scholars even go so far as to argue that there is a *right* to good governance, as part of the right to development.[86] Various international organisations advocate a good governance approach to human rights and vice-versa. This includes several human rights bodies, such as the UN Human Rights Council, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the UN CteeESCR. As stated by the CteeESCR, the OHCHR has been particularly active in linking the concepts, having organised two international conferences on the topic and published an extensive report on 'Good Governance Practices for the Protection of Human Rights'.[87]

The concepts can by now be considered to be mutually reinforcing. First, good governance benefits from the more detailed standards of conduct provided by human rights.[88] The international system for the protection of human rights provides values to guide both State and non-State actors, and concrete performance standards against which their conduct can be judged, better enabling the actors to be held to account.[89] The OHCHR identifies a further role for human rights in aiding the development of institutional aspects of good governance (e.g. legislative frameworks). In turn, human rights benefit from the enabling environment provided by good governance,[90] which has been described by the CteeESCR as being 'essential to the

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[86] See e.g. C Raj Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (Oxford University Press 2011) 92-93.

[87] Office of the United Nations High Commissioner for Human Rights, 'Good Governance Practices for the Protection of Human Rights' (2007) <http://ohchr.org/Documents/Publications/GoodGovernance.pdf> accessed 22 September 2017.

[88] ibid.

[89] ibid.

[90] ibid.

realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all'.[91] Good governance systems require appropriate regulations, institutions and procedures to be established, which are crucial for the effective realisation of human rights – sustainable human rights realisation requires action that goes beyond the mere adoption of relevant legislation to include 'political, managerial and administrative processes responsible for responding to the rights and needs of the population'.[92]

Further links between the concept are found in the OHCHR's statement that 'the true test of good governance is the degree to which it delivers on the promise of human rights'.[93] The body has even stated that 'good governance is the process whereby public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights',[94] thereby seemingly including the realisation of human rights as an aspect of good governance. While this may be true, it is important, in light of the OHCHR's focus on *public* institutions, to keep in mind this study's definition of governance going beyond government.

The strength of the relationship between good governance and human rights has also been repeatedly highlighted by the UN Human Rights Council (building on the work of the previous Commission on Human Rights, recognising that:

> transparent, responsible, accountable and participatory government that is responsive to the needs and aspirations of the people, including

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[91] UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' 12 May 1999, para 23.

[92] ibid.

[93] Office of the United Nations High Commissioner for Human Rights, 'Good governance and human rights' (2016) <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> accessed 12 November 2017, cited in David Androff, 'Human Rights-Based and Good Governance Approaches to Social Development' in James Midgely and Manohar Pawar (eds), *Future Directions in Social Development* (Palgrave Macmillan 2017) 67.

[94] Androff (n 93) 67, quoting Office of the United Nations High Commissioner for Human Rights, 'Good Governance Practices for the Protection of Human Rights' (n 87).

> women and members of vulnerable and marginalized groups, is the foundation on which good governance rests and that such a foundation is an indispensable condition for the full realization of human rights.[95]

Given the close ties between good governance and human rights, and in particular the latter's need of good governance, it is important to consider how a good governance approach to international human rights could be taken. Perhaps the easiest way to conceive of a 'good' human rights governance system is to take a 'human rights-based approach' (HRBA[96]). Several similarities can be identified between good governance and HRBAs conceptually. As with good governance, for example, the concept of HRBAs can be traced back to development studies, in particular international development cooperation. Also in parity with good governance, the concept of HRBAs has now gained much traction and is considered to have a much broader scope of application. Congruently with good governance, a HRBA is difficult to specify in terms of particular action to be taken, and is also defined through the identification of certain elements that should be present (or principles that should be followed), some of which match those of a good governance approach. In light of the different uses and understandings of HRBAs, a 'Statement of Common Understanding' was adopted by UN agencies in 2003, detailing what a HRBA actually is. In the statement, three common aspects of HRBAs are identified: (1) all activities within development cooperation should aim to 'contribute directly to the realization of one or several human rights'; (2) human rights principles should guide programmes in all sectors (including governance) and at all stages of the process, comprising 'planning and design (including setting of goals, objectives and strategies); implementation, monitoring and evaluation'; and (3) the 'relationship between individuals with valid claims (rights-holders) and State and non-State actors with correlative obligations (duty-bearers) is

[95] UN Human Rights Council, Resolution 7/11, 'The role of good governance in the protection of human rights', (27 March 2008) A/RES/7/11.
[96] See UN Practitioner's Portal on Human Rights Based Approaches to Programming' <http://hrbaportal.org/> accessed 2 January 2018.

determined by human rights', working to strengthen the capacity of each.[97] The definition of a HRBA has more recently been provided by the United Nations Human Rights Council in 2015, using the Statement as a point from which to build a more concrete list of principles for a HRBA. The principles are intended to be adhered to at all stages of an actor's activities, and signify that HRBA go beyond the application of human rights standards by providing a conceptual framework to guide activities.[98] The list of principles identified by the Human Rights Council can be summarised as:

(a) Universality:

(b) Indivisibility;

(c) Participation and consultation;

(d) Non-discrimination;

(e) Accountability;

(f) Transparency; and

(g) Do no harm or do less harm.[99]

From this definition, it is possible to draw several parallels between HRBAs and good governance, particularly for what concerns the three good governance principles of transparency, accountability and participation. The OHCHR, for example, notes that (in the context of poverty reduction) a HRBA requires 'active and informed *participation* by the poor in the formulation, implementation and monitoring of poverty reduction

[97] The Statement was adopted following an 'Inter-Agency Workshop on a Human Rights-Based Approach' in May 2003. See United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' (2003) <https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/> accessed 12 November 2017.

[98] Hesselman and Lane (n 11).

[99] UN Human Rights Council, 'Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations' (10 February 2015) A/HRC/28/76, para 40. See also Hesselman and Lane (n 11) 528-529.

strategies'.[100] The OHCHR further comments on the emphasis that HRBAs place on accountability, in particular that '[r]ights imply duties, and duties demand accountability.'[101] Furthermore, whichever means of accountability is chosen under HRBAs, the OHCHR stresses that 'all mechanisms must be accessible, *transparent* and effective.'[102] The three good governance principles are also reflected in international human rights law more broadly, both in international human rights instruments and in the work of the United Nations international human rights treaty monitoring bodies. Participation, for example, is substantiated through the right to participation in public affairs (found in Article 25 ICCPR), which has a large effect on the enjoyment of many human rights.[103] Similarly, accountability could be said to be reflected through the right to an effective remedy. According to the ICCPR, this extends to a requirement that States 'ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State', and that States should work towards making judicial remedies available.[104]

In the context of international human rights and non-State actors, an interesting panel took place in September 2015 at the United Nations Human Rights Council, which focused on a human rights-based approach to good governance in the public service. The opening speaker, Ibrahim Silamar, reiterated the abovementioned connections between good governance and human rights made by the OHCHR.[105] Significantly, he linked the debates to

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[100] Office of the United Nations High Commissioner for Human Rights, 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' (2012) HR/PUB/06/12, para 23, <http://ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> accessed 12 November 2017.

[101] ibid para 24.

[102] ibid [emphasis added].

[103] Office of the United Nations High Commissioner for Human Rights, 'Equal Participation in Political and Public Affairs' (n 84).

[104] Article 2(3)(b) ICCPR. The right to an effective remedy can also be found in Article 13 of the European Convention on Human Rights.

[105] See Ibrahim Salama, 'Opening Statement', presented at the 'Panel discussion on a human

the issue of non-State actors and human rights, adding in his concluding statement that 'States should ensure that private actors comply with human rights standards and operate in a manner that achieves and secures the dignity of all individuals and communities'.[106] Further mention of the significance of non-State actors in good governance and human rights was made (among others) by a delegate for Belgium. The delegate noted the importance of good governance for private actors involved in public service provision, and that the Belgian government 'wishes to see Business take comprehensive initiatives to encourage the streamlining of Human Rights due diligence in all their operations', asking the panellists to elaborate on the role of the UN Guiding Principles on Business and Human Rights, and challenges to ensuring the principles of good governance are respected no matter the (public or private) identity of the relevant actor.[107] Another interesting connection was made in the panel between good governance and existing treaty law, relying on the 'trias' of 'information (i.e. transparency), participation and access to justice' found in the Aarhus Convention.[108] Looking at these three principles, which Anne Peters argued 'captur[e], in a very easy formula, the main elements of good and accountable governance', through the lens of human rights, it is possible to flesh out and apply good governance beyond the realm of public services.[109] Strikingly, although

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rights-based approach to good governance in the public service', 15 September 2015 <https://extranet.ohchr.org/sites/hrc/HRCSessions/RegularSessions/30thSession/Pages/OralStatement.aspx?MeetingNumber=23&MeetingDate=Thursday%2c%2024%20September%202015> accessed 12 November 2017. See also Office of the United Nations High Commissioner for Human Rights, 'Good Governance Practices for the Protection of Human Rights' (n 87).

[106] Salama (n 105).

[107] Statement by the permanent representative of Belgium to the United Nations presented at the 'Panel discussion on a human rights-based approach to good governance in the public service' (n105).

[108] See United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). Anne Peters, statement presented at the 'Panel discussion on a human rights-based approach to good governance in the public service' (n 105).

[109] Peters (n 108).

confined to the environmental sphere, the Convention couches the three aspects of good governance as *rights*, rather than principles, and contains multiple connections between the three pillars and human rights in its preamble.[110]

It can be concluded from this discussion that good governance and human rights are closely connected and mutually reinforcing, and could both be used to ensure that international human rights governance is done in a way that maximises the system's achievement of its purpose. Furthermore, beyond the added value of each concept explained by the OHCHR, the distinct *approaches*, viewed as conceptual frameworks, also complement each other. The added value of a good governance approach for human rights lies in the fact that governance, as understood in the present study, allows us to move our focus away from international legal obligations and the consideration of rights-holders and obligation-holders (upon which HRBA seem to focus) and away from the State-centric nature of the international human rights law system. In so doing, good governance opens the way for more inclusion of non-State actors, both as governing actors in their own right and as those affected by decisions taken within a governance system. The added value of HRBAs is two-fold. First, it lies in the more specific and comprehensive principles that must be followed throughout activities – for example non-discrimination and the principle of doing no harm or doing less harm. Second, HRBAs require all activities to seek to 'contribute directly to the realization of one or several human rights'.[111]

Good governance will be applied throughout Chapters 10 and 11, as part of the multi-level governance approach that will be suggestion in Section 9.4. Human rights-based approaches will also be applied in Chapter 10 as a basis on which to argue that the World Bank should include human rights in its policies and programmes.

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[110] See Aarhus Convention (n 108) Preamble.

[111] United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' (2003) <https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/> accessed 12 November 2017.

## 9.4 Multi-level governance

The following sections will introduce the theory of multi-level governance, explain a multi-level governance approach to international human rights (bearing in mind the study's understanding of governance and the importance of good governance) and address some key challenges to implementing a multi-level governance regime.

Multi-level governance was introduced in the context of governance within the European Union. The key proponents and developers of multi-level governance, Gary Marks and Liesbet Hooghe, originally envisaged multi-level governance as a theory suited to economic governance within the European Union.[112] multi-level governance is certainly still widely used within the European Union, as evidenced by the Charter for Multilevel Governance that was adopted by the European Committee of the Regions in 2014.[113] However, as with many governance theories, multi-level governance has by now been defined by many different scholars, used in different ways and adapted to different situations. Indeed, since its academic debut in the early 1990s, multi-level governance has been applied to broad and diverse

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[112] See Liesbet Hooghe and Gary Marks, 'Unraveling the Central State, but How? Types of Multi-level Governance' (2003) 97(2) The American Political Science Review 223; and Gary Marks and Liesbet Hooghe, 'Contrasting visions of multi-level governance' in Ian Bache and Matthew Flinders (eds), *Multi-level governance* (Oxford University Press 2004). Multi-level governance was actually introduced by Gary Marks in 1993 in the context of Europe, but has been significantly developed by the two scholars working together. See Gary Marks, 'Structural policy and multi-level governance in the EC', in Alan W Cafruny and Glenda G Rosenthal (eds), *The State of the European Community*: *The Maastricht Debate and Beyond* (Lynne Rienner 1993). For a review of the original use and developments of multi-level governance in the literature, see Paul Stephenson, 'Twenty Years of Multi-Level Governance: "Where Does It Come From? What Is It? Where Is It Going?"' (2013) 20(6) Journal of European Public Policy 817, 817-822.

[113] See European Committee of the Regions, 'Charter for Multilevel Governance in Europe', 20 February 2014, <https://portal.cor.europa.eu/mlgcharter/Pages/default.aspx> accessed 12 November 2017 (Charter for Multilevel Governance in Europe). While this instrument shows that multi-level governance is considered significant at the European Union level, it is important to bear in mind that it is not legally binding. Closer inspection of the Charter also shows its limitations, as it is rather vague and minimalistic in its principles.

settings, including, *inter alia*, environmental,[114] climate change[115], health[116] and global governance.[117] As well as different topic areas, multi-level governance has now been applied to 'a wide variety of multilevel governance systems ranging from global institutions, regional organizations, such as the EU, national governments, and subnational governments'.[118] Having conducted a thorough literature review of the studies applying multi-level governance to different fields, Paul Stephenson has identified five main uses of multi-level governance that have developed over time.[119] The most recent,

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[114] See e.g. Inger Weibust and James Meadowcroft (eds), *Multilevel Environmental Governance: Managing Water and Climate Change in Europe and North America* (Edward Elgar Publishing 2014); Joanna Cent, Malgorzata Grodzińska-Jurczak and Agata Pietrzyk-Kaszyńska, 'Emerging Multilevel Environmental Governance – A Case of Public Participation in Poland' (2014) 22(2) Journal for Nature Conservation 93; Jouni Paavola, 'Multi-Level Environmental Governance: Exploring the Economic Explanations' (2016) 26(3) Environmental Policy and Governance 143; Stefan Larsson, Lars Emmelin and Sandra Vindelstam, 'Multi-Level Environmental Governance: The Case of Wind Power Development in Sweden' (2014) 6(2) Societal Studies 291; Gerd Winter (ed), *Multilevel Governance of Global Environmental Change Perspectives from Science, Sociology and the Law* (Cambridge University Press 2006).

[115] See e.g. Jan Corfee-Morlot and others, 'Cities, Climate Change and Multilevel Governance' (2009) OECD Environmental Working Papers No. 14; Kirsten Jörgensen, Anu Jogesh and Arabinda Mishra, 'Multi-Level Climate Governance and the Role of the Subnational Level' (2015) 12(4) Journal of Integrative Environmental Sciences 235; Joyeeta Gupta, 'The Multi-Level Governance Challenge of Climate Change' (2007) 4(3) Environmental Sciences 131.

[116] See e.g. Sharifah Rahma Sekalala and Monica Twesiime Kirya, 'Challenges in Multi-Level Health Governance: Corruption in the Global Fund's Operations in Uganda and Zambia' (2015) 7(1) Hague Journal on the Rule of Law 141; Kumanan Wilson, 'The Complexities of Multi-Level Governance in Public Health' (2004) 95(6) Canadian Journal of Public Health 409; Seye Abimbola and others, 'Towards People-Centred Health Systems: A Multi-Level Framework for Analysing Primary Health Care Governance in Low- and Middle-Income Countries' (2014) 29(2) Health Policy and Planning 29.

[117] See e.g. Zürn, 'Global Governance as Multi-Level Governance' (n 7); and César de Prado, *Global Multi-Level Governance: European and East Asian Leadership* (United Nations University Press 2007).

[118] Arjan H Schakel, 'Applying Multilevel Governance' in Hans Keman and Jaap Woldendorp (eds), *Handbook of Research Methods and Applications in Political Science* (Edward Elgar Publishing 2016) 97.

[119] The five main uses are: (1) 'original' uses; (2) functional uses; (3) combined uses; (4) normative uses; and (5) comparative uses. Stephenson (n 112) identifies that 'original uses'

'comparative' use began being used in 2007, and refers to a growing corpus of literature examining multi-level governance in the context of globalisation and international law.[120] Despite such developments in the literature, however, no study has yet discussed or applied multi-level governance in the context of international human rights. The present study seeks to fill this gap. Before doing so, however, a more thorough definition of multi-level governance will be provided.

### *9.4.1 Defining multi-level governance*

Defining what multi-level governance is in concrete terms is somewhat of a challenge. However, it is possible to identify two main characteristics, or 'dimensions' of a multi-level governance system – the vertical and horizontal dimensions.[121] The first, vertical dimension corresponds to the 'multi-level' nature of multi-level governance, 'refer[ring] to the increasing interdependence of actors situated or nested at different territorial levels'.[122] The second, horizontal dimension denotes the 'increased role of nonstate actors in decision making'.[123] This dimension can be said to represent the 'governance beyond government' approach that is very often found in multi-level governance.[124] It is possible to roughly equate the two dimensions of multi-level governance with two of the shifts in governance discussed in

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are present from 1993 onwards, functional uses from 1997 onwards, combined uses from 2001 onwards, normative uses from 2003 onwards and comparative uses from 2007 onwards. Within the types of use, he has also identified the different contexts and fields within which the uses have occurred.

[120] Stephenson refers here to authors such as Enderlein, Kaul, and Slaughter and Hale. See ibid 829-830.

[121] Some authors, such as Simona Piattoni, identify three dimensions (or 'distinctions') within multi-level governance, although they can still be roughly translated into the vertical and horizontal dimensions. See Simona Piattoni, *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges* (Oxford University Press 2010) 17.

[122] Ian Bache, 'Multilevel Governance' in Mark Bevir, *Encyclopedia of Governance* (SAGE Publications 2007) 581-583.

[123] ibid.

[124] Most proponents of multi-level governance understand governance as going beyond government (which is generally equated to the 'nation-State') to include more fragmented and public-private administrative arrangements. Welch and Kennedy-Pipe (n 47) 128-129.

Section 9.2 – the vertical dimension resembles the upwards shift in governance, and the horizontal dimension resembles the horizontal shift in governance. Although the name of multi-level governance would suggest that its vertical dimension is its more significant trait, the horizontal dimension has been the focus of much attention, particularly because of the coordination and cooperation that occurs between the different actors involved in a multi-level governance system. The horizontal dimension has led to claims that multi-level governance 'emphasise[s] how the different levels were traversed and linked by actors moving rather freely across formally still existent levels of government and spheres of authority.'[125] From this perspective, it is possible to link multi-level governance with 'network governance', and to identifying policy networks[126] created by the movement and coordination between different governance actors on different governance levels.[127] Such coordination is a crucial to an effective system of multi-level governance but also constitutes one of its most substantial challenges. This will be discussed below, in Section 9.4.3.2.

Multi-level governance can be summarised as shown in Figure 9.1.

[125] ibid 20.
[126] A discussion of policy networks falls outside of the scope of this book. It suffices to note, at this point, that a 'policy network' can be defined as 'a social system in which actors develop comparatively durable patterns of interaction and communication aimed at policy problems or policy programs'. See Johannes TA Bresser and Laurence J O'Toole, 'The selection of policy instruments: A network-based perspective' (1998) 18(3) Journal of Public Policy 213, 218, cited in Laurence J O'Toole and Kenneth I Hanf, 'Multi-Level Governance Networks and the Use of Policy Instruments in the European Union' in Johannes TA Bresser and Walter A Rosenbaum, *Achieving Sustainable Development: The Challenges of Governance Across Social Scales* (Praeger Publishers 2003) 257, 259.
[127] See e.g. Gary Marks and others, *Governance in the European Union* (SAGE Publications 1996); Thomas Conzelmann, 'Towards a New Concept of Multi-Level Governance?', *Commitee of the Regions* (2009) 30-31 <http://cor.europa.eu/en/activities/governance/Documents/Conzelmann.pdf> accessed 25 September 2017.

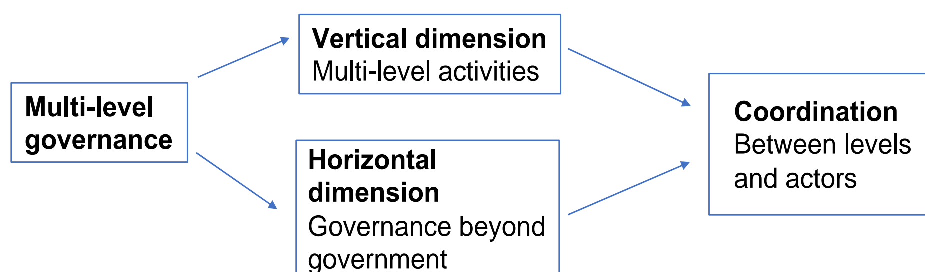


**Figure 9.1**: Multi-level governance (source: the author)

*9.4.2 Type I and Type II multi-level governance*

It is important to note that there are two types of multi-level governance systems – Type I and Type II.[128] The distinction between the two types lies in the way that a multi-level governance system is organised.

First, this relates to the fact that multi-level governance systems are divided into 'jurisdictions', or segments. In Type I multi-level governance systems, the jurisdictions are 'general purpose', being divided on the basis of a territorial level (i.e. the international, regional, national, sub-national).[129] This means that at each level within a Type I multi-level governance system, governance activities are bundled together, with the distinction between jurisdictions residing in their territorial scope. Ultimately, the jurisdictions in Type I multi-level governance can be described as 'conceiv[ing] authority in neatly defined local, regional, national, and international layers'.[130] Jurisdictions in Type II multi-level governance systems, on the other hand, are divided in a task-specific manner, on the basis of what action is required on the different levels. This results in 'specialised' jurisdictions,[131] and means that, on the basis of their expertise, some governance actors may operate in multiple jurisdictions.

[128] Marks and Hooghe (n 112).
[129] Hooghe and Marks, 'Unraveling the Central State, but How?' (n 112) 236.
[130] Alessandra Casella and Barry R Weingast, 'Elements of a Theory of Jurisdictional Change' in Barry Eichengreen, Jeffry Frieden and Jürgen von Hagen (eds), *Politics and Institutions in an Integrated Europe* (Springer Verlag 1996) 13, cited in Marks and Hooghe (n 112) 20.
[131] Hooghe and Marks, 'Unraveling the Central State, but How?' (n 112) 236.

Second, the difference in the organisation of Type I and Type II multi-level governance lies in the structure of the jurisdictions. In Type I multi-level governance, membership is 'non-intersecting', meaning that smaller jurisdictions will 'be contained within the borders of the larger ones',[132] in a 'Russian doll-like' manner.[133] This means that each jurisdiction in Type I multi-level governance has separate members, which do not overlap with the members of other jurisdictions. In Type II multi-level governance systems, a more flexible approach is taken, and there can be intersecting memberships between jurisdictions. Under Type II multi-level governance the allocation of an actor to a jurisdiction is based not on the level on which the actor operates, but the expertise and interests of the actor. This means that if a certain actor has expertise and/or interests in different areas, they may operate on different levels and within the different task-specific jurisdictions.

The third difference between Type I and Type II multi-level governance systems is that under Type I multi-level governance jurisdictions exist on a set, limited number of levels. This is not to say that Type I multi-level governance systems must all have the same amount of levels, but rather that within a given Type I multi-level governance, the number of levels cannot be increased or decreased. There is no limitation, however, on the number of levels in Type II multi-level governance systems. In such systems, the number of jurisdictions depends on which tasks need to be performed, resulting in jurisdictions that 'come and go as demands for governance change.'[134]

Essentially, Type I multi-level governance systems have a 'system-wide architecture' that is not designed to change with time and needs – reforms within such systems do not result in the creation of new jurisdictions but rather in the reallocation of tasks or functions between existing jurisdictions.[135] This, combined with the fact that '[t]erritorial jurisdictions

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[132] Casella and Weingast (n 130) cited in Marks and Hooghe (n 112) 20.
[133] Lane and Hesselman (n 17) 97, citing Marks and Hooghe (n 112) 15-17.
[134] Hooghe and Marks, 'Unraveling the Central State, but How?' (n 112) 236.
[135] ibid 237.

are intended to be, and usually are, stable for period of several decades or more', contrasts with the more fluid and flexible design of Type II systems that can respond to changing governance needs.[136]

To summarise, the differences between Type I and Type II multi-level governance systems are the following:

| Characteristic | Type I | Type II |
|---|---|---|
| Jurisdictions | • General purpose<br>• Divided according to territorial levels<br>• Russian-doll models | • Task specific<br>• Divided according to governance activities/subject matter |
| Membership of jurisdictions | • Non-intersecting | • Intersecting |
| Number of jurisdictions | • Limited | • Unlimited |
| Design of system as a whole | • Durable | • Flexible |

**Table 9.1:** Type I vs Type II multilevel governance (source: the author[137])

It is important to note that although the two types of multi-level governance have been cast as 'contrasting visions', it is possible for them both to apply simultaneously; according to Marks and Hooghe it is even possible (and in fact very common) for Type II arrangements to be established, or organised,

[136] ibid 236-237.
[137] This table is based on a similar table by Marks and Hooghe (n 112) 17; and Hooghe and Marks, 'Unraveling the Central State, but How?' (n 112) 236.

by Type I jurisdictions.[138] There are nonetheless consequences of the differences between the organisation of Type I and Type II multi-level governance systems. This is mainly that Type II systems are more flexible and less formalised than Type I systems. Indeed, Type I multi-level governance systems are considered to be somewhat hierarchical, based on the Russian doll model of jurisdictions (with individuals 'situated at the bottom'[139]). A more hierarchical structure raises the question of to what extent Type I multi-level governance can be considered to be governance beyond government, but it has by now been recognised that there are 'intensified (horizontal) interactions between government and non-governmental actors' in Type I multi-level governance systems.[140] In contrast, the flexibility of Type II multi-level governance allows movement of actors between levels and jurisdictions to the participation of actors in the system as a whole, and within the different jurisdictions – actors with the relevant expertise or interests in a certain field are able to voluntarily participate in Type II multi-level governance systems.[141]

Looking at the two types of multi-level governance in the context of international human rights, it can be said that most legal scholars would view the international human rights law framework to be organised in the manner of a Type I multi-level governance system. In other words, and as reflected in Chapters 1-7 of the present study, it can be considered to be divided into

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[138] See Liesbet Hooghe and Gary Marks, 'Types of multi-level governance' in Hendrik Enderlein, Sonja Wälti and Michael Zürn (eds), *Handbook on multilevel governance* (Edward Elgar 2010) 17, cited in Schakel (n 118) 103. See also Marks and Hooghe (n 112) 24, in which the authors mention that Type II multi-level governance 'tends to be embedded in legal frameworks determined by Type I jurisdictions'.

[139] Lane and Hesselman (n 17) 97.

[140] Ian Bache, Ian Bartle and Matthew Flinders, 'Multilevel governance' in Christopher Ansell and Jacob Torfing (eds), *Handbook on theories of governance* (Edward Elgar 2016) 487, cited in Lane and Hesselman (n 17) 97.

[141] Ian Bartle, Ian Bache and Matthew Flinders, 'Rethinking governance: Towards convergence of regulatory governance and multilevel governance?', Paper presented at the ECPR Standing Group on Regulation and Governance 4th Biennial Conference, University of Exeter, UK (2012); Hooghe and Marks, 'Unraveling the Central State, but How?' (n 112) 11, cited in Lane and Hesselman (n 17) 97.

territorial levels (the international, regional and national). Within international law more generally, specialised regimes, or branches of law have emerged. Even within international human rights law the argument could be made that the ten core UN human rights treaties actually form the basis of ten fragmented sub-branches of international human rights law. Such fragmentation could lead to the conclusion that international human rights law may be moving towards being organised in a Type II multi-level governance manner. Certainly, when approaching human rights from a *governance* perspective (looking at extra-legal measures and including the activities of non-State actors), it is clear that much action taken for the purpose of better protecting human rights is organised in the manner of a Type II multi-level governance system. Moving forwards towards a multi-level governance approach to international human rights, it is argued here that the more flexible and inclusive design of Type II multi-level governance is preferable than the more rigid organisation of Type I.

### *9.4.3 Challenges to multi-level governance*

Several criticisms have been made of multi-level governance, which must be addressed. These range from criticism of the concept itself to criticisms of the ways in which is it used (or not) by scholars, as well as how it works operationally. In particular, the criticisms are often related to the challenges that multi-level governance systems face. The following sections will address some of the main concerns that have been raised regarding multi-level governance, looking specifically at some definitional aspects of multi-level governance, the coordination of actors in (particularly Type II) multi-level governance and the legitimacy and accountability of multi-level governance regimes. As far as possible, the challenges will be discussed in the context of the governance of international human rights.

#### 9.4.3.1 Definitions: territorial and functional governance

First, concerning definitional issues and the use of terminology, Thomas Conzelmann has criticised Marks and Hooghe's explanation that Type II multi-level governance allows individuals to make up a governance 'level'. Marks and Hooghe stated this in relation to Type II multi-level governance's

nature as 'functional governance', in contrast with the 'territorial governance' of Type I regimes[142] which looks at, for example, the local, national, regional and international levels. Conzelmann raises this issue because if 'the constituencies of Type II jurisdictions are individuals who share some geographical or functional space and who have a common need for decision-making', as Marks and Hooghe have suggested, the 'multi-level concept can relate to any situation of distinct actors with joint problems'.[143] The problem here is that this understanding of multi-level governance can easily be conflated with 'governance' generally, especially if one assumes a definition of governance as purpose-based – as different actors working together to achieve a common goal (see Section 9.2.1). From this perspective, in order to truly say that multi-level governance adds something to simply 'governance', levels must be conceived of in territorial terms, although not in the same strict sense as under Type I multi-level governance.[144] However, it is argued in this study that the coordination of activities in a multi-level governance, which will be discussed in the next section, should be considered one of its central characteristics. In addition, suggesting such a hybrid approach to the definition of Type I and Type II multi-level governance would create more challenges to the operationalisation and organisation of a multi-level governance regime.

#### 9.4.3.2 Coordination of actors and activities

One of the key attributes of a multi-level governance system is coordination and communication between different actors. However, it is also one of the main challenges to and criticisms of multi-level governance, raising the question of how such coordination can be achieved, particularly when actors participate on an *ad hoc* basis. Until now, '[multi-level governance] theorists have not framed clear expectations about the dynamics of this polity.'[145]

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[142] Conzelmann (n 127), discussing Marks and Hooghe (n 112) 240.
[143] Conzelmann (n 127); see also Michael Keating, 'Thirty Years of Territorial Politics' (2008) 31(1) West European Politics 60.
[144] For a full discussion, see Conzelmann (n 127).
[145] Marks and others (n 127) 167, cited in Piattoni (n 120) 23.

Although multi-level governance envisages coordinated action and perhaps even networks within a governance system, the details as to how this should be achieved 'remain murky…apart from a generalized presumption of increasing mobilization across levels, [multi-level governance proponents] provide no systematic set of expectations about which actors should mobilize and why.'[146] Unfortunately, due to constraints of time and space, delineating the precise manner in which this occurs in the governance of international human rights falls outside of the scope of this study. Instead, several suggestions will be made, more generally in this chapter and more specifically in Chapters 10 and 11, of measures that could be taken by various actors to better enable cooperation and collaboration to strengthen the protection of human rights.

When considering the coordination of actors in a multi-level governance system, the first issue to consider is how and why actors become involved in governance. Generally speaking, the participation of a particular actor in a governance system is authorised. In multi-level governance structures, the authorisation of a certain actor to participate can be done by the actor themselves, or by an overarching governing body (e.g. the European Commission, in the context of European multi-level governance). Authorisation (and thus participation) seems to happen for two reasons. The first is that the actor has the relevant technical or 'specialised' knowledge to 'contribute to a specific policy'; the second is that they have a 'legitimate' concern in doing so.[147] In the context of human rights, it is easy to imagine that many NGOs become involved for both of these reasons – they may be driven by a (legitimate) desire to improve the enjoyment of people's rights, alleviate conditions of poverty,[148] or to protect individuals' dignity. At the same time, they may have staff that have a specialist knowledge in particular aspects of human rights (many NGOs, for example, focus on specific human

[146] ibid.
[147] Piattoni (n 120) 201.
[148] This could also be a legitimate concern of the World Bank.

rights issues).[149] This method of authorisation allows for a collection of more localised actors to become involved in a multi-level governance system, boosting the likelihood that opinions of 'the people' are actually being taken into account.[150] In this respect, the governance principle of subsidiarity is relevant. Subsidiarity stipulates that the governance authority, or role, should be given to the 'lowest competent authorities' (i.e. the most localised actor).[151] It can therefore be considered to reinforce the benefit of multi-level governance that it allows governance 'stakeholders' to come from the local level as well as the national, regional or international territorial levels. In turn, this strengthens the participatory nature of a multi-level governance system, which is important if the system is to be considered one of 'good governance'. The principle of subsidiarity should therefore play a role in the coordination of tasks and actors within a multi-level governance system.

It has been pointed out that the notion of 'volunteering', or having a 'choice' to participate in governance (mentioned above in relation to Type II multi-level governance systems) is not always a good reflection of reality, in that in many cases non-State actors may have no choice but to volunteer their expertise. For example, States can still coerce such participants to contribute on the basis of binding agreements, national legislation or even by requiring or stimulating action through non-binding initiatives. A clear example of this would be when States delegate certain functions to non-State actors in order

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[149] Examples of such NGOs include Amnesty International (initially established to prevent the proliferation of torture, but now focusing on broader human rights issues), UNICEF (focused on the protection of children's rights), the Association for the Prevention of Torture, but also NGOs taking a broader focus, such as Human Rights Watch.

[150] Piattoni does warn that this system of authorisation could have issues of effectiveness, depending on whether the actors involved do actually have a 'legitimate concern', because this is not as easily identifiable as an actor that has the relevant technical or specialised knowledge. Piattoni (n 120) 201.

[151] See e.g. Maria de Lourdes Melo Zurita, 'Towards new disaster governance: Subsidiarity as a critical tool' (2015) 25 Environmental Policy and Governance 386, 387, discussing Nicholas Aroney, 'Subsidiarity: 'European lessons for Australia's federal balance' (2011) 39 Federal Law Review 213, and Michelle Evans and Augusto Zimmermann, 'The global relevance of subsidiarity: an overview' in Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer Verlag 2014) 1.

to fulfil their own human rights obligations under international treaties (for example the provision of public services, as explained above and in Chapter 5). In this sense, as acknowledged in literature, there is still space for some critical engagement with the representation of the two Types of multi-level governance as completely distinct from one another (something that could also be linked to the discussion in Section 9.4.3.1 regarding what 'levels' refer to in Type II multi-level governance).[152]

Having established why and how actors become involved in (especially Type II) multi-level governance systems, it is important to turn to what coordination actually is. Coordination is closely linked to cooperation, and can occur to varying extents. Gro Sandkjaer Hanssen, Per Kristen Mydske and Elisabeth Dahle have addressed the difficulties of coordinating different levels of government in the context of climate change adaptation in Norway.[153] Their helpful study discusses what coordination within governance structures actually means, and how it differs in the way that it is achieved on different levels. For example, they highlighted the increase in network-oriented practices in which 'the coordination mechanism is the mutual dependence and trust among operationally autonomous actors who recognise the need to achieve coordinated action in order to handle common problems'.[154] At the national-local level, though, the scholars referred to Ian Bache and Matthew Flinders' notion of a 'cooperative turn' in network governance,[155] whereby the reliance of national governments on more localised actors to implement policies gives rise to an acute need to cooperate with the local actors, as well as those members of the private sector that can provide more capacity for the implementation of policies.[156] Significantly, this led Hanssen, Mydske and Dahle to identify different 'strengths' of

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[152] Bache, Bartle and Flinders (n 140) 486.
[153] Gro Sandkjaer Hanssen, Per Kristen Mydske and Elisabeth Dahle, 'Multi-Level Coordination of Climate Change Adaptation: By National Hierarchical Steering or by Regional Network Governance?' (2013) 18(8) Local Environment 869.
[154] ibid 872.
[155] Ian Bache and Matthew Flinders (eds), Multi-Level Governance (Oxford University Press 2004).
[156] Hanssen, Mydske and Dahle (n 153) 872.

cooperation, expressed in a 'ladder of coordination', shown in Figure 9.2.

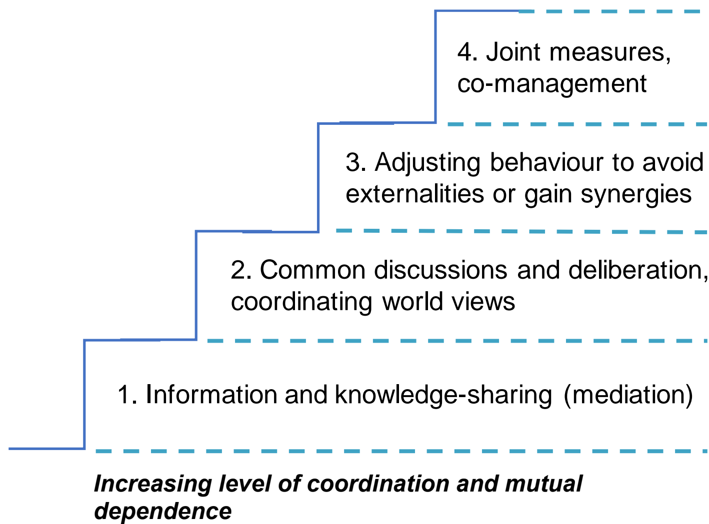


**Figure 9.2**: Ladder of coordination (source: Hanssen, Mydske and Dahle[157])

Hanssen, Mydske and Dahle use the ladder to explain that lower levels of coordination involve discussions and interactions between actors, but it is not until the third level that actors actually change their behaviour to ensure coordination of activity, as well as coordination between actors in the sense of communication. This, the authors note, can happen through hierarchical instruments (e.g. 'hard' law or regulation that coerces an actor into particular behaviour) or self-regulation.

Particularly at the third step of the ladder it becomes obvious (also looking at the outcome of the study) that a coordinated *goal* or *purpose* to governing activities needs to be established, preferably with common standards that can be applied by actors on different levels. Applying this to the context of international human rights, perhaps the biggest challenge to the coordination of human rights governance activities, in the context of non-

[157] ibid.

State actors and human rights, is precisely this – the lack of common, agreed upon, or imposed standards to which particular non-State actors should adhere. This makes it very difficult for different actors to coordinate their actions towards the achievement of the common goal (the protection and realisation of human rights). Although many non-State actors do take measures of self-regulation (through codes of conduct), and initiatives exist on various levels to provide non-State actors with standards that they can follow (e.g. the UN global Compact and the UN Guiding Principles on Business and Human Rights at the international level, legislation adopted by States at a national level and guidance published by NGOs on a sector-level), there is a conspicuous lack of agreement at the international level, and particularly within international human rights *law*, as to what standards non-State actors should adhere to. Perhaps here the negotiations on a binding treaty on business and human rights could play a useful role, 'coordinating a world view' on the matter (as seen in step two of the ladder). Multilateral (or even bilateral) agreements or memoranda of understanding adopted between different actors working on different levels within particular areas of human rights could also improve the coordination of human rights governance. Such agreements could be between exclusively public actors, public and private actors, or exclusively private actors.

Looking at Hanssen, Mydske and Dahle's findings as a whole, it does seem that at the core of coordination are communication and access to information – in other words, transparency. Transparency is crucial for the first step of information and knowledge-sharing (step 1 of Hanssen, Mydske and Dahle's ladder) upon which the remaining three steps rest, and which also relies on the willingness of actors to cooperate with one another. In light of this, as well as the link between coordination and participation mentioned above and accountability discussed in Section 9.4.3.3, placing an emphasis on good governance principles throughout the governance of international human rights, in all activities and by all actors, could therefore go some way towards improving coordination within multi-level human rights governance. The role of good governance principles in a multi-level governance approach to international human rights will be further explained in Section 9.4.4.

#### 9.4.2.3 Legitimacy and accountability

Another criticism of multi-level governance systems and literature on the topic relates to the legitimacy and (democratic) accountability of multi-level governance regimes.[158] This section will first discuss the issue of legitimacy before moving on to problems of accountability in multi-level governance.

As explained in Chapter 3.2.1, there are two kinds of legitimacy – input and output legitimacy. Input legitimacy refers to the procedures according to which decisions (including *inter alia* those creating policies, regulations, or placing obligations on certain actors) are created, meaning that those affected by the decision were able to consent to or participate in the process. Output legitimacy refers to the effectiveness of the outcomes of the decisions. One of the problems of legitimacy caused by multi-level governance is that it can take the decision-making away from democratically elected representatives. The question arises – where does the legitimacy come from for non-State actors that are involved in multi-level governance systems? This is a question that has often been overlooked by literature on multi-level governance, which often fails to address the negative impact that the regimes may have on democratic values, particularly within the European Union.[159] In terms of the input (procedural) legitimacy of multi-level governance systems, multi-level governance could actually improve democratic legitimacy within a nation-State.[160] This is due to the fact that because multi-level governance structures allow for the participation of local actors, particularly if the abovementioned principle of subsidiarity is

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[158] See e.g. Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (n 21); and Yannis Papadopoulos, 'Accountability and Multi-Level Governance: More Accountability, Less Democracy?' (2010) 33 West European Politics 1030.

[159] See e.g. Bache, Bartle and Flinders (n 140) 486-498; Ian Bache, 'Researching Multilevel Governance', Paper presented to the CINEFOGO/University of Trento Conference on 'The Governance of the European Union: theories, practices and myths', Brussels, January 25-6, 2008.

[160] This has been pointed out by Fritz W Scharpf, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration' (1988) 66 Public Administration 239, discussed in Piattoni (n 120) 200).

followed, 'policy-making can more closely reflect local citizens' preferences and, hence, be more legitimate'.[161] Similarly, the inclusion of local actors within a multi-level governance system allows for higher levels of participation (the good governance criterion to which legitimacy is closely linked – see Chapter 3.2.1).[162]

In a similar vein, although democratic legitimacy may suffer under multi-level governance systems which rely on non-legal and non-binding mechanisms, institutions, processes and procedures established by non-elected entities, the 'benchmarking, transparency and direct civil society input' common in multi-level governance systems could help to ensure that citizen's interests are protected, and can improve levels of participation in decision-making.[163] This is likely to be true in relation to the governance of international human rights, since many instruments containing guidelines for actors to better protect human rights are non-binding, and even those binding norms found in international human rights treaties do not have binding enforcement or judicial mechanisms.[164] As suggested in Section 9.2.2, there is also a considerable amount of self-regulation by non-State actors vis-à-vis human rights.

However, if there are problems of legitimacy within a multi-level governance system, it is possible that solutions offered in the context of

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[161] Ibid.

[162] As Christopher Lord notes, participation can even be considered to be an element of input legitimacy, alongside authorisation and representation. Christopher Lord, *A Democratic Audit of the European Union* (Palgrave Macmillan 2004).

[163] Conzelmann (n 127) citing Bernard Gbikpi and Jürgen R Grote, 'From Democratic Government to Participatory Governance' in Jürgen R Grote and Bernard Gbikpi (eds), *Participatory Governance: Political and Social Implications* (Springer 2002) 17; Susana Borrás and Thomas Conzelmann, 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn' (2007) 29(5) Journal of European Integration 531; and Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (n 21).

[164] On the nature of the output of the UN human rights treaty monitoring bodies, see Chapter 5 of this book. At the regional level, some of the output (i.e. case law) is binding upon Member States of the regional human rights organisations, but there remain some issues of implementation and follow-up regarding decisions (see Chapter 6 of this book).

'organic' governance could be used. For example, as Simona Piattoni suggests, parliaments could authorise non-governmental governance actors and thus 'contribut[e] to "defining, controlling and legitimising post-parliamentary forms of governance"'.[165] This goes back to the notion that governance actors should be authorised before participating in a multi-level governance system, and would be more suited to Type I rather than Type II multi-level governance systems, where actors are able to authorise themselves to participate. As well as authorising non-State actors, Piattoni has proposed that parliaments could 'monitor and hold accountable these specialized systems of governance, "possibly addressing problems and issues of long-term global development, the tensions and contradictions between sectoral developments, and overall social stabilization.'[166] This suggests that legitimacy and accountability are closely linked, and that problems of illegitimacy could be overcome if those actors legitimately endowed with governing powers (i.e. the elected government) put measures in place to hold non-State actors accountable. In reality, this is most likely to succeed at the national level where States are able to use mechanisms within their domestic legal and political systems to hold actors to account. At the international level, the confines of the international human rights legal system and the lack of a centralised authority make such a solution more difficult to realise. It is here, therefore, that the self-regulation, voluntary and/or internal accountability mechanisms for non-State actors, as well as external accountability mechanisms that fall outside of the international legal framework, are crucial.

The potential lack of accountability in multi-level governance is especially worrisome in light of the good governance approach suggested by this study. The definition of accountability adopted here is the same as that in Section 9.2.3.2 discussing accountability as a criterion of good

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[165] Piattoni (n 120) 196, quoting Svein S Andersen, and Tom R Burns, 'The European Union and the Erosion of Parliamentary Democracy: A Study in Post-parliamentary Governance' in Svein S Andersen and Kjell A Eliassen (eds), *The European Union: How Democratic Is It?* (SAGE Publications 1996) 243.
[166] ibid.

governance. There may be problems of accountability in multi-level governance because of the 'dilution' of responsibility between different actors. This means that the allocation of responsibilities in particular needs to be made very clear, so that, in the context of international human rights, for example, individuals relying on human rights know which of the many governance actors should be held accountable. Moves towards 'multi-duty bearer frameworks' for human rights could help here,[167] as well as the current research that is being taken regarding shared responsibility, through the SHARES project. To date, the focus within this is still on sharing (international) responsibility between multiple States, but there have been some publications on shared responsibilities between State and non-State actors.[168]

The extent to which accountability is a problem within multi-level governance systems depends on the degree to which the dilution of responsibility between different (non-State) actors includes binding decisions, as opposed to tasks such as providing 'consultative' advice to democratically elected decision-makers.[169] It could be that accountability would not be significantly compromised by a multi-level governance approach to international human rights; non-State actors involved in the governance of human rights, although conducting self-regulation and perhaps even supervision and regulation of other actors, are not necessarily given the authority to take *binding* governance decisions (although this is the case for private contracts, which bind the parties thereto). Binding governance decisions often remain within the ambit of States (at the international and regional levels) and State actors (at the national and local levels). The role of non-State actors in the adoption of binding decisions of international human

[167] See e.g. Arne Vandenbogaerde, *Towards Shared Accountability in International Human Rights Law: Law, Procedures and Principles* (Intersentia 2016).
[168] See e.g. the SHARES Research Project on Shared Responsibility in International Law <http://www.sharesproject.nl/> accessed 12 November 2017; and Thomas Gammeltoft-Hansen, 'The Practice of Shared Responsibility in Relation to Private Actor Involvement in Migration Management' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press 2016).
[169] Papadopoulos, 'Accountability and Multi-Level Governance?' (n 158) 1031.

rights, as explained in Section 9.2.2 is indeed limited to a consultative responsibility – while NGOs, for example, may be involved in the development of a new human rights treaty, to become binding, the document must be adopted by States (acting through the United Nations). This is of course not to say that there are no deficits of accountability in international human rights governance – there is a well-documented 'accountability gap', particularly for what concerns non-State actors. However, the argument made here is that multi-level governance would not exacerbate the problem.

Ways in which accountability could be improved within multi-level governance systems have been suggested by Carol Harlow and Richard Rawlings, in relation to the multi-level governance of the European Union. The scholars suggest that one option for improving the accountability of multi-level governance systems would be through 'accountability networks', defining such networks as: '(i) a network of agencies specialising in a specific method of accountability, such as investigation, adjudication or audit, which (ii) come together or coalesce in a relationship of mutual dependency, (iii) fortified by shared professional expertise and ethos', to be 'thickened' by '(iv) the execution of a common purpose'.[170] This could certainly be applied within the context of international human rights.

Another approach that has been taken to improve accountability with the European Union's multi-level governance structure that could be used in the governance of international human rights can be found in the European Commission's White Paper on European Governance.[171] The document deals in part with the role of civil society and various networks that arise in multi-level governance structures, suggesting 'partnership arrangements' between the European Commission and civil society, expecting through the agreements that civil society abides by the principles of 'accountability and openness'.[172] Although there is no central governing authority within international law with which civil society could make such an arrangement,

[170] Harlow and Rawlings (n 73) 546.
[171] European Commission, 'European Governance: A White Paper' (COM(2001) 428 final).
[172] Conzelmann (n 127) 9-10; European Commission (n 171) 15-17.

the UN is certainly the body that spearheads efforts to protect human rights. At the national and local levels, such agreements could also be made with more localised public authorities. As well as improving accountability, such agreements, when seen in light of the comments above regarding the authorisation of governance activities conducted by non-State actors, could also have an effect on the legitimacy and coordination of a governance system.

The UNDP has also suggested how to monitor accountability in the governance of international human rights. A study carried out by the organisation proposes the use of various indicators that

> capture mechanisms of monitoring and independent oversight (such as establishment of ombudsmen's offices, and human rights monitoring at the domestic level), institutionalization of complaints facilities that are anchored in national institutions or in specific parts of the executive branch, as well as access to formal and informal justice (such as local and community dispute resolution mechanisms and those that link formal and informal systems).[173]

Ultimately, there are many ways in which accountability can be improved within multi-level governance regimes. In the context of human rights, the added complication exists that current international legal accountability mechanisms do not cover the actions of non-State actors. There remain, however, many non-legal ways to achieve accountability at the international level, as at the regional, national and sub-national level. Recommendations for improving the accountability of the World Bank and non-State armed groups for what concerns human rights will be provided in Chapters 10, 11 and 12.

To conclude this section, there are several important criticisms and challenges of multi-level governance systems. The challenges, and in

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[173] UNDP, 'Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty' (2011) 280-281 <http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Towards_SustainingMDG_Web1005.pdf> accessed 12 November 2017.

particular coordination, legitimacy and accountability, appear to be linked to the three good governance principles of transparency, participation and accountability. As mentioned in the discussions, ensuring adherence to these three principles may go some way to answering the main challenges to multi-level governance. This study therefore proposes that multi-level governance, as defined in Section 9.4.1, include the three principles of good governance, as shown in Figure 9.3.

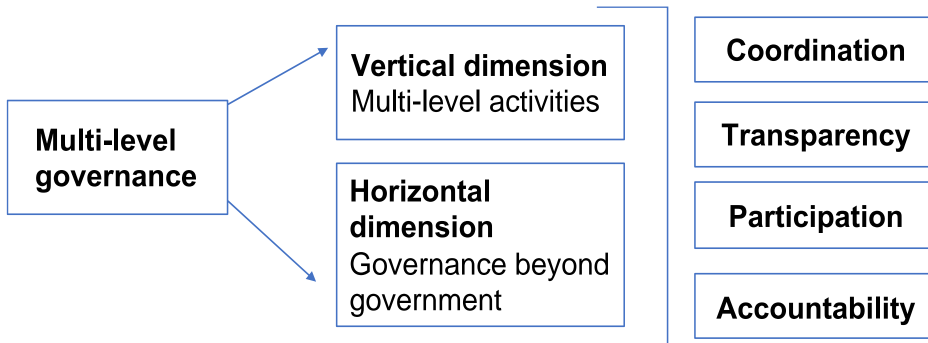


**Figure 9.3**: 'Good' multi-level governance (source: the author)

*9.4.3 A 'good' multi-level governance approach to international human rights*

The previous sections have explained this study's understanding of governance, the governance of international human rights, and multi-level governance. In addition, it has been argued that to overcome some of the challenges faced by multi-level governance systems, and due to the close relationship between good governance and human rights, a good governance approach should be taken. This means that the three principles of good governance should be adhered to by all actors and throughout all governance activities. The present section will apply the findings of the previous sections to the context of international human rights, suggesting a 'good' multi-level governance approach to international human rights and its implications for the protection of human rights vis-à-vis non-State actors.

As suggested in Section 9.2.2, the field of human rights is no stranger

to the concept of multi-level action by many different actors. However, as shown by Chapters 1-8 of the present book, the international legal framework, only deals with non-State actors to a limited degree and with a limited effect on the protection of human rights. This study argues that rather than starting with the legal framework, when considering the impact of non-State actors on the enjoyment of human rights, we should take a governance perspective. According to the definition of governance adopted in this study (i.e. governance beyond government and including non-legal activities), a governance approach allows much more direct focus to be placed on non-State actors. A governance approach allows the activities of non-State actors that have a negative impact on human rights to be dealt with directly by instruments, processes, mechanisms and procedures. Further, a governance approach acknowledges the important role that non-State actors have in the drafting, adoption, implementation and enforcement of standards aimed at achieving the goal of ensuring the better respect, protection and fulfilment of human rights/human dignity. To ensure that governance actors activities contribute towards this goal, human rights-based approaches can be taken, as suggested in Section 9.3.2.

Taking a *multi-level* governance approach enables the actors and activities of the governance of international human rights to be transformed into a system that is organised in a particular manner. As explained in Section 9.4.2, the organisation of a Type II multi-level governance system is preferable to that of a Type I system in the context of international human rights. This is because of the flexible design of Type II multi-level governance systems which allow actors to move between levels and jurisdictions, and to volunteer as governance actors on an *ad hoc* basis. The flexibility is important in the governance of international human rights, which is constantly developing and including new actors, activities and subject-matters.

It may seem at this point as though the governance of international human rights already follows a Type II multi-level governance approach.[174]

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[174] Some scholars have remarked that multi-level governance exists internationally, although

This is true, to an extent. However, while many initiatives within the international governance of human rights take a multi-stakeholder approach, there is no recognisable system of organisation or coordination between governance actors and activities – when we envisage the governance of international human rights, we do not see a system as such, but rather a collection of (sometimes sporadic) activities. As explained in Section 9.4.3.2, coordination is a very important aspect of multi-level governance, and can have a significant impact on adherence to the three principles of good governance. It has been suggested that it is such a *need* for coordination between decisions on different levels, when more than one actor possesses authority, that actually gives rise to multi-level governance (rather than the coordination itself).[175] In any case, coordination and cooperation would certainly have a great impact on the success of a multilevel human rights governance system, which, as other multi-level governance systems, would entail 'a panoply of systems of coordination and negotiation among formally independent but functionally interdependent entities that stand in complex relations to one another and that, through coordination and negotiation, keep redefining these relations.'[176] The crucial point here is that rather than conflicting with one another, different actors would, if not collaborate, then at least cooperate with one another to achieve the common goal of protecting human rights, including when they operate on different levels.

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not in the specific context of human rights. James N Rosenau, for example argued more than 20 years ago that multilevel governance had reached such levels of coordination and flexibility that it has already 'outflanked' intergovernmental organisations, which were in turn being proven to be 'defective, inefficient, ineffective or largely irrelevant.' James N Rosenau, 'Governance in a New Global Order' in David Held and Anthony McGrew (eds), *Governing Globalization* (2nd edn, Polity Press 2003) 225, cited in Knight (n 3) 184. However, in the realm of human rights, there remains much work to be done to coordinate different actors and to determine how authority and responsibilities should be allocated throughout the various levels and of human rights governance.

[175] See Michael Zürn, 'Globalization and Global Governance' in Walter Carlsnaes, Thomas Risse and Beth A Simmons (eds), *Handbook of International Relations* (2nd edn, SAGE Publications 2013), citing Arthur Benz (ed), *Governance - Regieren in komplexen Regelsystemen: Eine Einführung* (Springer Verslag 2004).

[176] Piattoni (n 120) 26.

In sum, a 'good' multi-level governance approach to international human rights can be envisaged as follows:

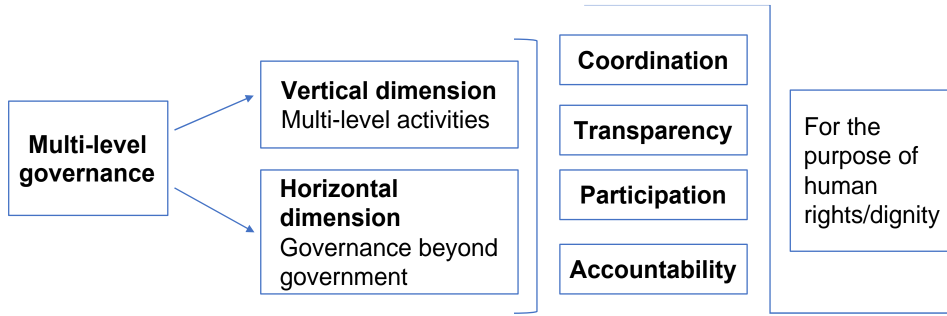


**Figure 9.4**: The 'good' multi-level governance of international human rights (source: the author)

This approach will be applied in Chapters 10 and 11 in relation to the World Bank and non-State armed groups.

For reasons of space, a full evaluation of how the current governance of international human rights could be transformed into a good multi-level governance system, will not be conducted in this study. Instead, more specific recommendations are provided in relation to the two case studies in Chapters 10 and 11, and some more general recommendations will be made in the remainder of this chapter.

As mentioned above, the current governance of international human rights does not yet constitute a multi-level governance system. To do so, governance activities and actors need to be better coordinated and the task-specific jurisdictions of a Type II multi-level governance approach to human rights need to be clearly established. This could be done in relation to each main thematic area of human rights, which can be roughly based on the nine core UN human rights treaties. These would be: economic, social and cultural rights, civil and political rights, the elimination of racial discrimination, the elimination of discrimination against women, the rights of children, the rights of migrant workers, the rights of people with disabilities, the prohibition of

torture and other cruel, inhuman and degrading treatment and the protection of people from enforced disappearance. It is also possible that specific human rights that are found within several of the core treaties would form a subset of the governance of international human rights which would be divided into task-specific jurisdictions. Examples of such right would be the rights to health, food, life, housing, private and family life and non-discrimination, which sometimes form the sole focus of particular governance activities. The jurisdictions themselves could roughly be divided into efforts to draft, adopt, implement and enforce human rights standards relating to each thematic area. Different actors could, as they do now, volunteer to take part in a particular governance jurisdiction according to their interests and expertise. Each jurisdiction could be coordinated by an allocated actor. In this sense, it would be useful to borrow from the United Nations 'Cluster Approach' to disaster response, adopted in 2005 in recognition of the need for better coordination between disaster sectors.[177] The approach is demonstrated in Figure 9.5.

[177] See United Nations Office for the Coordination of Humanitarian Affairs, 'Cluster coordination' <https://www.unocha.org/legacy/what-we-do/coordination-tools/cluster-coordination> accessed 22 December 2017, discussed in Lane and Hesselman (n 17).

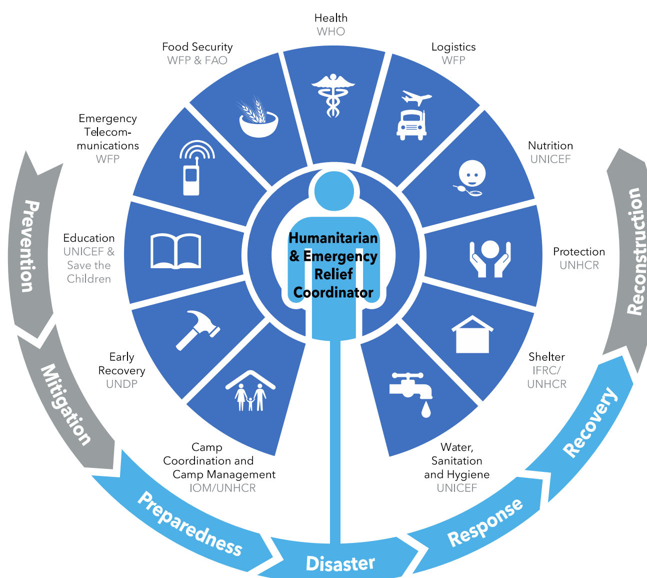


**Figure 9.5**: The United Nations Cluster Approach to disaster management (source: Inter-Agency Standing Committee[178])

As Figure 9.5 shows, each cluster under the approach consists of groups of humanitarian organisations from within and outside of the UN in each main sector of humanitarian action.[179] Each cluster is designated by the Inter-Agency Standing Committee and is allocated clear responsibilities for coordinating disaster management efforts. Taking a similar approach within a multi-level governance system for the governance of international human rights could not only help coordination, but also go some way to allocating different human rights-related responsibilities between different actors involved in the system.

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[178] Inter-Agency Standing Committee, 'Reference Module for Cluster Coordination at Country Level (revised July 2015)' <https://interagencystandingcommittee.org/iasc-transformative-agenda/documents-public/reference-module-cluster-coordination-country-level> accessed 9 April 2018.

[179] Humanitarian Response, 'What is the cluster approach?' <https://www.humanitarianresponse.info/en/about-clusters/what-is-the-cluster-approach> accessed 22 December 2017.

## 9.5 Concluding reflections on a multi-level governance approach to human rights

Chapters 1-8 of this book explained and analysed the current legal framework for the protection of human rights at the international level. Chapter 8 in particular concluded that the tools available within the framework are insufficient for protecting the enjoyment of individuals' human rights from the harmful actions of non-State actors. The present chapter sought to build on this finding by introducing a multi-level (good) governance approach to human rights.

First, this study's understanding of governance was explained. This can be summarised as a collection of legal and extra-legal activities conducted by a range of State and non-State actors, for a common purpose. In the context of human rights, the actors include, *inter alia*, States, international organisations, (multi-national) corporations, NGOs, local communities and individuals. The governance of international human rights, which evidently goes beyond government, has the purpose of improving the respect, protection and fulfilment of human rights and human dignity, and can be considered to be one sub-set of a larger framework of global governance.

Using this understanding of governance as a foundation, the chapter then introduced the notion of good governance, which can be boiled down to three main principles of transparency, participation and accountability. Good governance has extremely close ties with human rights, which can be considered to be mutually reinforcing with good governance. Reflecting this close relationship are human rights-based approaches, which include the three principles of good governance and can provide a more detailed conceptual framework that different actors can use to ensure that their activities are guided by human rights and contribute to the goal of international human rights governance.

The most significant governance approach suggested by this study – multi-level governance – was then explained. Multi-level governance has two dimensions, the vertical dimension which reflects the multi-level nature of multi-level governance systems, and the horizontal, which reflects the

'governance beyond government' aspect of multi-level governance systems. Every multi-level governance has these two dimensions. However, multi-level governance systems may be organised in two ways – according to Type I, or Type II multi-level governance. The differences in organisation pertain mostly to the flexibility of the systems, the way in which the system is divided into different segments, or jurisdictions, and the ability of actors to move freely from one jurisdiction to another. In the context of the governance of international human rights, the more flexible Type II structure is preferable. There are several challenges to multi-level governance, particularly concerning coordination between actors and activities, the legitimacy of and accountability within the systems. However, several suggestions have been made for overcoming these solutions, which can be combatted particularly through adherence to the principles of good governance.

Ultimately, this study argues that a multi-level governance approach, within which all actors and activities work towards better coordination and compliance with transparency, accountability and participation, should be taken to international human rights. Rather than the current legal approach, a multi-level governance approach is better equipped to comprehensively address the issue of human rights interference by non-State actors, which as well as having a negative effect on human rights, also play an important role in the governance of international human rights.

The remaining substantive chapters of this book (Chapters 10 and 11) will apply the findings of the present chapter in the context of two case studies – the World Bank and non-State armed groups. Specifically, the role of different actors under a multi-level governance approach to international human rights will be discussed in relation to the two case studies. Recommendations of measures that could be taken under a multi-level governance approach to improve the impact of the two actors on the enjoyment of human rights will also be provided.

Chapter 10

# The World Bank, international human rights law and multi-level governance

## 10.1 Preliminary remarks

The World Bank is an international financial institution that operates on a global scale to 'end extreme poverty within one generation and boost shared prosperity'.[1] It is often assumed and very often stated that the World Bank should include international human rights standards in its policies and comply with human rights standards in its operations. Indeed, there has been a growing pressure on the Bank to improve its human rights footprint coming from international civil society (e.g. Human Rights Watch and Amnesty International), human rights experts working under the auspices of the United Nations (e.g. Special Rapporteurs), local communities and scholars.[2]

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[1] See website of the The World Bank, 'About the World Bank' <http://www.worldbank.org/en/about> accessed 28 September 2017.

[2] See e.g. Human Rights Watch, 'Human Rights Watch Submission: World Bank's Draft Environmental and Social Framework' (2015) <https://www.hrw.org/news/2015/04/07/human-rights-watch-submission-world-banks-draft-environmental-and-social-framework> accessed 29 September 2017; Human Rights Watch, 'World Bank, IMF' <https://www.hrw.org/topic/business/world-bank-imf> accessed 12 October 2017; Human Rights Watch, 'Human Rights Watch's Recommendations on the World Bank's Guidance Notes Regarding the Implementation of the Environmental and Social Framework' (5 September 2017) <https://www.hrw.org/news/2017/09/05/human-rights-watchs-recommendations-world-banks-guidance-notes-regarding> accessed 12 October 2017; Amnesty International, 'Nigeria: The World Bank Inspection Panel's Early Solutions Pilot Approach: The Case of Badia East, Nigeria' (2 September 2014) AFR 44/018/2014 <https://www.amnesty.org/en/documents/AFR44/018/2014/en/> accessed 29

However, the basis used for holding the Bank to such standards varies.

This chapter critically examines several bases for arguing that the Bank should engage with human rights through its policies and considers a new basis, drawing on the Bank's own good governance approach as well as the United Nations' HRBAs to development. Building on this basis, the chapter then further discusses the multi-level governance approach to human rights suggested in Chapter 9, applying it to the context of the World Bank.

First, the relationship between the World Bank and human rights will be explained, with reference to arguments providing a basis upon which to impose human rights standards on the Bank (Section 10.2). During this discussion, three perspectives will be considered: (1) the legal position – what the status of the World Bank is under international human rights law, and whether it can be said to have existing legal human rights obligations; (2) the World Bank's own position – how the Bank envisages its relationship with and role in the protection of international human rights; and (3) the relationship between the Bank's policies and practices and human rights – how its attitudes are reflected in its policies and how the Bank's operations impact human rights enjoyment in practice. Examples from the World Bank's policies and practice in this respect are tenfold. However, in the interests of space the chapter focuses on four examples which show the closeness of the Bank's relationship with human rights, highlight some developments towards increased engagement by the Bank with human rights, and underline several areas in which the Bank could improve its impact on the enjoyment of international human rights: (1) structural adjustment programmes and poverty reduction strategy papers; (2) the World Bank Inspection Panel; (3) the Bank's Grievance Redress Service; and (4) the Bank's (revised) Environmental and Social Safeguard Policies.

The discussions in Section 10.2 provide the basis for suggestions

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September 2017. UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (4 August 2015) A/70/274; Willem van Genugten, *The World Bank Group, the IMF and Human Rights: A Contextualised Way Forward* (Intersentia 2015); and Gernot Brodnig, 'The World Bank and Human Rights: Mission Impossible?' (2002) 17 The Fletcher Journal of Development Studies 1.

made in Section 10.3 as to how the Bank's impact on the enjoyment of international human rights could be improved, with particular reference to the concepts of good governance, human rights-based approaches and multi-level governance discussed in Chapter 9. Within Section 10.3, the role of different actors under a multi-level governance approach to human rights vis-à-vis the World Bank is discussed, and suggestions for measures to achieve multi-level governance are provided.

## 10.2 The relationship between the World Bank and human rights

The World Bank is an international organisation that was established at the Bretton Woods Monetary Conference in 1944 and consists of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) – two of the five organisations that comprise the World Bank Group.[3] The initial aim of the World Bank was to 'help rebuild European countries that had been devastated by World War II',[4] but they quickly became global, and now consist of ending extreme poverty and boosting shared prosperity, as mentioned above.[5] More specifically, the Bank aims to 'decrease the percentage of people living with less than $1.90 a day to no more than 3 percent by 2030' in order to end extreme poverty, and 'to promote income growth of the bottom 40 percent of the population in each country' in order to boost shared prosperity.[6] The main role of the World Bank in achieving these goals is to lend money to middle-

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[3] The remaining three organisations are: The International Financial Corporation, The Multilateral Investment Guarantee Agency and the International Centre for Settlement of Investment Disputes. ibid. The International Monetary Fund was also established at the Bretton Woods Monetary Conference, and the two organisations are commonly known as the 'Bretton Woods Institutions'. Bretton Woods Project, 'What are the Bretton Woods Institutions?' (23 August 2005) <http://www.brettonwoodsproject.org/2005/08/art-320747/> accessed 9 January 2018.

[4] The World Bank, 'History' <http://www.worldbank.org/en/about/archives/history> accessed 9 January 2018.

[5] The World Bank, 'About the World Bank' (n 1).

[6] Amitava Chandra, The World Bank, 'Ending Extreme Poverty and Boosting Shared Prosperity' (19 April 2013) <http://www.worldbank.org/en/news/feature/2013/04/17/ending_extreme_poverty_and_promoting_shared_prosperity> accessed 9 January 2018.

income and credit-worthy low-income countries, having lent over 500 billion USD since becoming operative in 1946.[7] The World Bank has undeniably had an impact on improving development through its provision of loans, credits and grants to developing countries to support development in areas such as health, education, infrastructure and public administration, and through its knowledge-sharing activities (including technical assistance).[8] However, the World Bank has not had a smooth relationship with human rights, the protection of which is now generally considered to be crucial to achieving development.[9]

### *10.2.1 The Bank's position under international law*

As it stands, international law is currently in a somewhat nascent state for what concerns international organisations. This was aptly summarised by the Parliamentary Assembly of the Council of Europe in its statement that 'in contrast to the remarkable development regarding the number, role and expansion of powers of international organisations, the international legal

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[7] See World Bank, 'International Bank for Reconstruction and Development' <http://www.worldbank.org/en/who-we-are/ibrd> accessed 28 September 2017.

[8] The World Bank, 'What We Do' <http://www.worldbank.org/en/about/what-we-do> accesesd 9 January 2018.

[9] The relationship between development and human rights has been heavily discussed by organisations such as the United Nations Development Programme (UNDP). See e.g. UNDP, 'Human Development Report 2000' (2000) <http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf> accessed 9 January 2018. The importance of human rights for achieving development is also evident in the work of many development and human rights organisations that advocate a 'human rights-based approach' to development (discussed in Chapter 9 of this book, see also Section 10.3.1 below). See e.g. UNICEF, 'Human Rights-Based Approach to Programming' <https://www.unicef.org/policyanalysis/rights/index_62012.html#4> accessed 28 September 2017; United Nations Development Programme, 'A Human Rights-Based Approach to Development Programming in UNDP' (2002) <http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/human_rights/a-human-rights-based-approach-to-development-programming-in-undp.html> accessed 28 September 2017. For further discussion on the importance of human rights to development, see Mary Robinson, 'What Rights Can Add to Good Development Practice' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005).

system governing their activities is still markedly underdeveloped.'[10] This has led to many academic discussions regarding the obligations of international organisations under international law, including in the field of international human rights, which remains an issue of hot debate. In relation to the World Bank specifically, several aspects of international law have been invoked to argue that the organisation has existing obligations to act in compliance with these standards, some prominent examples of which will be discussed in the following paragraphs.

The World Bank is categorised as an international organisation (i.e. a non-State actor) and is not subject to human rights treaties creating binding international human rights obligations.[11] Nonetheless, commentators have argued that the Bank is subject to human rights obligations under customary international law, general principles of international law,[12] and the Draft Articles on Responsibility of International Organizations,[13] among others.[14] Some commentators have also pushed for the imposition of direct obligations on international financial institutions, including the World Bank, through the adoption of an internationally binding treaty.[15] This would raise multiple

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[10] Committee on Legal Affairs and Human Rights José Maria Beneyto, 'Accountability of International Institutions for Human Rights Violations' (17 December 2013) Cod 13370, 6 <http://www.assembly.coe.int/CommitteeDocs/2013/ajdoc172013.pdf> accessed 28 September 2017.

[11] Manisuli Ssenyonjo and Mashood A Baderin, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate Publishing Ltd 2010) 547.

[12] See e.g. Human Rights Watch, 'Human Rights Watch Submission Re the Situation of Human Rights Defenders Working on Business and International Financial Institutions to the UN Special Rapporteur on the situation of human rights defenders' (11 August 2017) <https://www.hrw.org/news/2017/08/11/human-rights-watch-submission-re-situation-human-rights-defenders-working-business> accessed 12 October 2017.

[13] International Law Commission, 'Draft Articles on Responsibility of International Organizations, with Commentaries' (2011) II Part Two Yearbook of the International Law Commission.

[14] For an in-depth discussion of the various sources of international law that could form the basis of human rights obligations for the World Bank, see Sigrun Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing 2001).

[15] See e.g. Adam McBeth, *International Economic Actors and Human Rights* (Routledge 2011) 65-71.

challenges, as any instrument imposing binding human rights obligations on the Bank would have to go through a long drafting and negotiation process, and receive the support and endorsement of many States to be effective.[16]

Although the World Bank (or indeed any international financial institution or international organisation) is not referred to by or party to the UN international human rights treaties,[17] references to international organisations were found in General Comments of UN human rights treaty monitoring bodies in Chapter 5.3.1. For example, relying on Articles 22 and 23 of the International Covenant on Economic, Social and Cultural Rights,[18] the UN CteeESCR has held that international financial institutions should take human rights into account 'in their lending policies, credit agreements, structural adjustment programmes and other development projects' in order

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[16] A full discussion of these challenges falls outside of the scope of the present book. For a similar discussion regarding a binding treaty on business and human rights, see Lottie Lane, 'Private Providers of Essential Public Services and de Jure Responsibility for Human Rights' in Marlies Hesselman, Brigit Toebes and Antenor Hallo de Wolf (eds), *Socio-Economic Human Rights in Essential Public Services Provision* (Routledge 2017) 150-155.

[17] Arguments have been made that international organisations can be bound by international treaties without having given their consent, but this is disputable on the grounds that the World Bank has its own international legal personality (see below) and that Article 34 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations (adopted 21 March 1986) 25 ILM 543 (VCLT-IO) explicitly prevents treaties from binding international organisations without their consent. This does remain an issue of contention, though, as the VCLT-IO has not received enough ratifications to enter into force. Further, the treaties that would be applicable in the present context would fall under the scope of the Vienna Convention on the Law of Treaties 1969 (i.e. treaties between States). Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57(2) Harvard International Law Journal 325, 326.

[18] Article 22 reads: 'The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.', and Article 23 reads: The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.'

to promote human rights.[19] The CteeESCR has further stated that 'the incorporation of human rights law and principles in the programmes and policies'[20] of international organisations and '[t]he adoption of a human rights-based approach by United Nations specialized agencies'[21] (of which the World bank is one) 'will greatly facilitate implementation' of human rights'.[22] However, as explained in Chapter 5, while general comments can be considered to be authoritative interpretations of the UN human rights treaties, they are by no means legally binding, and cannot be considered to provide a legal basis for arguing that international organisations have legally binding human rights obligations.[23]

The main method at the international level to allow individuals a remedy for harm caused by non-State actors was found in Chapters 5 and 8 of this book to be a reliance on States' positive obligation to protect individuals' enjoyment of human rights from interference by third parties.[24] This is expected to occur through the adoption and enforcement of national laws and policies within a State. However, this avenue of redress is not

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[19] UN CteeESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11, Section VI. Similar comments were also made in UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) E/C.12/1999/5, discussed in Daugirdas (n 17) 337.
[20] UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4, Section 5.
[21] ibid; UN CteeESCR, 'General Comment No. 15' (n 19).
[22] ibid.
[23] Other UN bodies have also encouraged the World Bank to take action with relation to human rights. For example, the UN General Assembly has 'invited' the World Bank 'to promote policies and projects that have a positive impact on the right to food, to ensure that partners respect the right to food in the implementation of common projects, to support strategies of Member States aimed at the fulfilment of the right to food and to avoid any actions that could have a negative impact on the realization of the right to food'. UN General Assembly, Resolution 62/164 on the Right to Food, (13 March 2008) A/RES/62/164 cited in UN Human Rights Council, 'Report of the Special Rapporteur on the right to food, Jean Ziegler' (10 January 2008) A/HRC/7/5, para 24.
[24] This obligation forms part of the tripartite typology of human rights obligations which is very widely accepted and applied by UN treaty bodies and human rights academics and requires states to respect, protect and fulfil human rights. See generally UN CteeESCR, 'General Comment No. 14 (n 20).

possible vis-à-vis the World Bank, against which domestic law is unable to effectively protect individuals' rights. Due to the doctrine of jurisdictional immunity of international organisations, 'it is generally impossible for individuals to bring cases against the Bank in domestic or international legal forums'.[25] This is despite the narrower scope of the Bank's immunity compared to other international organisations.[26] The Bank's Articles of Agreement do allow some actions to be brought against the Bank at the domestic level. Article VII, Section 3 provides that actions may be brought against the Bank in 'court[s] of competent jurisdiction in the territories of a member', if the Bank has an office there, appointed appropriate personnel or 'has issued or guaranteed securities'.[27] However, as Philippe Sands and Pierre Klein note, in practice this provision does not completely suppress the World Bank's immunity.[28] At least in the US, courts have used such clauses as Article VII, Section 3 (which are included in most regional development banks' constitutive instruments) to preclude immunity in all private law cases.[29] In the present context, this may still not allow much space for victims of human rights violations to seek redress against the World Bank. Even if private law cases could be brought against the Bank, the action forming the basis of the claim would have to include human rights standards in order for them to be upheld against the Bank in such a case. As was seen in Chapter 7,

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[25] Yvonne Wong and Benoit Mayer, 'The World Bank's Inspection Panel: A Tool for Accountability?' in Jan Wouters and others (eds), *The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (The World Bank 2015) 498. For more on the immunity of the World Bank, see Meghan Natenson, 'The World Bank Group's Human Rights Obligations Under the United Nations Guiding Principles on Business and Human Rights' (2015) 33(2) Berkeley Journal of International Law 489, 502-505.

[26] Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (6th edn, Sweet & Maxwell 2009) 495.

[27] See ibid.

[28] Sands and Klein suggest that the restriction on the Bank's immunity seems to have been intended to make it possible for creditors or bondholders to bring law suits against the World Bank at the national level. ibid.

[29] Referring, for example, to the case of *Lutcher v Inter-American Development Bank*, US Court of Appeals, DC Circuit (1967) 382 F.2d 454. See Sands and Klein (n 26) 495.

at least in the UK, the judiciary is very careful with the extent to which it allows human rights to be incorporated into private law.

Another way of indirectly applying human rights standards to the World Bank could be by looking to the human rights obligations of the States that are members of the organisation. It can be said that Member States of the Bank must at all times respect their human rights obligations, including when they are acting as part of the World Bank (e.g. in the drafting of World Bank policies). The UN CteeESCR has in more than one General Comment noted the importance of States that are both party to international human rights treaties and members of international financial institutions ensuring that the institution give due consideration to the human rights standards that the States themselves have agreed to uphold.[30] This may have the indirect effect that the World Bank respects human rights, but does not actually lead to legally binding obligations for the Bank *per se*. Indeed, to argue otherwise would require the World Bank to be treated only as a collection of States rather than as a separate international legal person. This would be contrary to the Bank's Articles of Agreement and the agreement between the World Bank and the United Nations, which together afford it distinct international legal personality.[31] Furthermore, the human rights obligations of each State vary

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[30] E.g. UN CteeESCR, 'General Comment No. 13: The Right to Education (Art. 13 of the Covenant)', (8 December 1999) E/C.12/1999/10 and UN CteeESCR, 'General Comment No. 14' (n 20) in Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 94.

[31] As Namita Wahi points out, various provisions within the World Bank's Articles of Agreement clearly establish that the Bank fulfils the criteria for an entity to possess international legal personality. This includes: Articles 1(2), 5(5)(c) and 8(4) of the Agreement Between the UN and the International Bank for Reconstruction and Development (IBRD), which illustrate the Bank's functioning independent of its member States (see Protocol concerning the entry into force of the Agreement between the United Nations and the International Bank for Reconstruction and Development (15 November 1947) UNTS vol. 16, 341); Article 1 International Bank of Reconstruction and Development Articles of Agreement (adopted 27 December 1945, amended 1989) UNTS 2, 13, which evidence the Bank's capacity to create international rights and obligations; and Article 9(c) of the Bank's Articles of Agreement, which demonstrates the Bank's capacity to bring and defend international claims. Namita Wahi, 'Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability'

according to which human rights treaties they have ratified. This means that even if States follow their human rights commitments within the Bank, the human rights standards that may be followed could vary or be overlooked by States that have not ratified a certain treaty.[32] Finally, it is unclear whether victims of human rights interference caused by the Bank would be able to gain redress against their State for failing to act according to human rights standards during their participation in the Bank. It would be very difficult and require extensive knowledge of how a particular decision was made within the Bank for an individual to show that an individual State were responsible for a violation of human rights arising from the World Bank's activities.

The fact that the World Bank has its own international legal personality has led some experts to argue that it does have international legal obligations for what concerns human rights. For example, The Tilburg Guiding Principles on the World Bank, the International Monetary Fund (IMF) and Human Rights in 2003[33] suggest that the Bank's separate international legal personality is strengthened by the fact that it is a specialised agency of the UN.[34] The Principles claim that as a distinct international legal person, the World Bank has international legal obligations to 'take full responsibility for the respect of human rights when its projects, policies or programmes negatively impact or undermine the enjoyment of

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(2006) 12 University of California, Davis Journal of International Law and Policy 331, 364-365.

[32] See for discussion Frederik Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations' in Jan Wouters and others (eds) *Accountability for Human Rights Violations by International Organizations* (Intersentia 2010), discussed in Jan Klabbers, 'Book Review: Jan Wouters, Eva Brems, Stefaan Smis and Pierre Schmitt (eds.), *Accountability for Human Rights Violations by International Organisations* (Intersentia, Antwerp, 2010), 600pp., ISBN 978-90-5095-746-5, retail price EUR 120,00' (2011) 8 International Organizations Law Review 273, 274.

[33] Willem van Genugten and others, 'Tilburg Guiding Principles on World Bank, IMF and Human Rights' in Willem van Genugten, Paul Hunt and Susan Matthews (eds), *World Bank and Human Rights* (Wolf Legal Publishers 2003) (Tilburg Guiding Principles).

[34] ibid para 6.

human rights'.[35] While it is certainly desirable that the Bank take on such responsibility, the Principles also fail to provide a precise legal basis of the obligations of the World Bank. Furthermore, it appears from the wording of the Principles that the Bank's obligations are of an *ex post facto* nature; it seems as though some evaluation of projects, policies and programmes which have *already* negatively impacted human rights is required by the Principles, rather than consideration and respect of human rights from the outset, for example during the drafting of its policies.

Although the Principles themselves are somewhat unconvincing, the finding that the World Bank does have some obligations under international law should not be summarily rejected. Such a finding is supported by the statement of the International Court of Justice (ICJ) in its advisory opinion on the *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (*WHO-Egypt* advisory opinion) that '[i]nternational organizations are subjects of international law, and, as such, are bound by any obligations incumbent upon them under general rules of international law.'[36] However, the statement has been subject to much criticism as the ICJ did not offer any evidence or basis for this claim, which reads on face value as though it equates being a subject of international law with being bound by general international law.[37] This would suggest that any actors with international legal personality (including, for example, multinational corporations, non-State armed groups and international NGOs, which could each be said to have a degree of international legal personality) would be bound by general international law.[38] There is very little, if any, evidence to support such a

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[35] ibid para 5.

[36] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt* (Advisory Opinion) 1980 ICJ Rep 73, paras 89–90, cited in Daugirdas (n 17) 326.

[37] See Daugirdas (n 17) 333. See also Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 International Organizations Law Review 151, 165, cited in Daugirdas (n 17) 326. General international law generally refers to customary international law and general principles of law. Koen de Feyter, 'The International Financial Institutions and Human Rights: Law and Practice' (2004) 6(1) Human Rights Review 56, 57.

[38] The International Court of Justice (ICJ) does not, however, seem to suggest that all subjects of international law have the same obligations (which would conflict with its statements in its

claim. The ICJ's statement in the *WHO-Egypt* advisory opinion also fails to specify which precise obligations are incumbent on organisations (or indeed upon all subjects of international law). Jan Klabbers, who has undertaken a significant amount of research on the matter, concludes that the ICJ could not have intended to hold that international organisations are bound by *all* customary international law. Indeed, if it had, this would be very problematic in light of the fact that international organisations have a very limited capacity to contribute the formation of customary international law.[39]

In light of the omission by the ICJ to specify which obligations international organisations are subject to, scholars have hotly debated the topic. A full discussion of the scholarly debate on this topic will not be attempted in the present book. However, it is important to note that many scholars accept the proposition that customary international law is applicable to international organisations,[40] but not that they are subject to customary law in its entirety.[41] However, even if we agree that customary international law

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advisory opinion on the *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) 1949 ICJ Rep 174, 178 to the effect that each subject of international law has different rights and obligations under international law). For a discussion of these statements in the context of international organisations, see Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002) 43.

[39] Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability' in Jean D'Aspremont and Samantha Besson (eds), *The Oxford Handbook on Sources of International Law* (Oxford University Press 2017), cited in Daugirdas (n 17) 333-334. For comments on how international organisations can be considered to contribute to the formation of customary international law, see Michael Wood, 'International Organizations and Customary International Law' (2015) 48(3) Vanderbilt Journal of Transnational Law 609.

[40] E.g. Guglielmo Verdirame, who understand the ICJ's statement to be 'shorthand for customary international law or universal or quasi-universal applicability and for general principles of law'. See Guglielmo Veriame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011) 71, discussed in Jan Klabbers, 'Book Review: *The UN and Human Rights: Who Guards the Guardians?*, written by Guglielmo Verdirame' (2014) 11(1) International Organizations Law Review 235, 236-237. See also de Feyter (n 37) 57. See also International Law Association Committee on Accountability of International Organisations, 'Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices', New Delhi Conference Report (2002) <http://www.ila-hq.org/index.php/committees> accessed 18 January 2018.

[41] Klabbers, for example, believes that customary international law that 'require[s], permit[s], or prohibit[s] certain conduct' (which human rights norms regularly do) does not apply to

can bind the World Bank, the question still remains as to which norms, if any, under international human rights law, have reached the status of customary international law. Ultimately, the question of which rights can be considered to be customary international law remains an issue of debate.[42] Certainly, those rights which have obtained the status of *jus cogens* norms can be said to fall within the scope of international law obligations applicable to international organisations.[43] However, the scope of such rights is relatively narrow, and mostly concern civil and political rights such as the prohibitions of torture and slavery rather than economic, social and cultural rights, which are particularly affected by the World Bank's activities.

Further, even if customary international law does apply to the World Bank, Sigrun Skogly argues the norms that are applicable to international financial institutions are mostly negative in nature (as, she argues, they are in customary international law generally[44]), and would include only an obligation to respect human rights, and to a very limited extent, an obligation to protect human rights (to the exclusion of an obligation to fulfil them).[45] This would mean that the World Bank may be required to be mindful of human rights in its operations, but could not extend to an obligation for the Bank to take positive action to contribute to the realisation of human rights. Skogly's findings are contested by Andrew Clapham, who pictures, if not

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international organisations. Daugirdas (n 17) 333, discussing Klabbers, 'Book Review: *The UN and Human Rights*' (n 40) 237.

[42] As Daugirdas has noted, some scholars believe (for example) that economic rights constitute customary international law, while others reject this. See Daugirdas (n 17) 338, citing Skogly (n 14) 76-79; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 148-151; François Gianviti, 'Economic, Social and Cultural Human Rights and the International Monetary Fund' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005) 121-122; and August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) American Journal of International law 851, 862.

[43] See e.g. Council of Europe Committee on Legal Affairs and Human Rights, 'Accountability of international institutions for human rights violations: Introductory memorandum' (10 May 2013) AS/Jur (2013) 17.

[44] Skogly (n 14).

[45] See ibid 93, cited in Clapham (n 42) 150.

obligations to protect and fulfil human rights in the same manner as States, customary international law obligations for the World Bank that go beyond an obligation to 'refrain from acting in a way that immediately denies people' human rights.[46]

In relation to those norms of customary international law which do bind the World Bank, the International Law Commission in 2011 – the Draft Articles on Responsibility of International Organizations may come into play. [47] The Articles are an important development and have been applied in the past by bodies such as the European Court of Human Rights.[48] However, they 'do not in principle address the so-called primary rules, which establish whether an organization is bound by a certain international obligation'.[49] Rather, the Articles specify under which circumstances an international organisation could be held responsible for breaches of its (already existing) international legal obligations. In light of the lack of clarity concerning binding obligations for the World Bank with regard to human rights at the international level, the Draft Articles will not be discussed further here.

Ultimately, it is difficult to conclude with certainty that the World Bank currently has binding international obligations under human rights law, at least to actively engage with human rights in its operations and to take positive action vis-à-vis human rights. Although the Bank may be bound by certain human rights that have reached customary or *jus cogens* status, this by no means extends to the full corpus of human rights that the Bank affects

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[46] Clapham (n 42) 150-151.

[47] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Vol. II Part Two Yearbook of the International Law Commission (as corrected) A/56/10.

[48] E.g. in the cases of *Behrami and Behrami v France and Saramati v France*, *Germany and Norway* (Decision on Admissibility) App Nos 71412/01 and 78166/01 2 May 2007. See for discussion, Michael Wood International Law Discussion Group, 'Legal Responsibility of International Organisations in International Law: Summary of the International Law Discussion Group meeting held at Chatham House' (2011) <https://www.chathamhouse.org/publications/papers/view/109605> accessed 28 September 2017.

[49] Giorgio Gaja, 'Articles on the Responsibility of International Organizations' [2014] United Nations Audiovisual Library of International Law.

in practice, and the Bank does not appear to consider itself legally obliged to consider human rights – to the contrary, as Section 10.2.2.2 will discuss, the Bank considers itself legally bound by its constituent instrument to refrain from considering human rights.

### *10.2.2 The World Bank's own position on human rights*

Despite a propensity to underscore the importance of human rights for the eradication of poverty and the achievement of development, the Bank does not appear to accept legal arguments that it should include human rights considerations in its policies. This section will outline the Bank's public support for human rights and evidence of its views regarding its own role in the protection of human rights.

#### 10.2.2.1 The Bank's public endorsement of human rights

In 1998, the World Bank published a report entitled 'Development and Human Rights: The Role of the World Bank', in which it stated its belief that 'creating the conditions for the attainment of human rights is a central and irreducible goal of development'.[50] Since then, the World Bank has not shied away from discussing, and even endorsing human rights. In 2010, for example, the Bank published a detailed study on 'Human Rights Indicators in Development', which specifically dealt with the mutually reinforcing nature of human rights and development.[51] A further publication in 2011 that was jointly published by the World Bank and the World Health Organization contained much 'practical guidance about how human rights law is relevant to dealing with disability issues in development'.[52] The 'World Development

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[50] The World Bank, 'Development and Human Rights' (1998) <http://documents.worldbank.org/curated/en/820031468767358922/pdf/multi0page.pdf> accessed 10 January 2018.

[51] Siobhan McInerney-Lankford and Hans-Otto Sano, 'Human Rights Indicators in Development' (The World Bank 2010) <http://elibrary.worldbank.org/doi/book/10.1596/978-0-8213-8604-0> accessed 28 September 2017.

[52] UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 26, discussing The World Health Organization and the World Bank, *World Report on Disability* (Geneva, World Health Organization, 2011).

Project', which has resulted in several reports published by the World Bank, has also shown a progressively engaging and supportive attitude towards human rights. For instance, in the report of 2012 the Bank stated that 'the ability to live the life of one's own choosing and be spared from absolute deprivation is a basic human right.'[53]

Another significant publication is the Bank's report on 'Integrating Human Rights into Development: Donor Approaches, Experiences, and Challenges', which was published together with the OECD in 2013.[54] The report emphasised the importance of human rights and development and the integration of the two. However, the significance of the report is tempered by the phrase that 'the findings, interpretation, and conclusions expressed in this work do not necessarily reflect the views of the World Bank, its Board of Directors, or the governments they represent' (which, as the Special Rapporteur on Extreme Poverty and Human Rights has pointed out, features in most of the Bank's publications endorsing human rights).[55]

In 2016, the World Bank's support for human rights was reflected through the launch of a High-Level Panel on Water by World Bank President Jim Yong Kim and previous United Nations Secretary-General Ban Ki-moon.[56] While the Panel is not directly an activity of the Bank *per se*,[57] it is significant that Jim Yong Kim took on the responsibility for helping to

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[53] The World Bank, 'World Development Report 2012: Gender Equality and Development' (2012) <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf> accessed 28 September 2017, discussed in UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) paras 23-24.

[54] The World Bank and the OECD, *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges* (Washington DC 2013).

[55] UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 27.

[56] See The World Bank, 'The World Bank, 'United Nations, World Bank Group Launch High Level Panel on Water' (21 January 2016) <http://www.worldbank.org/en/news/press-release/2016/01/21/united-nations-world-bank-group-launch-high-level-panel-on-water> accessed 28 September 2017.

[57] The Panel is co-chaired by the Presidents of Mauritius and Mexico, and consists of a group of heads of State/Government from developed and developing countries. See ibid.

establish a panel, one of the themes of which is 'valuing our water right' which explicitly allows a focus on the human right to water.[58] Most recently, the World Bank highlighted the importance of human rights, and discussed various aspects of international human rights law in particular, in its 2017 World Development Report (see Section 10.3.1).[59]

Laudable as they are, these examples remain ambiguous as to what the Bank believes its *own* role in the protection of human rights to be – the studies and reports explicitly link development with human rights and the establishment of the Panel suggests a progressive attitude of the Bank towards human rights generally. However, these examples give us little insight into what the Bank is willing to do in its own practices.[60] To gain more insight on this, it is necessary to examine the Bank's interpretation of its Articles of Agreement.[61]

#### 10.2.2.2 The Bank's interpretation of its Articles of Agreement

In the first years of its existence the World Bank was focused on particular projects aimed at repairing damage caused to certain infrastructures during the Second World War.[62] As an organisation with an economic focus, the lack of human rights activities by the Bank was initially logical (particularly given the timing of the Bank's establishment, which was before the

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[58] The overarching aim of the Panel is to provide the leadership necessary to 'ensure availability and sustainable management of water and sanitation for all' – Sustainable Development Goal 6. See UN Sustainable Development Knowledge Platform, 'High-Level Panel on Water – Background Note' <https://sustainabledevelopment.un.org/HLPWater> accessed 28 September 2017.

[59] World Bank Group, 'World Development Report: Governance and the Law' (2017) <http://www.worldbank.org/en/publication/wdr2017> accessed 5 October 2017.

[60] In a 2015 report on the World Bank and human rights, the Special Rapporteur on Extreme Poverty and Human Rights noted that he was not 'aware of significant internal impact resulting from those publications.' UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 28.

[61] IBRD Articles of Agreement (n 31).

[62] Laurence Boisson de Chazournes, 'The Bretton Woods Institutions and Human Rights: Converging Tendencies' in Wolfgang Benedek, Koen De Feyter and Fabrizio Marrella (eds), *Economic Globalisation and Human Rights* (Cambridge University Press 2007) 213.

emergence of modern international human rights law).[63] Much like the earlier days of the European Union, the Bank restricted itself to the economic mandate given in its Articles of Agreement.[64] The Articles prohibit the Bank from considering questions of a non-economic nature and from interfering with the political affairs of any member countries (of which human rights was seen to be one).[65] Article IV, Section 10 of the Articles of Agreement provides:

> The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

Over time, the Bank's General Counsels, whose opinions on the Articles of Agreement and human rights form the basis of the World Bank's executive directors' interpretation of such, has fluctuated.[66] At times, General Counsels have interpreted the prohibition on dealing with political affairs narrowly (or rather, they have interpreted the meaning of 'economic' affairs more

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[63] The World Bank was established in 1944, before the Universal Declaration on Human Rights, and before the existence of binding international human rights law.

[64] The core focus of the European Union did not initially include human rights, with the Union focusing more on economic than social matters. However, the protection of human rights has become increasingly part of the Union's focus, particularly with the adoption of the Lisbon Treaty in 2009. See for discussion Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) Human Rights Law Review 645; and for a broader perspective, Viktor Muraviov and Olena Sviatun, 'Protection of Human Rights in the European Union' in Rainer Arnold (ed), *the Convergence of the Fundamental Rights Protection in Europe* (Springer 2016).

[65] See IBRD Articles of Agreement (n 31), Article III, Section 5(b); and Article IV, Section 10 respectively. See also UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2).

[66] Bretton Woods Project, 'World Bank appoints new General Counsel' (31 January 2017) <http://www.brettonwoodsproject.org/2017/01/world-bank-appoints-new-general-counsel/> accessed 18 January 2018. For an overview of the different opinions of the General Counsel from the 1980s until 2015, see UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) paras 8-13.

broadly), so as to allow, and in some instances to even require, action by the Bank for what concerns human rights. This was the view adopted by former General Counsel Roberto Dañino in 2006, but subsequent General Counsels have taken a more restrictive approach.[67] Significantly, the previous General Counsel Anne-Marie Leroy rejected Dañino's interpretation as going 'beyond the bounds of the Bank's institutional mandate', and argued that since his views had not been endorsed by the Board of Executive Directors, it could not be considered to represent the Bank's policy.[68] Instead, Leroy favoured a restrictive interpretation of the Articles of Agreement that limited the Bank's considerations to economic ones.[69] It is hoped that the current General Counsel, who has a background in human rights, takes a broader approach to the Bank's role in the protection of human rights, but this is as yet unclear.[70]

As suggested by Special Rapporteur on Extreme Poverty and Human Rights Philip Alston, the restrictive view in relation to human rights seems

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[67] Roberto Dañino, 'The legal aspects of the World Bank's work on human rights: some preliminary thoughts', in Philip Alston and Mary Robinson (eds) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005), discussed in UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 9.

[68] 'Letter from Anne-Marie Leroy and Makhtar Diop to the Special Rapporteur on the right to food and the Independent Expert on the effects of foreign debt and other international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (9 October 2012) <http://spdb.ohchr.org/hrdb/22nd/OTH_09.10.12_(7.2012).pdf> accessed 18 January 2018; and 'Letter from Anne-Marie Leroy to the Special Rapporteur on the right to food and the Independent Expert on the effects of foreign debt and other international financial obligations of States' (16 January 2013) <http://spdb.ohchr.org/hrdb/22nd/World_Bank_16.01.13_(7.2012).pdf> accessed 18 January 2018, both discussed in UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 11.

[69] ibid.

[70] In February 2017, Sandie Okoro was appointed as the General Counsel. Okoro has been a council member of JUSTICE, a human rights organisation. This has raised hopes that the Bank may take a more human rights-oriented approach in the future. See The World Bank, 'Sandie Okoro' <http://www.worldbank.org/en/about/people/s/sandie-okoro> accessed 18 January 2018.

hypocritical considering the fact that the Bank has actively engaged in other issues 'such as corruption, the rule of law, environmental degradation', governance and criminal justice,[71] which could all be construed as having a political nature.[72]

It is even possible to argue that the World Bank's Articles of Agreement could be considered a basis for saying that the organisation should engage with human rights. The UN CteeESCR has explicitly addressed the human rights responsibilities of the World Bank, referring to both 'negative' and 'positive' action to be taken by the Bank to 'ensure that their activities are fully consistent with the enjoyment of civil and political rights'.[73] The significance of this lies in the Bank's obligation in its Articles of Agreement to 'cooperate with any general international organization and with public international organizations having specialized responsibilities in related fields'.[74] The obligation is furthered by that to give consideration to the views and recommendations of such organisations when the Bank is 'making decisions on applications for loans or guarantees relating to matters directly within the competence' of the public international organisation/s.[75] Stephen Herz and Anne Perrault understand this to mean that in relation to the UN CteeESCR (and other such UN human rights bodies), the World Bank must 'make a good faith assessment' as to whether, and to what extent, they should follow the recommendation of the Committee, publicly justifying any decision not to do so.[76] This is a somewhat overzealous interpretation, given that the UN human rights treaty monitoring bodies cannot themselves be

[71] UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 39.
[72] For a full discussion of the Bank's argument and grounds for invalidating it, see Brodnig (n 2).
[73] UN CteeESCR, 'General Comment No. 2 International technical assistance measures (Art. 22 of the Covenant)' (2 February 1990) E/1990/23, para 6, quoted in Steven Herz and Anne Perrault, 'Bringing Human Rights Claims to the World Bank Inspection Panel' <http://www.bankinformationcenter.org/wp-content/uploads/2013/01/InspectionPanel_HumanRights.pdf> accessed 28 September 2017.
[74] IBRD Articles of Agreement (n 31) Article V, Section 8(a).
[75] ibid Article V, Section 8(b).
[76] Herz and Perrault (n 73).

classed as international organisations. However, it would apply to the UN itself, particularly given that the World Bank is a specialised agency of the UN. Herz and Perrault's understanding does allow an argument that far from precluding human rights from the considerations of the World Bank as has been suggested, its Articles of Agreement *require* the World Bank to take human rights into account in some circumstances. Were the Bank to consider such an interpretation of its Articles of Agreement, it could also go some way towards answering criticism by many experts that the Bank should engage more with UN human rights treaty bodies as well as the UN more generally.[77]

*10.2.3 Human Rights and the Bank's policies and practice*

Given the World Bank's wide scope of operations, it is natural that various of its policies and practices reflect different types of relationships with human rights. As the CteeESCR noted in its second General Comment, '[m]any activities undertaken in the name of 'development' have subsequently been recognised as ill conceived and even counter productive in human rights terms'.[78] Indeed, the World Bank has now itself 'acknowledged the relationship between the objectives of development and the realization of human rights'.[79] Despite this, five examples of the World Bank's practices will highlight the inadequacy of the Bank's practical response to its human rights impact: (1) structural adjustment programmes and poverty reduction strategy papers; (2) the World Bank Inspection Panel; (3) the Bank's Grievance Redress Service; and (4) the Bank's (revised) Environmental and Social Safeguard Policies.

[77] See e.g. UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 61. Calls have also been made for the treaty bodies themselves to make more effort to engage the Bank, see Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Kluwer Law International 2001) 55.

[78] UN CteeESCR, 'General Comment No. 2 International technical assistance measures (Art. 22 of the Covenant)' (2 February 1990) E/1990/23, para 7, quoted in Skogly (n 14).

[79] Hallo de Wolf (n 30) 95-96.

#### 10.2.3.1 Structural Adjustment Programmes and Poverty Reduction Strategy Papers

A way in which the World Bank can affect human rights more directly is through the conditions it places on borrower countries. Initially, these were to be found in Structural Adjustment Programmes (SAPs). The Bank began offering SAPs in the late 1970s with the aim of improving borrower countries' economic policies. Many concerns were expressed regarding the negative effect that the loans' conditions had on rates of poverty and the enjoyment of human rights.[80] Namita Wahi has noted that in essence SAPs remove decision-making power from the borrower country's government on a wide range of issues previously 'considered strictly within the province of independent nations' sovereignty'.[81] This raises questions over the substantive legitimacy of SAPs. Although borrower countries consent to the conditions, in the face of severe economic difficulties the necessity of receiving the Bank's loan may give the countries little choice in doing so. The legitimacy of SAPs was particularly called into question when they required countries to reduce spending on (for example) 'subsidies for food, medical care and education',[82] risking the violation of its human rights obligations. Should a State take measures to reduce spending on food, medical care and education, it may be held to have violated the International Covenant on Economic Social and Cultural Rights.[83] The CteeESCR has held that while States are not expected to immediately implement the rights

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[80] See e.g. Carol Welch, 'Structural Adjustment Programs & Poverty Reduction Strategy' (12 October 2005) *Foreign Policy in Focus* <http://fpif.org/structural_adjustment_programs_poverty_reduction_strategy/> accessed 5 October 2017; and Canan Gunduz, 'Human Rights and Development: The World Bank's Need for a Consistent Approach' (2004) LSE International Development Working Papers No. 04-49.

[81] Wahi (n 31) 341.

[82] Asad Ismi, 'Impoverishing a Continent: The World Bank and the IMF in Africa' [2004] Report commissioned by the Halifax Initiative Coalition <http://www.halifaxinitiative.org/updir/ImpoverishingAContinent.pdf> accessed 28 September 2017, 5.

[83] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS vol. 993, 3.

contained in the instrument in full, they should avoid taking retrogressive measures as much as possible; should a State take a retrogressive measure, it would 'need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[84] While it is perceivable that taking a retrogressive measure in relation to one right in order to (better) protect another right may be accepted by the CteeESCR, the State would have to be very careful in taking and justifying such measures.

Much of the decision-making authority assumed by the World Bank is to ensure that the borrower country will be in a position to pay the loan back ('economic conditionality').[85] Sigrun Skogly has distinguished these types of conditions from 'political' ones dealing more with democracy, the environment and governance issues.[86] Both types of conditions have the potential to (positively or negatively) affect human rights enjoyment in borrower countries. The actual impact of SAPs has been somewhat contentious. For example, whilst many negative critiques have been made regarding how SAPs worsened human rights enjoyment, the results of an empirical study called the accuracy of such blanket allegations into question.[87] Even so, criticism seemed rife enough for the World Bank to end the adoption of new SAPs in the late 1990s, introducing in their wake the 'poverty reduction strategy initiative', a joint initiative with the IMF.[88] The

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[84] UN CteeESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 9. See also Chapter 11.7.

[85] Wahi (n 31) 343.

[86] Skogly (n 14) 23, cited in Wahi (n 31) 343.

[87] Abouharb and Cingranelli, for example, found that 'possible that the worsened human rights practices observed and reported in previous studies might have resulted from the poor economic conditions that led to the imposition of the structural adjustment conditions rather than the implementation of the structural adjustment conditions themselves'. See M Rodwan Abouharb and David L Cingranelli, 'The Human Rights Effects of World Bank Structural Adjustment, 1981-2000' (2006) 50(2) International Studies Quarterly 233, 234.

[88] See World Bank Operations Evaluation Department, 'The Poverty Reduction Strategy Initiative: An Independent Evaluation of the World Bank's Support Through 2003' (2004) <http://www.worldbank.org/oed> accessed 5 October 2017. For discussion, see e.g. Welch (n 80); Ellen Verheul and Mike Rowson, 'Poverty reduction strategy papers: It's too soon to say

initiative aimed to 'improve the planning, implementation and monitoring' (or the 'governance') of 'public actions geared toward reducing poverty.[89]

A central element of the initiative is a document that must be drafted by a national government lending from the World Bank which 'outlin[e] a country's objectives with regard to poverty reduction and stipulat[e] the policies needed to achieve these goals.'[90] The documents are known as poverty reduction strategy papers (PRSPs). An inclusive approach is considered to be central to the drafting of PRSPs, with input from various stakeholders at the national level as well as the World Bank and the IMF.[91] It therefore seems as though more decision-making power regarding structural adjustment is given back to a borrow country, rather than having adjustments imposed upon them by the Bank through SAPs. Indeed, in relation to human rights, the PRSPs have been praised for allowing 'both government and domestic stakeholders [to] assert greater control over policy making and resources', which corresponds with the idea under international human rights law that State bear the primary responsibility for ensuring human rights within their territory/jurisdiction.[92] However, Carol Welch, among others, has criticised the way that PRSPs have been adopted in practice, arguing that they have not actually been successful in improving SAPs.[93] PRSPs have been criticised because despite the inclusive approach expected by the initiative, important stakeholders (including various members of civil society and indigenous communities) have faced significant challenges in or been excluded from participating in the drafting process of PRSPs.[94] This is due,

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whether this new approach to aid will improve health' (2001) 323(7305) British Medical Journal 120.

[89] World Bank Operations Evaluation Department (n 88) xiii.

[90] Welch (n 80).

[91] International Monetary Fund, 'Poverty Reduction Strategy Papers (PRSP)' (2016) <http://www.imf.org/external/np/prsp/prsp.aspx> accessed 5 October 2017.

[92] Gobind Nankani, John Page and Lindsay Judge, 'Human Rights and Poverty Reduction Strategies: Moving Towards Convergence' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005).

[93] Welch (n 80).

[94] See ibid; Samia Liaquat Ali Khan (Minorities Rights Group International), 'Poverty Reduction Strategy Papers: Failing Minorities and Indigenous Peoples' (2010) 3, 13-14

in part, to the fact that consultations regarding PRSPs have been conducted too quickly for input from outside of governments to be carefully considered.[95] Further issues of coordination between stakeholders, particularly between governments and civil society, have limited the positive impact of PRSPs on reducing poverty,[96] and risk limiting their positive impact on the enjoyment of related human rights.[97] The problems regarding the ways in which PRSPs are adopted raise concerns of participation that contradict the World Bank's good governance approach (and the good, multi-level governance approach suggested by the present book). However, the problems can also have an effect on the enjoyment of human rights. A less participatory process means that important concerns that could be raised by, for example, local communities, indigenous groups or women (or their representatives) regarding development issues closely related to human rights may be omitted from PRSPs. Indeed, the process of adopting PRSPs has led commentators to argue that PRSPs 'have not been a very powerful mechanism for promoting either negative or positive human rights.'[98]

Furthermore, Welch explains that since PRSPs must gain the approval of the World Bank and the IMF, governments tend to pander to the international financial institutions when deciding on structural adjustments to include in the documents.[99] In a similar way to SAPs, this could cause a country to compromise on important human rights considerations for the sake

<http://minorityrights.org/wp-content/uploads/old-site-downloads/download-873-Download-full-report.pdf> accessed 5 October 2017.

[95] Frances Stewart and Michael Wang, 'Poverty Reduction Strategy Papers within the Human Rights Perspective' in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005).

[96] Khan (n 94) 3. Concerns regarding coordination were also raised by the World Bank itself during an evaluation of the poverty reduction strategy. See World Bank Operations Evaluation Department (n 88).

[97] This covers a broad spectrum of human rights, including civil and political as well as economic, social and cultural rights – the poverty reduction strategy papers are based on a broad understanding of poverty, which has the potential to increase the range of human rights that they impact. See Nankani, Page and Judge (n 92) 495.

[98] Stewart and Wang (n 95) 468.

[99] Welch (n 80).

of economic ones. Ultimately, the outcome of a PRSP could have a similar (negative) impact on human rights as SAPs. Among others, these issues have led to concerns, particularly concerning the rights of minority and/or vulnerable groups such as women and indigenous peoples,[100] that the enjoyment of human rights is being impaired at the hands of PRSPs, as it was by SAPs.

In order to 'assist countries, international agencies and development practitioners in translating human rights norms, standards and principles into pro-poor policies and strategies', the UN OHCHR's adopted its 'Principles and Guidelines on a Human Rights Approach to Poverty Reduction Strategies'.[101] The Principles and Guidelines provide useful guidance for those drafting PRSPs to incorporate certain human rights that are particularly linked to poverty, into the strategies.[102] However, although the document includes a chapter on how human rights principles (under a HRBA) should inform the way in which poverty reduction strategies are formulated, implemented and monitored, it does not contain guidance regarding the process of drafting or adopting such strategies.[103] To prevent PRSPs from having a negative impact on the enjoyment of human rights, and to maximise the potential of strategies to have a positive effect on human rights (even if they are not explicitly based on human rights[104]), the process of their drafting and adoption should be carefully considered.

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[100] Khan (n 94).

[101] Office of the United Nations High Commissioner for Human Rights, 'Principles and Guidelines on a Human Rights Approach to Poverty Reduction Strategies' H/PUB/06/12 (2006) Foreword <http://www.ohchr.org/EN/Issues/Poverty/DimensionOfPoverty/Pages/Guidelines.aspx> accessed 17 January 2018.

[102] See Office of the United Nations High Commissioner for Human Rights (n 101) Guideline 8.

[103] See Stewart and Wang (n 95) 468 discussing an earlier version of the Principles and Guidelines.

[104] Stewart and Wang have warned against encouraging poverty reduction strategy papers to be based explicitly on human rights, or at least to include the specific language of human rights as expressed in human rights instruments, as this risks the language of human rights being used 'with very little change in reality'. See ibid 469.

#### 10.2.3.2 The World Bank Inspection Panel

The World Bank's Inspection Panel was established in 1993.[105] The Panel is an independent complaints mechanism endowed with the power to investigate the way in which the Bank's projects are implemented. The aim of the Panel is to ensure that the World Bank is functioning in accordance with its operational policies and procedures (limited to those 'with respect to the design, appraisal and/or implementation of projects').[106] To this end, the Panel receives requests (known as 'requests for inspection') by 'affected parties' who can 'demonstrate that [their] rights or interests have been or are likely to be directly affected by an action or omission of the Bank'.[107] It is not possible for individuals to request a review, as the 1993 Resolution establishing the Panel requires affected parties to be 'a community of persons',[108] although this was subsequently clarified as referring to two or more individuals,[109] potentially broadening the scope of situations that the Panel can review.

The Inspection Panel is a welcome mechanism in that despite the omission of any explicit reference to human rights in the Panel's mandate, it has considered several human rights-related complaints. In particular, Herz and Perrault have noted how the Panel has 'identified four circumstances in which Bank policies and procedures may require the Bank to take human

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[105] The Inspection Panel was established by the International Bank for Reconstruction and Development and International Development Association, Resolution No. IBRD 93-10; Resolution No. IDA 93-6, 22 September 1993, reviewed in 1996 and 1999.

[106] IBRD and IDA, Resolution No. IBRD 93-10; Resolution No. IDA 93-6, 22 September 1993, para 12, reiterated in the 'Review of the Resolution Establishing the Inspection Panel 1996: Clarification of Certain Aspects of the Resolution' <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ReviewResolution1966.pdf> accessed 29 September 2017.

[107] IBRD and IDA, 'Review of the Resolution Establishing the Inspection Panel 1996' (n 106).

[108] ibid.

[109] The World Bank, '1999 Clarification of the Board's Second Review of the Inspection Panel' <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/ClarificationSecondReview.pdf> accessed 29 September 2017, para 9(a).

rights issues into account'.[110] These range from more general obligations such as ensuring that projects do not breach the borrower country's own human rights obligations and considering that country's domestic law protections of human rights, to more specifically interpreting the Bank's safeguard policy on indigenous peoples compatibly with the human rights objective of the policy.[111] This could go some way to alleviating the concerns below regarding Free, Prior and Informed Consent (FPIC) and the Bank's Environmental and Social Safeguard Policies (see Section 10.2.3.4). A recent discussion on human rights at the Civil Society Policy Forum, in which the Inspection Panel participated, commended the Panel on its engagement with international human rights law standards in previous complaints.[112]

Although this appears to be a positive move, the Panel's ability to actively protect and promote human rights remains restricted by the lack of human rights protection in the policies with which the Panel is authorised to ensure World Bank compliance. The Panel can refer to international law when investigating a complaint, and has even on occasion interpreted the Bank's policies to include human rights considerations.[113] However, the limitation means that the Panel may only consider human rights issues to the extent that the Bank's policies themselves deal with human rights. If a policy itself does not comply with human rights standards, the Panel has no power to request the Bank to change the policy. Only in the event that a particular policy requires the Bank to act in a human rights-compliant manner, which the Bank then fails to do, may the Panel hear a complaint centred on human rights. Were the safeguard policies to include human rights more specifically in individual policies, it would make it a lot easier for the Panel to make a finding and recommendations that would be accepted by the Board of Executive Directors (which, as explained below, has the ultimate decision-making power regarding complaints). Unfortunately, the limited scope of

[110] Herz and Perrault (n 73) 2.
[111] ibid 2.
[112] NYU Law School Clinic on International Organizations (n 145).
[113] For an in-depth discussion and review of the cases in which the Inspection Panel has done this, see ibid.

human rights protection in the safeguards has led several human rights organisations to castigate rather than applaud the Panel's effect on human rights.

Recent cases brought to the attention of the Inspection Panel that have led to criticisms on the basis of human rights include the Badia East case in Nigeria, and the case concerning the Gambella region in Ethiopia. Both will be briefly explained.

In 2014, the Inspection Panel failed to register a request for inspection in relation to a situation in which approximately 9,000 people from Badia East, Nigeria, who had been intended to be beneficiaries of a World Bank-supported project, were forcibly evicted by the Lagos state government from their homes without meaningful consultation and without appropriate alternative housing being offered by local authorities.[114] This led to violations of the right to housing (among other economic, social and cultural rights) and, as will be explained, the right to an effective remedy.[115] The decision not to file the request was made pursuant to the Panel's 'pilot approach to support early solutions in the Inspection Panel process'. The approach is intended 'to provide an additional opportunity for [Bank] Management and the Requesters to address the concerns about alleged harm raised in a Request for Inspection by postponing the Panel's decision on registration of the Request',[116] as the Panel itself is unable to provide dispute resolution and problem-solving services.[117] Under the 'Early Solutions Approach' a case will be closed before

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[114] See Amnesty International, 'Nigeria: The World Bank Inspection Panel's Early Solutions Pilot Approach' (n 2).

[115] Amnesty International, 'At the Mercy of The Government: Violation of The Right to An Effective Remedy in Badia East, Lagos State, Nigeria' (2014) <https://www.amnesty.org/en/documents/AFR44/017/2014/en/> accessed 17 January 2018.

[116] The World Bank, 'The Inspection Panel at the World Bank: Operating Procedures April 2014' (2014) Annex 1 para 2 <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf> accessed 17 January 2018.

[117] ibid; and SOMO, Inclusive Development International, 'An Evaluation of the Inspection Panel's Early Solutions Pilot in Lagos, Nigeria' (Natalie Bugalski, May 2016) 5 <https://www.inclusivedevelopment.net/wp-content/uploads/2016/06/Lagos-Early-Solutions-Evaluation.pdf> accessed 17 January 2018.

being filed by the Inspection Panel if the Panel considers that those who requested the inspection are content with the outcome.[118] The outcome of the approach in this instance (which was the first time it had been used by the Inspection Panel) did lead to some financial compensation being provided to affected individuals, pursuant to a 'resettlement action plan' offered by the Lagos state government). However, field research conducted by SOMO and Inclusive Development International one year after the award of compensation showed that the individuals affected did not receive enough compensation to restore their standard of living to that before the evictions occurred, and that financial compensation alone was insufficient.[119] The organisations have also criticised the Panel for using the approach at all, since the 'serious human rights violations' that the case involved were not 'amenable to early resolution', and the requestors did not fully consent to the procedure – both of which are criteria for the pilot approach to be used.[120] Amnesty International has also reviewed the situation and has criticised the Panel for failing to acknowledge important breaches of the Bank's operational policies when it responded to the complaints by the affected community, and for failing to make sure that the solution provided to the requestors was in conformity with international human rights standards.[121] Overall, the case raises many concerns regarding the requestors' right to an effective remedy, as well as the role, if any, of the Inspection Panel in safeguarding human rights.

The Inspection Panel has also been criticised for the way it dealt with

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[118] ibid.

[119] The field research involved surveys of individuals affected by the forced evictions and shows that although skills and job training was promised in addition to financial compensation, this had not been provided. Furthermore, some individuals remained homeless. See SOMO and Inclusive Development International (n 117) 8-9.

[120] SOMO and Inclusive Development International (n 117); The World Bank, 'The Inspection Panel at the World Bank: Operating Procedures April 2014' (n 116) Annex 1 para 3(a).

[121] Amnesty International, 'At the Mercy of The Government' (n 115); and Amnesty International, Nigeria: The World Bank Inspection Panel's Early Solutions Pilot Approach' (n 2).

a complaint brought in 2012 concerning the resettlement of around 2 million people in Ethiopia.[122] The World Bank had been funding a project for the protection of basic services, such as water, food, healthcare and education. Evidence arose, however, that the Ethiopian government used the funding for another project – the so-called 'villagization' project. Through this project, around 2 million people were resettled, including thousands from the Gambella region, known as the Anuak people. Many of the Anuak people claimed that they had been forcibly evicted and removed from their fertile lands to places where they had no access to food. They claimed that as a result, some people had died of starvation, and some who opposed the move and tried to go back were tortured and sexually assaulted. With the help of Inclusive Development International, a complaint was filed at the Inspection Panel. While finding that the Bank did indeed fail to comply with some policy requirements in this situation, the Inspection Panel failed to attribute any responsibility to the Bank for the treatment of the Anuak people. The reasoning for this was that examination of the evidence of shootings, beatings and sexual assaults of local farmers fell outside of the Panel's mandate and was therefore 'shelved'. Further, when the Panel visited Gambella to investigate the complaint, it did not pay attention to these aspects. While critics argue that this was 'in order to exonerate the bank',[123] the situation highlights the fundamental weaknesses of the Panel's mandate with respect to human rights.

A further limit of the Inspection Panel's ability to promote human rights is that the ultimate decision-making power regarding an inspection rests with the Bank's Board of Executive Directors. The Board receives

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[122] The request sent to the Inspection Panel (together with IDI's legal and policy analysis of the request) is available online. See Inclusive Development International, 'Request for Inspection by World Bank Inspection Panel' (24 September 2012) <http://ewebapps.worldbank.org/apps/ip/PanelCases/82-Request for Inspection (English).pdf> accessed 29 September 2017.

[123] Inclusive Development International, 'World Bank Whitewashes Ethiopia Human Rights Scandal: Bank Absolves Itself of Responsibility and Denies Redress to Victims' (2 March 2015) <http://www.inclusivedevelopment.net/world-bank-whitewashes-ethiopia-human-rights-scandal/> accessed 29 September 2017.

recommendations from the Panel and will publish its decision as to 'what steps should be taken to remedy the harm, or expected harm, caused by the project.'[124] The Board is able to either accept or reject the recommendations of the Panel.[125] This is worrying in light of the fact that the Board of Executive Directors appears to be largely responsible for the adoption of the Bank's restrictive interpretation of its Articles of Agreement, mentioned above.[126] In addition, despite being officially independent from the Bank,[127] the Panel's physical location inside the World Bank's headquarters raise concerns over its independence in practice.[128]

Overall, the mandate and lack of enforcement powers of the Panel, as well as perturbing examples from practice, suggests that the Panel's effectiveness as a tool for protecting human rights is limited. Although the World Bank has certainly increased its accountability through the Inspection Panel, it is effectively barred from upholding international standards to call out the World Bank management on its failures to respect and consider human rights. A more recent mechanism that may improve this will be discussed in the next sub-section.

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[124] SOMO and Accountability Counsel, 'The World Bank Inspection Panel' <https://www.somo.nl/wp-content/uploads/2013/06/The-World-Bank-Inspection-Panel.pdf> accessed 17 January 2018.

[125] See also Willem van Genugten and others, 'Tilburg Guiding Principles on World Bank, IMF and Human Rights' in Willem van Genugten, Paul Hunt and Susan Matthews (eds), *World Bank and Human Rights* (Wolf Legal Publishers 2003) para 21, which also draws attention the lack of human rights expertise of members of the Inspection Panel.

[126] The interpretation is decided upon by a vote of the Board of Executives, usually following legal opinions provided by General Counsel. See IBRD Articles of Agreement (n 31) Art. IX; UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) paras 38-39.

[127] The Panel is described as an 'independent complaints mechanism' and consists of three members that are selected 'on the basis of their ability to deal thoroughly and fairly with the complaints brought to them, their integrity and independence from Bank Management, and their exposure to developmental issues and living conditions in developing countries.' The Inspection Panel, 'About Us' <http://ewebapps.worldbank.org/apps/ip/Pages/AboutUs.aspx> accessed 17 January 2018.

[128] See Bretton Woods Project, 'World Bank Fails to Support Project Critics' (6 July 2015) <http://www.brettonwoodsproject.org/2015/07/world-bank-fails-to-support-project-critics/> accessed 29 September 2017; Yvonne Wong and Benoit Mayer (n 25) 510.

10.3.2.3 Grievance Redress Service

A new initiative was introduced by the World Bank in April 2015 to '[enhance] the World Bank's responsiveness and accountability',[129] holding some promise for human rights protection by the Bank. The Grievance Redress Service (GRS) is the Bank's new complaints forum, allowing complaints to be filed by individuals and communities (or representatives thereof) who 'believe that they are or may be directly and adversely affected by a World Bank-supported project' to file a complaint.[130] The GRS was adopted to enhance the Bank's responsiveness and accountability by making the Bank 'more accessible for project-affected communities and to help ensure faster and better resolution of project-related complaints.'[131] To achieve this, the GRS guarantees to respond to complaints with an action plan and a timeframe for its implementation within 30 days of receipt.[132] Further, the resolution of disputes will be in cooperation with the affected parties and the relevant borrower country, and will be accompanied by a monitoring and implementation process by the World Bank.[133]

The GRS is clearly stated as having no official relationship with the World Bank's Inspection Panel, and both mechanisms can be used alongside one another, if relevant.[134] Unlike the Panel, the GRS is not independent of the Bank.[135] The fact that the GRS is not independent begs the question of how biased the GRS will be when considering complaints and whether it can be considered impartial, especially given that the formally independent Inspection Panel suffers from lack of true impartiality.

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[129] The World Bank, 'Grievance Redress Service Brochure' <http://pubdocs.worldbank.org/en/223151434995262110/GRS-2015-Brochure-web.pdf> accessed 28 September 2017, 2.

[130] The World Bank, 'Grievance Redress Service' <http://www.worldbank.org/en/projects-operations/products-and-services/grievance-redress-service> accessed 17 January 2018. Complaints can also be filed regarding the procurement process on a World Bank-financed contract. The World Bank, 'Grievance Redress Service Brochure' (n 129).

[131] The World Bank, 'Grievance Redress Service' (n 130).

[132] ibid.

[133] ibid.

[134] The World Bank, 'Grievance Redress Service Brochure' (n 129) 1.

[135] Bretton Woods Project, 'World Bank Fails to Support Project Critics' (n 128).

Certainly, the cooperative approach of the GRS, which enables public participation and community engagement, are to be applauded as they provide an opportunity for the Bank to better respond to the needs of local communities. However, the options for resolution of complaints and the powers of the GRS remain somewhat unclear. For example, despite providing implementation monitoring, the GRS fails to specify what kind of measures could be imposed in the event of non-compliance, and how far the GRS can go in ensuring the success of the proposed resolution.

For human rights protection, the real potential of the new grievance mechanism lies in the scope of the GRS's mandate. The GRS can only consider complaints relating to open, ongoing projects of the World Bank, but complaints are not limited to those relating to the Bank's policies (therefore extending its mandate beyond the scope of the Inspection Panel's). Rather, affected persons or communities may bring a complaint relating to a Bank-supported project.[136] This potentially opens the door for human rights concerns to be addressed directly in complaints, improving the accountability and responsibility of the Bank. Unfortunately, the lack of any mention of human rights and the lack of specific standards to be considered in the GRS process means that it will be difficult to more accurately gauge the effect of the mechanism on the Bank's human rights-related practices until it is possible to see how the body deals with specific complaints. At the time of writing, this remains to be seen, as no complaints have yet been brought before the GRS. If used to its fullest potential, the service could constitute an important part of a multi-level governance structure, as explained below.

#### 10.2.3.4 Environmental and Social Safeguard Policies

One of the most controversial aspects of the World Bank's relationship with human rights relates to its Environmental and Social Safeguards Policies. The Policies 'serve to identify, avoid, and minimize harms to people and the environment' in the development process and require certain social and environmental risks to be addressed by borrowing governments before

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[136] ibid.

receiving investment support by the Bank.[137] Such requirements include 'conducting environmental and social impact assessments, consulting with affected communities about potential project impacts, and restoring the livelihoods of displaced people'.[138] The safeguards currently in place consist of 11 key Operational Policies and associated Bank Procedures which are particularly considered during the preparation and approval of World Bank projects.[139]

An extensive review of the safeguards was recently concluded, with approval of the final outcome of the almost four-year-long process on 4 August 2016.[140] Conducted in response to the findings of the Independent Evaluation Group's 2010 evaluation of the existing safeguards, the review aimed to update the safeguards, make them more effective and 'enhance the development outcomes of World Bank operations'.[141] However, despite an extensive and inclusive consultation process during the review, which included advice being given by human rights experts working for the United Nations and various international human rights non-governmental organisations, the ends result remains disappointing in its treatment of human

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[137] The World Bank, 'Environmental and Social Framework Setting Standards for Sustainable Development - First Draft for Consultation' <http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/first_draft_framework_july_30_2014.pdf> accessed 28 September 2017.

[138] The World Bank, 'Environmental and Social Safeguards Policies' (5 April 2017) <http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-and-social-safeguards-policies> accessed 17 January 2018.

[139] ibid.

[140] The World Bank, 'Review and Update of the World Bank Safeguard Policies: World Bank Board Approves New Environmental and Social Framework' <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies> accessed 28 September 2017.

[141] The World Bank, 'Review and Update of the World Bank's Safeguard Policies: Environmental and Social Framework (Proposed Third Draft)' (2016) <http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf> accessed 28 September 2017.

rights and have already faced much criticism. The second (of three) draft of the policies sparked a group of UN human rights experts (consisting primarily of Special Rapporteurs and independent experts within the OHCHR) to claim that the draft 'seems to go out of its way to avoid any meaningful references to human rights and international human rights law, except for passing references'.[142] This is regardless of the fact that many of the issues being raised by the safeguards are intrinsically related to human rights, for example the rights to property and non-discrimination.[143] The final draft adopted appears to be heedless of Human Rights Watch's urgings to include obligations for the Bank to respect and protect human rights itself,[144] although it does include explicit reference to human rights in its Vision Statement. Here, the Bank has provided that its 'activities support the realization of human rights expressed in the Universal Declaration of Human Rights'.[145] While certainly a positive inclusion, as the UDHR is extensive in the range of rights that it covers, the Vision Statement is not a policy as such,

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[142] Stated in a letter to World Bank President Jim Yong Kim in December 2014. Available at <ohchr.org/Documents/Issues/EPoverty/WorldBank.pdf> accessed 28 September 2017, cited in Bretton Woods Project, 'UN Experts Critique World Bank Draft Safeguards' (2 February 2015) <http://www.brettonwoodsproject.org/2015/02/un-experts-critique-world-bank-draft-safeguards/> accessed 28 September 2017.

[143] The World Bank, 'Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing' <http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf> accessed 29 September 2017, Policies 5 and 7.

[144] Human Rights Watch, 'Human Rights Watch Submission: World Bank's Draft Environmental and Social Framework' (7 April 2015) <https://www.hrw.org/news/2015/04/07/human-rights-watch-submission-world-banks-draft-environmental-and-social-framework> accessed 29 September 2017.

[145] The World Bank, 'Environmental and Social Safeguards Policies' (2016) <http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-and-social-safeguards-policies> accessed 12 October 2017, discussed in NYU Law School Clinic on International Organizations, 'The World Bank Inspection Panel and International Human Rights Law' (2017) <http://www.iilj.org/wp-content/uploads/2017/08/The-World-Bank-Inspection-Panel-FINAL-REPORT.pdf> accessed 12 October 2017.

and simply referring to the UDHR does not provide any detail as to how the Bank should concretely incorporate adherence to the rights throughout its activities. In addition, as Inclusive Development International has noted, the World Bank neglected to take the opportunity of reviewing the safeguard policies to set human rights standards as the 'non-negotiable minimum floor for the treatment of project-affected people.'[146] Indeed, while the reference to World Bank activities in the Vision Statement suggests that the Bank has undertaken to consider human rights more seriously through its new policies, most of the responsibility for meeting the standards set out in the policies has been allocated to borrowing States, rather than the Bank itself or jointly between the Bank and States.[147] Furthermore, while some commentators have lauded the World Bank for the due diligence standards included in the policies,[148] others have criticised the revisions herein, for being vaguer than the standards in the previous policies. In particular (and connected to the criticism regarding the allocation of responsibility) Inclusive Development International argues that borrowing States' evaluation of social and environmental risks are not required to be carefully reviewed by the World Bank to ensure their veracity and reliability before approval for a project is given, 'despite the obvious incentives on borrowers to downplay risks and undercount affected people to reduce costs and, indeed, the evidence of this malpractice in previous projects.'[149]

One victory for human rights in the updated policies and safeguards was the inclusion of the requirement of securing FPIC of indigenous peoples who 'are present in, or have collective attachment to a proposed project area' before going ahead with a project in that area.[150] The FPIC standard has

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[146] Inclusive Development International, 'World Bank Safeguards' <https://www.inclusivedevelopment.net/campaign/campaign-to-reform-the-world-banks-policies-and-practice-on-land-and-human-rights/> accessed 12 October 2017.
[147] ibid.
[148] See NYU Law School Clinic on International Organizations (n 145).
[149] Inclusive Development International, 'World Bank Safeguards' (n 146).
[150] The World Bank, 'Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing (n 143).

repeatedly been recognised within the field of international human rights.[151] While it is promising that the concept was included, the reference to human rights is made in the *aims* of the policy, rather than within the policy itself (which could be helpful to the Bank in delineating exact standards required by FPIC).[152] Missed opportunities such as this have led critics to dub the World Bank as a 'human rights free zone' that 'treats human rights more like an infectious disease than universal values and obligations'.[153]

## 10.3 Moving forwards

From these examples, it is clear that the World Bank can, and often does have large impact on the enjoyment of human rights. It nonetheless fails to allow for institutionalised protection of human rights through its policies and operations. After the outcome of the recent review of the Bank's safeguard policies, it does not appear likely that the Bank will change its approach towards human rights in the near future. Moreover, although there are strong arguments to support the claim that the Bank has at least some obligations under international law, it also cannot be concluded with any certainty that the World Bank currently has existing international legal obligations to respect or protect human rights. We therefore cannot expect a purely legal argument to convince the Bank to do so. However, it may be possible to look *beyond* legal reasoning to argue that the Bank should actively engage with human rights in its own operations, due to its 'good governance' approach to development.

### *10.3.1 Good governance and the World Bank*

The definition of 'good governance' was dealt with in detail in Chapter 9.2.6.

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[151] For a thorough discussion of this, see UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, 'Legal Commentary on the Concept of Free, Prior and Informed Consent' (14 July 2005) E/CN.4/Sub.2/AC.4/2005/WP.1, paras 10 *et seq*.

[152] The World Bank, 'Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing (n 143) 107.

[153] UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (n 2) para 68.

However, it is of particular interest for this chapter to consider the specific ties and uses of the term by the World Bank. The following sections will therefore briefly revisit the term. In the late 1980s, the World Bank introduced the concept of 'good governance'.[154] Since then, the term has been widely adopted and used by many development and human rights organisations (both within and outside of the UN framework) as well as other international financial institutions.[155] The Bank itself has now even gone so far as to create a matrix of policy objectives and actors within good global governance, to 'establish a "global architecture of governance"'.[156]

As in Chapter 9, the current chapter adopts a definition of good governance that relates to the performance and quality of governance activities,[157] and requires governance systems to be transparent, accountable and participatory, with an emphasis on human rights protection under a HRBA. As a brief reminder, transparency requires that the drafting and implementation of norms and standards be clear and accessible to the public – people need to be aware of what the relevant rules are and how they work. In other words, transparency is closely linked to accessibility of information,

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[154] The World Bank, 'Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long-Term Perspective Study' (1989) 60-61 <http://documents.worldbank.org/curated/en/498241468742846138/From-crisis-to-sustainable-growth-sub-Saharan-Africa-a-long-term-perspective-study> accessed 12 October 2017.

[155] See Naveed Ahmed, 'Reinforcement of Good Governance in the International Financial Institutions' (2015) 2(11) Law, Social Justice & Global Development.

[156] Stephen Welch and Caroline Kennedy-Pipe, 'Multi-Level Governance and International Relations' in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford University Press 2004) 134. The Bank has received criticism on this count for seemingly aspiring to be 'the mother of all governments'. Paul Cammack, 'The Mother of All Governments: The World Bank's Matrix for Global Governance' in Rorden Wilkinson and Stephen Hughes (eds), *Global governance: Critical perspectives* (Rutledge 2002) 44, 49, 50, cited in Welch and Kennedy-Pipe 134. A further critique stems from the fact that governance appears to be at its heart a political concept, with which the Bank has had no qualms in occupying itself.

[157] See Chapter 9.3.1, citing Jilles LJ Hazenberg, 'Good Governance Contested: Exploring Human Rights and Sustainability as Normative Goals', in Ronald Holzhacker, Rafael Wittek and Johan Woltjer (eds), *Decentralization and Governance in Indonesia: Development and Governance Vol. 2* (Springer International 2016) 33-34.

and making sure that standards are known and understood by those that they are imposed upon or those that are affected by them. Under the principle of transparency (as well as accountability), it is also important to clarify which actor is responsible for realising which standards within a governance system. Accountability allows affected individuals to hold responsible bodies directly to account. As mentioned in Chapter 9.3.1.2, the World Bank identifies two aspects of accountability – answerability and enforceability.[158] Answerability involves the responsible body giving information about its decisions and actions and justifying them to the public, while enforcement is defined by the Bank as allowing actors to be sanctioned when they do not conform to their responsibilities.[159] The third element of participation requires that each actor involved in or affected by norms should have a voice in their adoption and implementation.[160]

Chapter 9.3.2 detailed the connections and interdependencies between good governance and human rights. In essence, '[g]ood governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all',[161] while human rights lend good governance concrete performance standards against which actors' conduct can be judged.

In a 1992 report, the Bank stated that good governance is 'the manner in which power is exercised in the management of a country's economic and social resources for development.'[162] It is thus clear that the term is intended to apply to borrower countries. Since its first use of the term, the World Bank

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[158] See Rick Stapenhurst and Mitchell O'Brien, 'Accountability in Governance' (*World Bank Institute*) <https://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> accessed 22 September 2017, 1.
[159] ibid.
[160] See Chapter 9.3.1.3.
[161] UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) E/C.12/1999/5, para 23.
[162] The World Bank, 'Governance and Development' (1992) <http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development> accessed 12 October 2017.

has provided very extensive guidance as to what good governance is, how it relates to development and what is required for certain activities to meet good governance standards. A wonderful recent example is the 'World Development Report 2017: Governance and the Law' which provides detailed information and guidance on how to improve governance for development. Specifically, the report 'explores how policies for security, growth, and equity can be made more effective by addressing the underlying drivers of governance.'[163]

There is also evidence that the World Bank sees itself as having to abide by the standards of good governance. A full examination of the Bank's incorporation of good governance principles within its operations falls outside of the scope of the present study. However, it is interesting to note that Jan Wouters and Cedric Ryngaert have highlighted in this respect various initiatives that the Bank has taken to improve its good governance, including the establishment of a Department of Institutional Integrity,[164] its Inspection Panel, and its Information Disclosure Policy[165] (now replaced by the 'Policy on Access to Information'[166]). The Inspection Panel in particular, despite its shortcomings with relation to human rights, has been viewed as a substantial development because of its contribution to increased accountability of the World Bank. In addition, it was the first body of its kind, establishing a

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[163] World Bank Group, 'World Development Report: Governance and the Law' (n 59).

[164] The Department of Institutional Integrity was established in 2001 to reduce corruption and fraud in Bank-financed projects and to investigate allegations of misconduct by its staff. In 2016, the Department sanctioned 60 entities after substantiating investigations regarding 68 Bank-funded projects. See The World Bank, 'Combating Corruption' (26 September 2017) <http://www.worldbank.org/en/topic/governance/brief/anti-corruption> accessed 5 October 2017; The World Bank, 'The Department of Institutional Integrity Strategic Directions and Business Plan: A Summary' (2003) <http://documents.worldbank.org/curated/en/580111468329428876/pdf/297560INT.pdf> accessed 5 October 2017; Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons from International Organizations' (2004) University of Leuven Institute for International Law Working Paper No. 54, 15.

[165] Wouters and Ryngaert (n 164) 15-20.

[166] The new policy was adopted in 2015. See The World Bank, 'Bank Policy: Access to Information' (2015) <http://pubdocs.worldbank.org/en/393051435850102801/World-Bank-Policy-on-Access-to-Information-V2.pdf> accessed 5 October 2017.

complaints mechanism for individual complaints vis-à-vis an international organisation.[167] The Bank has also made important inroads towards good governance for what concerns transparency through its policies on information disclosure and access to information. However, although positive measures, there is still a lot of work to be done before the Bank can be said to successfully follow good governance.[168]

While the arguments and evidence discussed above in favour of the World Bank actively engaging with human rights in its policies and operations are persuasive, they do not necessarily provide a clear *rationale* for it to do so. Rationales for taking HRBAs have been elaborated by proponents of the approach, in particular by United Nations institutions. The first is an 'intrinsic' reasoning, that taking human rights as a starting point is the right thing to do from a moral or legal perspective.[169] The United Nations Population Fund (UNFPA), for example, highlights the fact that human rights represent universal values that 'that provide a common standard of achievement for all women, men and children and all nations', and suggests that taking a HRBA allows individuals to become the centre-point of their own development by making them rights-holders, making them active participants.[170] Further, HRBAs reject the idea of development action being a case of charity in favour of seeing certain standards as rights, to which there are corresponding obligations that must be upheld.[171] Unfortunately, as the

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[167] Wouters and Ryngaert (n 164) 17.
[168] Concerns as to the independence and transparency of the Inspection Panel and participation of stakeholders in decision-making processes such as the poverty reduction strategy papers mentioned above, to name two examples, remain valid.
[169] CIFEDHOP notes that as well as this, both human rights and development have the 'same intrinsic objectives of dignity and wellbeing' and that the intrinsic rationale for a HRBA 'recalls that human rights are the legal expression of a set of values subject to an international consensus'. CIFEDHOP José Parra, 'The Human Rights-Based Approach: A Field of Action for Human Rights Education' (2012) Thematic Special Edition, 18-19.
[170] United Nations Population Fund and Harvard School of Public Health, 'A Human Rights-Based Approach to Programming: Practical Information and Training Materials' (2010) 81-82 <http://www.unfpa.org/resources/human-rights-based-approach-programming> accessed 28 September 2017.
[171] ibid.

Bank has not yet been swayed by arguments that engaging with human rights is the 'right' thing for it to do, the intrinsic rationale for it to take a HRBA may be similarly unsuccessful.

The second rationale for taking HRBAs is instrumental, meaning that through such an approach the World Bank would be able to achieve the best possible results regarding development and poverty reduction. The UNFPA explains that the holistic and inclusive approach adopted in HRBAs are highly beneficial for overcoming development outcomes.[172] This is true not only in the range of issues that HRBAs take into consideration (i.e. civil, political, economic, social and cultural) but also the expertise on certain issues available within the international human rights framework (e.g. of the UN human rights treaty monitoring bodies) and the multi-sectoral approach to responsibility which, if adopted in the field of development 'can more capably address gaps and challenges that arise and can lead to more effective and sustainable solutions in the long term'.[173] In the context of poverty reduction specifically, the Swiss foundation CIFEDHOP notes that a conceptual framework has been developed by UN experts, based on initial theories by Amartya Sen.[174] The framework highlights various 'added values' of integrating human rights in addressing poverty reduction, including the inclusive approach taken by human rights (as mentioned by the UNFPA) and the fact that human rights approaches address not only the consequences but also more structural causes of poverty, including the distribution of power and patterns of discrimination.[175] Empirically, consideration of human rights in economic governance has been shown to be beneficial not only to the enjoyment of human rights, but also to the bodies

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[172] ibid.

[173] United Nations Population Fund and Harvard School of Public Health, 'A Human Rights-Based Approach to Programming: Practical Information and Training Materials' (2010) <http://www.unfpa.org/resources/human-rights-based-approach-programming> accessed 28 September 2017, 84.

[174] CIFEDHOP José Parra, 'The Human Rights-Based Approach (n 169) 19. The theories of Amartya Sen referred to can be found in Office of the United Nations High Commissioner for Human Rights, 'Human Rights and Poverty Reduction' (2004) Ref HR/PUB/04/1.

[175] CIFEDHOP José Parra, 'The Human Rights-Based Approach (n 169) 20.

involved in global economic governance. Research led by Daniel Kaufmann has shown that the successful implementation of World Bank-funded government investment projects substantially correlates to civil liberties within a State.[176] This is seen, for example, in the rates of return of loans by international financial institutions, which are higher in relation to borrower countries with better civil and political human rights records.[177]

In the event that the two main rationales for taking a HRBA are not found persuasive, it can also be argued that the World Bank should take a HRBA and good governance to achieving its mandate for reasons of consistency. As already explained, the Bank has repeatedly advocated a good governance approach to development and poverty eradication, and has explicitly linked the achievement of these goals with the realisation of human rights. In light of the interdependent relationship between good governance and human rights explained in Chapter 9.3.2 and in order to maintain consistency between what the Bank practices and what it preaches, the World Bank should consider how to integrate both of these approaches into its own policies and practices.

### *10.3.2 Multi-level governance, human rights and the World Bank*

Taking a multi-level governance approach to human rights could provide some important benefits for individuals whose enjoyment of human rights is or could be affected by the World Bank's operations. This section will map out a multi-level governance approach to human rights for what concerns the World Bank specifically. In particular, the discussion will address the World Bank's place and role within a multi-level governance approach to human rights that adheres to principles of good governance. Suggestions will be made as to reforms that could be made to follow a multi-level governance

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[176] See Daniel Kaufmann, 'Human Rights, Governance, and Development: An Empirical Perspective Challenges Convention', in World Bank Institute, 'Human Rights and Development', Development Outreach Series No. 40633 (2006) 18.

[177] According to an empirical study. See Jonathan Isham, Daniel Kaufmann and Lant H Pritchett, 'Civil Liberties, Democracy, and the Performance of Government Projects' (1997) 11(2) The World Bank Economic Review 219, cited in Brodnig (n 2) 10.

approach, particularly by the World Bank. As such, this chapter goes a step further than Chapter 9 by looking towards the operationalisation of multi-level governance. Including the World Bank in a multi-level governance approach and aligning its activities with the characteristics of multi-level governance may not require as many changes as one may expect. The most drastic change for the Bank would be the inclusion of human rights considerations in its policies. Institutionally speaking, multi-level governance approach would require more focus on cooperation and coordination of actions between different actors working towards the same goal, which will be discussed below.

#### 10.3.2.1 The role of different actors within a multi-level governance approach

It is clear that although it is not always successful, and despite not explicitly engaging with human rights in its own work, the World Bank shares a common goal with many different stakeholders in the field of development. While some such actors do place a specific focus on human rights and various actors increasingly take HRBA, an overarching goal of reducing or eliminating poverty on a global scale is held by many actors (including States, civil society, scholars, etc.) in this context. It could even be said that there is a common goal of improving human rights *through* international development.[178] Having established that a common goal exists, questions remain as to the roles that different actors would have within a multi-level governance approach to human rights in relation to the World Bank, as well as how their activities could be coordinated to ensure efficient and effective cooperation.

The role of civil society in human rights (and in development) governance is quite well-defined, and has been briefly mentioned in Chapter 9 of this book. NGOs have carved out a role for themselves, arguably at all levels of human rights governance and within many different human rights

[178] This idea is linked to the concept of a 'right to development' which has been gained traction, particularly since the adoption by the UN General Assembly of its 'Declaration on the Right to Development' (4 December 1986) A/RES/41/128.

governance activities. Notably, they contribute to the drafting of (*inter alia*) regulations, policies, legislation and guidelines that aim to provide better protection for human rights. NGOs also have a pivotal role in raising awareness of, sharing information about and reporting on human rights situations on the ground. Additionally, NGOs also already provide considerable contributions to accountability mechanisms for States regarding their human rights obligations (i.e. through shadow reporting) as well as conducting research into the topic of the World Bank and human rights (and indeed non-State actors and human rights more generally).[179] In relation to the World Bank, they have already proven instrumental in flagging up human rights concerns caused by the Bank's practices and policies[180] as well as bringing human rights-related issues to the attention of the Inspection Panel (even if they have not been taken up by the Panel).[181] In this respect, civil society also has a strong connection with individuals and local communities, which themselves, as the victims of human rights interferences, have a large role to play in bringing attention to the human rights impact of the World Bank in practice. Thus, in a multi-level governance framework, civil society could maintain its current position vis-à-vis the World Bank and human rights, adapting to fill any appropriate gaps in governance activities that may arise in the future (possible due to multi-level governance's flexible nature).

The position of States in both development and human rights governance is also quite clear. For example, States have the prerogative to draft, implement and enforce (at least at the national level) human rights law standards as well as to commit themselves to adhering to such standards. It is also States' prerogative to take unilateral, bilateral or multilateral measures to better protect human rights and allocate (most often between themselves)

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[179] See e.g. Amnesty International, 'Nigeria: The World Bank Inspection Panel's Early Solutions Pilot Approach' (n 2).

[180] See e.g. Bretton Woods Project, 'Bretton Woods Project - Critical Voices on the World Bank and IMF' <http://www.brettonwoodsproject.org/> accessed 29 September 2017.

[181] See e.g. the Ethiopia PBS request brought by Inclusive Development International on behalf of the Anuak people (discussed above, Section 10.2.3.2). Inclusive Development International, 'Request for Inspection by World Bank Inspection Panel' (n 122).

human rights responsibilities at the international level. One matter that should be further clarified under a multi-level human rights governance system is the relationship between States and the World Bank. While on a cursory inspection the relationship seems clear, it would be important to clarify States' human rights obligations when they are acting as members of the World Bank and the effect that this has on the Bank's own activities. In addition, the governance role of States in relation to PRSPs should be further clarified – while it initially seems that they have a lot of discretion in choosing which structural adjustments to include in the documents, it has been suggested that they actually relinquish authority to the World Bank and IMF in order to gain their approval.

In general, the position of international organisations within human rights governance system is relatively clear. The United Nations, in particular, along with its specialised agencies and subsidiary bodies, makes consistent contributions to human rights through both the UN legal framework and the international human rights system more generally. However, some aspects need further elucidation. For example, the exact relationship between United Nations institutions and the World Bank, which is currently subject to controversy over unspoken political influences between the organisation, should be clarified.[182] In particular, meaningful engagement between the World Bank and the UN human rights treaty monitoring bodies is crucial. Regarding international organisations other than the UN, much more clarification is needed concerning their role in human rights governance. While some do engage with human rights issues (e.g. the International Organization for Migration) many have yet to take a clear stance towards their role, if any, in human rights protection. One crucial piece of the puzzle would be to establish the legal obligations (if any) of international organisations for what concerns human rights.

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[182] For a full explanation of the controversy surrounding the relationship, see Axel Dreher and others, 'Development Aid and International Politics: Does Membership on the UN Security Council Influence World Bank Decisions?' (2009) 88(1) Journal of Development Economics 1.

The Bank itself has a clear and authoritative position within international development and economic governance, which can be built upon to improve its contributions to multi-level human rights governance. Many aspects of the Bank's current functions could play an important role herein. The Bank currently engages with experts, an example of which was seen in the discussion on its economic and social safeguard policies in Section 10.2.3.4. However, there is no evidence that it engages with international human rights treaty monitoring bodies, although they have explicitly mentioned the World Bank and could provide valuable guidance as to the standards that the Bank could include in its own policies or ensure are within its operations and the programmes that it funds.

Finally, other actors such as private companies and the commercial banks and private sector investors which co-finance projects together with the World Bank, would have a role in a multi-level governance approach. The importance of private sector contributions to achieving sustainable development, which itself has a mutually reinforcing relationship with human rights, has been acknowledged by the Bank.[183] Different branches of the World Bank (the IBRD, the International Finance corporation and the Multilateral Investment guarantee Agency) have worked together to provide better support for IDA countries and 'to encourage greater private sector involvement'.[184] This has included initiatives such as the 'Private Sector Window' which is 'based on the recognition that the private sector is central to achieving the SDGs' and is intended to 'catalyze private sector investment and create jobs in the poorest and most fragile countries'.[185] Enhanced participation by the private sector could have a large impact on the availability of resources for achieving sustainable development. This has been seen in Kenya, where a public-private partnership between the World Bank Group, the government of Kenya, Kenya's national power distributor,

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[183] IDA, 'Leveraging the Private Sector' <https://ida.worldbank.org/results/abcs/abcs-ida-leveraging-private-sector-ida-countries> accessed 18 January 2018.
[184] ibid.
[185] ibid.

private investors and commercial lenders was established to increase access to electricity in Kenya.[186] However, as with any public-private partnerships, collaborative efforts between the World Bank and the private sector should adhere to human rights standards, and the World Bank, when entering into partnerships with private actors, should require them to comply with relevant human rights standards.

##### 10.3.2.2 Suggestions for measures to achieve a multi-level governance regime

A first consideration when looking at changes that would need to be taken to establish a multi-level governance framework for human rights in relation to the World Bank is the Bank's relationship with individuals and communities affected by Bank-supported projects. The Bank has made efforts to allow individuals and communities more direct access to the Bank when they believe that they have been negatively affected by a World Bank project – the Inspection Panel and the GRS. However, there is still a large power disparity between the institution and affected individuals vis-à-vis human rights, which should be addressed.[187] This could be achieved, *inter* alia, by giving individuals and local communities more voice in decision-making processes (including those of the Inspection Panel). In particular, local populations and particularly vulnerable individuals (such as indigenous populations and women) should be more actively involved in the drafting of PRSPs. Such measures would increase participation and accountability within a multi-level governance framework and may also go some way to fostering more cooperation between individuals and local communities (as well as any NGOs acting on their behalf) and the Bank.

The Inspection Panel would remain a critical tool for holding the Bank accountable for human rights interference. After all, the Panel was established as an accountability mechanism and has been successful in some respects. However, the powers and independence of the Panel need to be

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[186] ibid.

[187] This disparity was particularly noted by SOMO and Inclusive Development International (n 117) in the situation in Badia East that was brought to the attention of the Inspection Panel.

strengthened. This would include giving the Panel more decision-making power, rather than allowing the ultimate decision as to the outcome of a complaint to lie with the Bank's management. Improving the Panel's transparency would also be key. This could be done through more open engagement with affected communities, and through strengthening the operational policies of the Panel itself. Engaging more with affected communities on the ground would necessarily be required by a multi-level governance approach and would certainly improve participation. As one of the primary aspects of a multi-level governance approach is the cooperation and complementarity between action taken by different actors and levels to maximise the efficiency of measures, open engagement is extremely important. Strengthening the Panel would also be linked to further review of the environmental and social safeguard policies. If more human rights standards were (preferably explicitly, but also implicitly) included in the policies, the Panel would then have the discretion to assess the Bank's operations according to such standards. In turn, the role of the UN human rights treaty monitoring bodies would be important here, as their interpretations of what standards should be met in relation to different human rights could be used as a benchmark by the Inspection Panel. Along with an improved Inspection Panel, the GRS could form an important link between the international and local level within a multi-level human rights governance system. The service could ensure that the World Bank stays connected with affected communities and remains able to work with the communities in real time towards mutually beneficial solutions. It may also allow the Bank to reflect the needs of local communities more accurately in its policies and the way that it conducts its operations more generally (e.g. by providing staff with more training), reducing the need for similar complaints in the future. In these ways, the GRS and the Inspection Panel could go some way to addressing one of the main challenges to multi-level governance – coordination between different actors. However, further measures would need to be taken to address issues such as the fact that the Bank has not

engaged meaningfully with the UN human rights treaty monitoring bodies.[188]

Coordination would also have to be further fostered amongst civil society, which could be in a good position to help the Bank to develop a HRBA within its activities. Other international organisations, such as the UNDP or the UNFPA, could also collaborate with civil society and the World Bank in this respect. Concrete measures to achieve these goals and improve coordination could include the Bank establishing contact points/persons from within the Bank to liaise with other actors, including other international organisations, non-governmental organisations and the human rights treaty monitoring bodies (for example). To increase coordination between multiple actors, activities such as conferences could be organised to encourage information sharing and avoid the duplication of activities and efforts to help the Bank improve its impact on human rights. Of course, such activities would need to adhere to the principles of transparency, accountability and participation, so it would be important for local communities, human rights experts and other relevant actors to be involved in or at least have access to the activities (e.g. by attending the conference). Participation of actors could be on a more formal or informal basis. Other measures that could be taken would be for the contact person to deliver periodical reports on the activities that the Bank is taking to improve human rights, lessons that have been learnt and efforts that could be taken in the future to further reduce its negative impact on human rights.

The measures suggested here are merely examples of what could be done to move towards a multi-level governance approach to human rights and are by no means exhaustive. It is clear that action must be taken on all levels of a multi-level governance system, and that more coordination and cooperation between actors and levels is required. Perhaps most strikingly, in consideration of the suggestions for the Bank to take a HRBA, the delineation

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[188] The Bank does not appear to follow the guidance of the treaty bodies, that it should (for example) 'cooperate effectively with State parties…in relation to the implementation of the right to health at the national level', as suggested by the UN CteeESCR in its General Comment No. 14 (n 20) para 64.

of responsibilities of the Bank for human rights needs further clarification. Persuading the Bank to actively engage with human rights is a first (albeit high) hurdle on the path to better human rights protection.

## 10.4 Concluding reflections on the World Bank, international human rights law and multi-level governance

This chapter has demonstrated the relationship between global economic and development governance by the World Bank and human rights, and has explained how many of the Bank's activities are problematic in this respect. While the Bank itself promulgates the close relationship between development and human rights, it has yet to acknowledge its own role in the protection of human rights. Whether the Bank is currently subject to international law obligations to actively engage with (or simple to respect) human rights is still a matter of debate, and the Bank does not seem to be swayed by moral arguments that it would be the 'right thing' for it to do, despite the large potential for it to affect human rights realisation. It can be concluded from the analysis above that there are several obstacles to achieving good governance standards within a multi-level governance approach to human rights for what concerns the World Bank.

For example, the analysis showed that difficulties in achieving accountability of the World Bank are currently extensive, particularly when the current international human rights law framework and the lack of direct human rights obligations of the World Bank are borne in mind. In addition, despite measures taken by the world Bank to improve its own good governance, the analysis of the Inspection Panel and the environmental and social safeguard policies review suggested that further efforts should be taken towards participation and transparency. Taking a multi-level governance approach, suggestions were provided that could improve the coordination of actors as well as adherence to the principles of good governance. Given the range of actors already connected with the operations of the World Bank, including States, local communities (in the sense that they are often the most affected by the World Bank as well as the complaints mechanisms open to them) and civil society (e.g. through naming and shaming the World Bank,

and working with affected communities), a multi-level governance approach provides a promising framework for improving the Bank's impact on human rights. As Section 10.3.2 discussed, this would require a strengthening of the current tools available to the Bank, and more empowerment of individuals whose human rights are affected by the Bank. It would ultimately require the World Bank to take a human rights-based approach, the biggest obstacle to which is the Bank's reluctance to actively engage with human rights.

Chapter 11

# Non-State armed groups, international human rights law and multi-level governance

## 11.1 Preliminary remarks

Non-international armed conflicts give rise to many dilemmas concerning the applicable laws, effective governance of different actors involved, how to ensure the protection of human rights, and how to protect civilians and societies from the devastating impact of war (to name a few). The ongoing non-international armed conflict in Syria, for example, has been described as causing the 'biggest humanitarian emergency in our era'.[1] The combination of a repressive regime, armed opposition groups and terrorist activities has left the country in a constant state of instability and chaos for several years. Millions of people have been forced to flee the country and/or live in abject conditions, without access to basic living supplies such as food, water and shelter. The enduring grapple for power between the Islamic State and the Syrian government exacerbates the already dire situation and prevailing humanitarian crisis.

This chapter will critically assess the way in which international law addresses the actions of non-State armed groups (NSAGs) during non-international armed conflicts (Section 11.2). As such, the analysis considers

[1] Eyder Peralta, 'U.N.: Syrian Refugee Crisis Is "Biggest Humanitarian Emergency Of Our Era" : The Two-Way : NPR' *NPR* (29 August 2014) <http://www.npr.org/sections/thetwo-way/2014/08/29/344219323/u-n-syrian-refugee-crisis-is-biggest-humanitarian-emergency-of-our-era> accessed 29 September 2017.

how international humanitarian, criminal and human rights law apply to NSAGs during non-international armed conflicts. Once the applicability of human rights law more generally has been established, the chapter focuses on those human rights particularly at stake during humanitarian crises – 'subsistence rights' falling within the category of economic, social and cultural rights. The analysis will show that while the rights are applicable in non-international armed conflicts, the current legal framework and initiatives adopted to encourage NSAGs to respect human rights struggle to provide adequate protection for individuals facing such strife (Section 11.3). The chapter then goes on to apply the multi-level human rights governance approach suggested in Chapter 9 to the context of NSAGs (Section 11.4). Finally, the chapter will evaluate the potential role of a new measure, ceasefire agreements, as part of a multi-level governance approach to human rights in the context of NSAGs and humanitarian crises.

## 11.2 The law applicable to non-State armed groups during non-international armed conflicts

### *11.2.1 International humanitarian law*

The laws applicable to armed conflicts are extremely well rehearsed,[2] and will be only briefly laid out here. The following section will focus on non-international armed conflicts taking place between a State and at least one non-State armed group. The term 'non-State armed group' shall refer to a definition suggested by Geneva Call. It shall therefore include 'any armed group, distinct from and not operating under the control of, the state or states in which it carries out military operations, and which has political, religious, and/or military objectives'.[3]

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[2] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (1st edn, Cambridge University Press 2010); Andrew Clapham and Paola Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014); Katherine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press 2017).
[3] Annyssa Bellal, Gilles Giacca and Stuart Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan' (2011) 93(881) International Review of the Red Cross 47. As it is a non-governmental organisation, the definition of Geneva Call is not contained in a legally

The corpus of international humanitarian law applicable during non-international armed conflicts is somewhat limited compared to that applicable during international armed conflicts. In the early days of international law, the lack of development of was perhaps due to a general understanding that because of its domestic nature, internal warfare fell within the scope of a State's national jurisdiction and did not need not be regulated internationally.[4] Although some *customary* international law pertaining to non-international armed conflicts existed (relating particularly to the recognition of belligerency), State practice on the matter rapidly declined.[5] However, the prevalence of non-international armed conflicts grew and their transnational effects became more evident (e.g. the influx of refugees and/or a 'spill-over' of hostilities to neighbouring States).[6] Realisation grew that parties most affected by conflicts (i.e. civilians) were in need of protection regardless of the nature of the conflict, and accordingly the mid-20th century brought a greater acceptance of the application of humanitarian norms to non-international armed conflicts. Nonetheless, despite efforts of the International Committee of the Red Cross (ICRC) to encourage the application in practice (having adopted a resolution on the matter in 1938[7]), progress was stopped short by the breakout of World War II. It was therefore not until 1949, after a rejection of the ICRC's attempts to have the totality of international humanitarian law extended to cover non-international armed conflicts, that the somewhat restrictive Common Article 3 to the universally binding Geneva Conventions was adopted.[8] The non-international armed conflict-

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binding document. However, it is very influential, given the vast experience and work of the organisation in the field of non-international armed conflicts and in relation to NSAGs.

[4] Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 2.

[5] Lindsay Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' (1998) 47(2) The International and Comparative Law Quarterly 337, 352.

[6] Moir, *The Law of Internal Armed Conflict* (n 4) 2.

[7] Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' (n 5) 337, 354.

[8] Geoffrey Best, *War and Law Since 1945* (Oxford University Press 1997) 82-833. 'Universal' is used here in the sense that each member state of the UN has ratified the Geneva Conventions. See International Committee of the Red Cross (ICRC), 'Treaties, States Parties,

specific Additional Protocol II to the Geneva Conventions of 12 August 1949 was later hastily adopted in 1977,[9] after further disagreements between States as to the extent to which their internal affairs should be opened to external scrutiny.[10]

The standards contained in these instruments apply to both State and non-State parties to non-international armed conflicts. However, a high threshold must be met for Additional Protocol II to be applicable.[11] This means that in many situations, only Common Article 3 providing minimal protections would apply, as the provision automatically applies upon the classification of a situation as a non-international armed conflict. By now, however, this body of law has matured, with a more expansive corpus of *customary* international humanitarian law applying to non-international armed conflicts.[12] Notwithstanding criticism of this customary law, its application to NSAGs has been more broadly accepted than the application of treaty-based rules.[13]

In addition, the assertion that some rules of international armed conflicts are also applicable in non-international armed conflicts is becoming more commonplace;[14] until the 1990s, developing the rules of non-

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and Commentaries – Geneva Conventions of 1949 and Additional Protocols, and Their Commentaries' <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 29 September 2017.

[9] ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

[10] Best (n 8) 346-347.

[11] Article 1, para 1 APII requires that (alongside the existence of an armed conflict within the territory of a High Contracting Party) non-State parties to a non-international armed conflict have 'responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.'

[12] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 102.

[13] Bellal, Giacca and Casey-Maslen (n 3) 56.

[14] Columbia Law School Human Rights Institute, 'Harmonizing Standards for Armed Conflict' <http://www.law.columbia.edu/human-rights-institute/counterterrorism/harmonizing-standards-armed-conflict> accessed 29 September 2017 cited in Sarah Cleveland, 'Harmonizing Standards in Armed Conflict' *EJIL: Talk!* (8 September 2014) <https://www.ejiltalk.org/harmonizing-standards-in-armed-conflict/>

international armed conflicts beyond those provided for by Geneva law was 'never seriously entertained'.[15] However, with the majority of armed conflicts currently occurring worldwide being *non*-international in nature,[16] the developments are now a welcome opportunity to mitigate the human suffering caused by armed conflicts, and thwart concerns regarding the deregulation of non-international armed conflicts.[17]

These developments nonetheless raise several conceptual concerns, perhaps the most notable relating to the legitimacy of applying treaty standards to NSAGs, which have not ratified the relevant treaties or contributed to the formation of customary law. At the international level, in the absence of an elected world government, the legitimacy of obligations stems originally from the sovereign equality of States and the fact that they bind only themselves through the creation and adoption of international norms.[18] The source of legitimacy for the imposition of direct obligations on non-State actors at the international level without their participation therefore raises some questions, as mentioned in Chapter 3.2.1. Justifications proffered range from the 'doctrine of legislative jurisdiction'[19] to the analogy of

accessed 29 September 2017.

[15] Sivakumaran (n 12) 55.

[16] See the list of inter-State vs intra-State armed conflicts on the International Institute for Strategic Studies, 'Armed Conflict Database' (2014) <https://acd.iiss.org/en/conflicts?tags=CF582C41FE1847CF828694D51DE80C08> accessed 29 September 2017.

[17] Whether or not the rules are effective is another question, which falls outside of the scope of this study.

[18] While State sovereignty was certainly the source of legitimacy for international law under the traditional Westphalian system, a 'legitimacy crisis' has since emerged, as 'the system of legitimation at the international level has not kept pace with perceived changes in the operation or location of political authority.' See Helen Keller, 'Codes of Conduct and their Implementation: the Question of Legitimacy' in Rudiger Wolfrum and Volker Roeben (eds), *Legitimacy in International Law* (Springer 2008) 257-258, citing Steven Bernstein, 'The Elusive Basis of Legitimacy in Global Governance: Three Conceptions' in Steven Bernstein, 'The Elusive Basis of Legitimacy in Global Governance: Three Conceptions' (2004) Institute on Globalization and the Human Condition, Working Paper GHC 04/2 <http://globalization.mcmaster.ca/research/publications/working-papers/2004/ighc-wps_04-2_bernstein.pdf> accessed 9 October 2017.

[19] This doctrine holds that since the '"parent" state has accepted a given rule of IHL', the State

individual criminal responsibility.[20] Perhaps the most persuasive justification is the argument that some procedural requirements of legitimacy need not be followed in relation to norms preventing heinous conduct. As discussed in Chapter 3.2.1, it has been argued that if the expected result of the obligations' implementation is of paramount importance, it may negate the necessity of the norms being adopted with the consent of affected parties.[21] Cedric Ryngaert asserts that in the absence of participation by a non-State actor, if a 'legal norm or its implementation has in itself an important substantive value', participation is not necessary.[22] Arguably, in the case of international humanitarian law that was extended to non-international armed conflicts primarily for the purpose of protecting civilians, this argument rings true. Indeed, 'it has now become uncontroversial [...] that [NSAGs] are bound by international humanitarian law'.[23]

Now that the law applicable during non-international armed conflicts is in a more (though by no means fully) developed state, the primary issue to be addressed is how to ensure that NSAGs comply with the relevant norms and close the gap between law and practice during non-international armed conflicts. Aligning the practice of NSAGs with the legal standards is an extremely challenging task. On the one hand, NSAGs may not be aware of the existence or meaning of humanitarian norms, and may lack the institutional structure to ensure compliance of their own fighters.[24]

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may impose the obligations upon its nationals, including those who take up arms against the State or other nationals. See Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) International Review of the Red Cross 443, 445; see also Clapham and Gaeta (n 2) 778.

[20] I.e. the argument that because individuals can be held responsible under international criminal law for war crimes, which consist of grave breaches of humanitarian law, they must therefore be obliged to comply with humanitarian law. See Kleffner (n 19) 449-451.

[21] Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Math Noormann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 73.

[22] ibid 71.

[23] Bellal, Giacca and Casey-Maslen (n 3) 56.

[24] Cedric Ryngaert and Anneleen Van de Meulebroucke, 'Enhancing and enforcing compliance with international humanitarian law by non-state armed groups: an enquiry into

Alternatively, a NSAG may be unwilling to engage with the notion that it has legal obligations under humanitarian law.[25] Even those NSAGs willing to abide by the laws may encounter an array of obstacles in implementing them.[26] Whatever the reason for non-compliance, the negative effect is always felt by civilians. It is for this reason that organisations such as the ICRC have engaged with NSAGs, offering them education, practical training, and the opportunity to adopt unilateral declarations or enter into agreements with other parties to a conflict.[27] Nonetheless, as Cedric Ryngaert and Van der Meulebroucke note, unlike for States, there is no formal advisory service available to NSAGs struggling to comply.[28]

Notwithstanding the difficulties faced in ensuring NSAGs' compliance with humanitarian law, their violation of international humanitarian law applicable to them may allow individuals belonging to a NSAG to be held responsible under international criminal law. This will be briefly explained in the following section.

### *11.2.2 International criminal law*

Under Article 5 Rome Statute of the International Criminal Court (Rome Statute), the Court has the jurisdiction to prosecute individuals for the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[29] If found guilty, the individual (whether affiliated with a State

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some mechanisms' (2012) 16(3) Journal of Conflict and Security Law 443, 456-457.

[25] ICRC, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (2008) <https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf> accessed 9 October 2017.

[26] E.g. knowing how to translate the legal text into operational policies, or determining the correct scope and content of obligations.

[27] See Section 11.3 for an in-depth discussion of declarations and agreements adopted by NSAGs. For a brief overview of the activities that the ICRC undertakes to engage with NSAGs, see ICRC, 'Building Respect for Humanitarian Action and IHL among "other" Weapon Bearers' (29 October 2010) <https://www.icrc.org/eng/what-we-do/building-respect-ihl/dialogue-weapon-bearers/other-weapons-bearers/overview-icrc-other-weapon-bearers.htm> accessed 13 October 2017.

[28] Ryngaert and Van de Meulebroucke (n 24) 457.

[29] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (Rome Statute).

or not) will be held individually (criminally) responsible for their actions; a rare occurrence in the international sphere. The jurisprudence of the ICC to date shows no inclination of the institution to shy away from finding such responsibility, as can be seen from the *Lubanga* case,[30] particularly relevant to this study given that the defendant in the case was Thomas Lubanga Dyilo, President of the rebel group 'Union des Patriotes Congolais'. Lubanga was accused of 'enlisting and conscripting of children under the age of fifteen years into the armed forces or groups or using them to participate actively in hostilities', which are classed as a war crime by the Rome Statute.[31]

The *Lubanga* case is significant in a general sense because it emphasises the heinousness of Lubanga's actions in using child soldiers by making his conduct as a private individual the subject of scrutiny in the international arena, and demonstrates a willingness on behalf of the international community to hold private actors to count for their conduct. The *Lubanga* case is particularly significant in the present context because although it constitutes international *criminal* law jurisprudence, the fact that the defendant was found guilty for this crime could if it were possible to take action against him directly under international human rights law, support a complaint that he had also violated Article 38 Convention on the Rights of the Child and Article 4 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol CRC).[32]

### *11.2.3 International human rights law*

The extent to which NSAGs, as non-State actors, are bound by international human rights law has already been dealt with to a large extent by previous chapters of this book and will be briefly summarised here. In Chapter 3, the

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[30] International Criminal Court, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 (14 March 2012).

[31] Article (8)(2)(b)(xxvi) Rome Statute.

[32] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000, entered into force 12 February 2002). Article 4 would only be relevant, however, to those children between the ages of 15 and 18 which would not be captured by Article 38.

applicability of *jus cogens* norms to NSAGs was discussed, as some international bodies have held the actors to be bound by 'human rights obligations constituting peremptory international law'.[33] As explained in Chapter 3, this is bolstered by international criminal law, some provisions of which have attained *jus cogens* status. However, as was also noted in relation to the World Bank, the range of *jus cogens* human rights obligations remains narrow, and does not include many of the rights that NSAGs have a great impact on.

Chapter 4.5 discussed the relevance of the Optional Protocol to the CRC on the involvement of Children in Armed Conflict to NSAGs, and Chapters 5 and 8 showed that the harmful actions of NSAGs vis-à-vis human rights have been dealt with by some of the United Nations human rights treaty monitoring bodies. The analyses found that there are currently no direct obligations for NSAGs, although they are mentioned in Article 4 of the Optional Protocol. In addition, the prohibition of the recruitment and use of child soldiers by NSAGs in Article 4 does not fall within the scope of any monitoring or enforcement mechanisms, which 'inevitably will hinder' its effectiveness.[34] This is particularly true in relation to NSAGs, which unlike States are not subject to external monitoring mechanisms (e.g. the Human Rights Council's Universal Periodic Review[35]).

The most significant application of indirect horizontal effect in relation to NSAGs was found in Chapters 5 and 8 to be categorical indirect

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[33] 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', A/HRC/19/69, para 106, cited in Geneva Academy, 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN human Rights Council' (2016) Academy In-Brief No. 7, 22 <www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf> accessed 6 November 2017.

[34] S Abraham, 'Child Soldiers and the Capacity of the Optional Protocol to Protect Children in Conflict' (2003) Human Rights Brief 10(3) 15, 17.

[35] The Universal Periodic Review (UPR) is a UN Charter-based system that involves peer review by States on a periodic basis, with each Member State of the UN having their human rights record reviewed within each 'cycle' of the system. See Office of the United Nations High Commissioner for Human Rights, 'Universal Periodic Review' <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> accessed 13 October 2017.

horizontal effect, according to which non-State actors are re-categorised as State actors because they carry out certain public functions. Diagonal indirect horizontal effect (based on States' obligation to protect human rights)[36] becomes difficult to uphold in situations where a NSAG operates outside of State control; as explained in previous chapters of this book, while States are expected to protect individuals' human rights from interference by third parties, this obligation is one of conduct, not result.[37] This means that if a State has taken all reasonable measures to protect human rights but nevertheless fails to do so, it has still fulfilled its obligation to protect (thereby discounting the possibility of an individual relying on diagonal indirect horizontal effect).[38] This may not be a problem in itself, but becomes more problematic in light of the lack of direct horizontal effect for NSAGs. An illustrative example is that of the Fuerzas Armadas Revolucionarias de Colombia (FARC) in Colombia. The non-international armed conflict between the FARC and the State took place over a period of more than 50 years, finally coming to an end in November 2016 when a peace accord between the parties was ratified.[39] Before the end of the conflict, many concerns were raised regarding the effect of the conflict on human rights. In

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[36] See Chapter 8.3.1.

[37] Office of the United Nations High Commissioner for Human Rights, 'Economic, Social and Cultural Rights Handbook for National Human Rights Institutions' (2005), 61 <http://www.ohchr.org/Documents/Publications/training12en.pdf> accessed 18 August 2017.

[38] See Chapters 3 and 8.

[39] The peace process for this conflict was fraught with tension. The parties finally successfully ended the four year-long negotiations in August 2016 when a peace agreement between the FARC and the Colombian government was reached. However, a referendum on whether the agreement should be ratified by Congress narrowly failed to gain enough support. This led to further negotiations, and the final agreement was ratified by the Colombian houses of Congress on 29-30 November 2016. See 'Colombia's Government Formally Ratifies Revised Farc Peace Deal' *The Guardian* (1 December 2016) <https://www.theguardian.com/world/2016/dec/01/colombias-government-formally-ratifies-revised-farc-peace-deal> accessed 9 October 2017. For a full discussion of the peace process and ongoing issues with implementation of the agreement, see e.g. 'Colombia Peace – Monitoring Progress in Peace Dialogues' <http://colombiapeace.org/> accessed 9 October 2017; and FARC-EP International, 'Timeline' <https://www.farc-epeace.org/peace-process/timeline.html> accessed 9 October 2017.

the year 2000, the FARC gained effective control over a large area of Colombian territory, making it extremely difficult for Colombia to fulfil its obligation to protect in that area (see Section 11.3.1).

The UN Human Rights Council nonetheless expressed concern at the lack of the Colombian State's inquiry and investigation into crimes committed by demobilised individuals from the FARC against women and children, in particular for what concerned the recruitment of child soldiers.[40] Such lack of inquiry and investigation would presumably fail to comply with the State's obligation under Article 4(2) of the Optional Protocol CRC to 'take all feasible measures' to ensure that the relevant norms are respected.[41] The Inter-American Commission on Human Rights emphasised the importance of the obligation to investigate and punish actions by non-State actors in its assessment of whether Colombia had acted with due diligence in relation to FARC activity, but ultimately stated that 'in situations of civil strife the State cannot always prevent, much less be held responsible for, the harm to individuals and destruction of private property occasioned by the hostile acts of its armed opponents.'[42] This appears to place a lower (albeit more realistic) burden on States than the ECtHR. In the case of *Ilascu and Others v Moldova and Russia* the ECtHR was called upon to question the responsibility of Moldova for harm that occurred in an area of its territory over which it no longer had effective control.[43] The Court opined that 'States retain the obligation to use all means and resources available to them to guarantee human rights'[44] and upheld Moldova's responsibility. While encouraging States to make efforts to guarantee human rights throughout its

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[40] UN Human Rights Council Working Group on the Universal Periodic Review, 'National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Colombia' (2008) A/HRC/WG.6/3/COL/1, para 57.
[41] Article 4(2) Optional Protocol CRC.
[42] Inter-American Commission on Human Rights, Organization of American States, 'Third Report on the Human Rights Situation in Colombia' (1999) OEA/Ser.L/V/II.102, Chapter IV para 4, discussed in Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 422.
[43] *Ilascu and Others v Moldova and Russia*, App No. 48787/99 (8 July 2004).
[44] ibid para 333.

territory regardless of situations of conflict is laudable, finding the State to have violated its obligations in areas where it is no longer capable of securing human rights is questionable. Although the approach of the Inter-American Commission on Human Rights may appear to be too soft-handed, the much more heavy-handed approach of the ECtHR has been questioned, not least by dissenting judges.[45]

Ultimately, whichever view is taken could result in a gap in human rights protection. Even if a State were to use all means and resources available to try to secure human rights in areas controlled by NSAGs, it may not be possible. Additionally, and unfortunately, the vast majority of previous cases upholding indirect horizontal effect at the international level have been in relation to civil and political rights.[46] Until recently, it was not possible to bring an individual complaint in relation to rights contained in the ICESCR.[47] The entry into force of the Optional Protocol to the Covenant now allows for this possibility, but it remains to be seen how the UN CteeESCR will deal with such situations.[48] These factors all culminate in a gap in effective legal protection of subsistence rights during armed conflicts. While some NSAGs take it upon themselves to provide public services and to essentially fulfil

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[45] ibid Partly Dissenting Opinion of Judge Sir Nicolas Bratza.
[46] See Chapter 5.
[47] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 63/117 (10 December 2008) A/RES/63/117. Although the Covenants were adopted at the same time, unlike the ICCPR the ICESCR was not accompanied by an Optional Protocol providing the Committee on Economic, Social and Cultural Rights with a mandate and jurisdiction to hear individual complaints against states for alleged violations of human rights obligations. Despite this fact, there have been some possibilities of bringing complaints directly in relation to economic, social and cultural rights prior to the Optional Protocol to ICESCR. E.g. under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (adopted 9 November 1995, entered into force 1 July 1998) ETS No. 158; the African Charter on Human and Peoples' Rights, 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58; and the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2005). The African Charter and the Protocol have now been merged together by the Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.
[48] The Protocol entered into force on 5 May 2013. See also Chapter 5.3.2.

some human rights on a *de facto* basis, there exists a legal lacuna. A correlative of this is an inequality in human rights protection. Victims living in an area controlled by the State may still be able to receive redress for their human rights violations by bringing a complaint directly against the State. For those living in NSAG-controlled areas, depending on the situation on the ground and the efforts that States have made in securing human rights enjoyment despite the control of the NSAG, this may not be possible. Individuals suffering the effects of severe humanitarian crises may therefore be left with no way of accessing essential materials. Despite laudable efforts by humanitarian aid organisations to deliver materials to those in need, and the humanitarian norms prohibiting the restriction of their access to areas in need of essential materials,[49] some areas remain rife with crisis. For these reasons, more measures need to be taken to try to achieve a rounder, more comprehensive protection of human rights.

The situation under international human rights law contrasts with that under international humanitarian law, which contains the fundamental principle of equality of obligations.[50] This means that all parties to a conflict

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[49] The ICRC has identified the main customary international law rule as requiring parties to a conflict to '[...] allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.' Basic norms regarding access to and protection foodstuffs, healthcare and humanitarian personnel in relation to non-international armed conflict can be found in Article 3(2) Geneva Conventions; Articles 9, 11 and 18 Additional Protocol II. A full explanation of the norms in non-international armed conflict has been written by the ICRC. See International Committee of the Red Cross, 'Customary IHL Rule 55: Access for Humanitarian Relief to Civilians in Need' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 2 October 2017.

[50] This is often referred to as 'the principle of equality of belligerents' and is reflected in Common Article 3 to the Geneva Conventions, which refers to 'each party' to a conflict, as well as Article 1(1) Additional Protocol II. Ezequiel Heffes, 'Generating Respect for International Humanitarian Law: The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents' (2015) 18 Yearbook of International Humanitarian Law 181. The principle has long been considered a central principle of international humanitarian law, although some scholars have called for it to be renounced. See Elihu Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 British Yearbook of International Law 206, cited in Sivakumaran (n 12) 242; Marco Sassòli and Yuval Shany, 'Should the obligations of states and armed groups under

owe the same obligations and hold the same rights 'irrespective of the "justness" of the cause', even during non-international armed conflicts.[51] Consequently, civilians belonging to both sides of the conflict are in theory equally protected from the effects of the conflict. However, as mentioned above, the developments in the range of laws applicable during non-international armed conflicts remains limited in comparison with international armed conflicts. The limited scope of the norms renders the equality of obligations during non-international armed conflicts less meaningful, particularly in situations where the high threshold for the application of Additional Protocol II is not met. Indeed, the equality of obligations in non-international armed conflicts was seemingly a response to the need to ensure equal protection for civilians during internal as well as international conflicts rather than to recognise NSAGs as bodies competent of discharging obligations.

In this respect, it is possible to compare the application of humanitarian law to NSAGs with that of human rights norms to some extent. States have shown a reluctance to impose direct obligations on non-State actors under both spheres of law, resulting in the (deliberate) gaps in the obligations of State vs non-State actors. With respect to both legal fields, the primary reason for this is the prevailing State-centric, Westphalian approach to international relations. States are still considered to be the primary subjects of international law; sovereign entities endowed with the power and responsibility of managing their internal affairs (including the regulation of non-State actors[52]). This is reflected, for example, in the fact that only States

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international humanitarian law really be equal?' (2011) 93 (882) International Review of the Red Cross 425; and René Provost, 'The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany' (2011) 93 (882) International Review of the Red Cross 437.

[51] Sivakumaran (n 12) 242-246.

[52] As Robert Kolb explains, States are considered the 'principal subjects of international law' because they have the 'largest spectrum of rights and duties' necessary for an entity to have international legal personality. See Robert Kolb, *Theory of International Law* (Bloomsbury Publishing 2016). The regulation of non-State actors by States for what concerns human rights has been discussed in Chapters 5, 6 and 8 of the present book, as an obligation to do

may be party to international human rights law treaties and the Geneva Conventions (including Additional Protocol II). Changes in the prevalence and power of NSAGs are highlighting the insufficiency of this paradigm for dealing with situations of humanitarian crisis during non-international armed conflicts. Interestingly, some level of equality has been transposed into the younger field of international criminal law, which, as already shown, allows for individuals to be held individually criminally responsible at the international level for certain crimes.[53] Many international crimes pertain to conduct during armed conflicts, in particular those 'grave breaches' of humanitarian law that amount to war crimes, some of which concern human rights principles.[54] Nonetheless, the norms involved do not relate to 'subsistence rights' (discussed below, Section 11.2.3.3), the enjoyment of which is particularly impaired during humanitarian crises, rendering the value of international criminal law as a deterrent less valuable in this context. Consequently, the current gap in both humanitarian and human rights law makes it difficult to govern the actions of NSAGs effectively.

#### 11.2.3.1 The legitimacy of direct human rights obligations for non-State armed groups

As Christa Rottensteiner has noted, 'the primary responsibility for meeting the needs of the civilian population in an armed conflict rests with the warring parties that are in effective control of the territory on which that population lives'.[55] This could lead to the conclusion that direct human rights obligations

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so has repeatedly been found to fall within the ambit of States' obligation to protect human rights. See for discussion Daniel Augenstein and Lukasz Dziedzic, 'State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention on Human Rights' European University Institute Working Papers LAW 2017/15.

[53] The principle of individual criminal responsibility, bringing individuals within the jurisdiction of the ICC, can be found in Article 25 Rome Statute.

[54] Examples of war crimes that also concern human rights standards include: torture, extensive destruction or appropriation of property, willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial and unlawful deportation. See Article 2(a) Rome Statute.

[55] Christa Rottensteiner, 'The Denial of Humanitarian Assistance as a Crime under International Law' (1999) International Review of the Red Cross No. 835.

should be imposed on NSAGs in the future, which, as seen Chapter 3.2.1, may cause problems of legitimacy. However, the comments made in this respect in the context of direct obligations of NSAGs under international humanitarian law may also apply to (some) obligations under international human rights law, at least to the extent that the obligations overlap or build upon those found in humanitarian law.

There may also be fewer concerns of legitimacy of direct obligations when a NSAG has effective control over a territory of land. This is because the NSAG will often be acting (at least in part) as a governmental body within the territory, particularly when providing public services. If this is the case, the NSAG could be described as a 'quasi-public' entity (as in the case of *Sadiq Shek Elmi v Australia*).[56] According to the International Law Commission's Draft Articles on State Responsibility,[57] if this occurs, the NSAG (or 'insurrectional movement') that completely replaces a government will naturally assume all governmental obligations (including those emanating from the human rights treaties which the previous government had ratified).[58] Significantly, these groups will also be answerable for any violations committed *prior* to their entry into government, the rationale being that to allow these groups to evade responsibility for earlier conduct would be 'anomalous'.[59] The distinction between holding such a NSAG responsible as opposed to one which has not achieved its ultimate goal of replacing the State is extremely important for reasons of transparency, and indeed legitimacy.[60]

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[56] *Sadiq Shek Elmi v Australia v Australia* (120/1998) UN Doc. CAT/C/22/D/120/1998 (25 May 1999), see Chapter 5.5.2. As well as having an impact on the legitimacy of direct human rights obligations for such NSAGs, the fact that they are operating as quasi-public entities opens the door (at least in theory) to the application of categorical indirect horizontal effect (see Chapter 8.3.2).

[57] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) Vol. II Part Two Yearbook of the International Law Commission II Part Two (as corrected) A/56/10 (DASR), Article 10.

[58] See ibid 50, on Article 10 and commentary.

[59] ibid.

[60] While some NSAGs do aim to ultimately replace the sitting government, it is important to note that this is not the goal of *all* NSAGs.

Nonetheless, the legitimacy of direct human rights obligations for non-State armed groups does face some challenges. In terms of procedural legitimacy, it can be difficult to negotiate with and secure the consent of the groups in the drafting of obligations. Previous attempts to conclude agreements with NSAG as to their observance of both international humanitarian and international human rights law have had erratic success.[61] However, groups may be more willing to abide by human rights obligations if they are the result of a collaborative process between themselves and the State, preferably with a degree of supervision by the United Nations (as was the case with the aforementioned Human Rights Accord). To be perceived as legitimate by the NSAG, the process of placing obligations upon them must be transparent and open to negotiation. Given the already strained relationship between the State and the NSAG, with deep-rooted mistrust between the two, this transparency is of the utmost importance. Ensuring participation and transparency in efforts to increase the human rights protection of individuals during non-international armed conflicts is also crucial under the multi-level governance approach suggested in Chapter 9, which should adhere to the principles of good governance.

On the other hand, it should not be the case that individuals under the control of a NSAG suffer from gross human rights violations because the NSAG is not willing to commit to human rights obligations. For this reason, substantive legitimacy may justify the legitimacy of the imposition of (some) direct human rights obligations on NSAGs without their consent. This could extend to the range of gross human rights violations considered to be international crimes (as defined in the Rome Statute of the International Criminal Court[62]). The effectiveness of such human rights obligations, given the continued abuse of them under international criminal law, is yet another challenge to be addressed, but falls outside of the scope of this chapter.

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[61] See e.g. June S Beittel, 'Peace Talks in Colombia' (31 March 2015) Congressional Research Service Report <https://fas.org/sgp/crs/row/R42982.pdf> accessed 29 September 2017.
[62] Rome Statute.

#### 11.2.3.2 The doctrine of *lex specialis* and non-international armed conflicts

The rhetoric pertaining to the application of international human rights law to armed conflicts was initially somewhat divergent. A major focus of this debate has revolved around the doctrine of *lex specialis derogat legi generali* (*lex specialis*), which many believe to render the application of human rights during armed conflicts inappropriate.[63] As the literature engaging with this debate is extremely extensive, this section will present a summary of the doctrine and its consequences within the context of this chapter. The doctrine mandates that more precise and specialised law is to take precedence over more general laws. Reluctance to apply international human rights law during armed conflicts was also due to the differing natures and 'roots' of humanitarian and human rights law,[64] as discussed in Chapter 2.2. To summarise, international humanitarian law seeks to diminish the devastating human cost of conflicts and to ensure a fairer fight,[65] whereas international human rights law seeks to offer individuals certain standards of living as well as protection from potentially abusive actions by States.[66] Furthermore, international human rights law imposes obligations on the State for the benefit of individuals, resulting in an inherently vertical relationship between obligation-holders and beneficiaries (or rights-holder). In contrast, as explained above, many humanitarian obligations are owed by all parties to the conflict, which essentially act as mutual beneficiaries (assuming that all parties comply with their obligations).

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[63] See e.g. William A Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40(2) Israel Law Review 592, 594.

[64] Solis (n 2) 24.

[65] Asser Institute (2014) What is international humanitarian law? <http://www.asser.nl/Default.aspx?site_id=9&level1=13336&level2=13374&level3=1347> accessed 2 December 2014. This is evidenced by the core principle of distinction, allowing only the targeting of 'military objectives', but allowing any such classified individual to be killed at any time during the conflict, even when not directly participating. See Article 13(1) Additional Protocol II; Solis (n 2) 251-257.

[66] Whether the killing on sight of an enemy soldier would be classified as an 'arbitrary' execution falls outside the scope of the present study.

In more recent years, the international community has increasingly accepted the view of the ICJ in its Advisory Opinion on the *Legality of the Construction of a Wall in the Occupied Territory* that during armed conflicts international humanitarian norms and international human rights norms may apply simultaneously, in a complementary manner.[67] It may be said, therefore, that the doctrine of *lex specialis* serves more to determine the *precise* rules to apply to a particular situation, rather than precluding the application of one body of law. This view is supported by Marko Milanović, who has highlighted that understanding the doctrine as being generally applicable to the human rights and humanitarian regimes as a whole, is mistaken.[68] Following Heike Kreiger, Milanović's suggestion is to assess which rule constitutes the *lex specialis* by looking at the relationship between specific norms, rather than regimes as a whole.[69] The present study also departs from this starting point, understanding the *lex specialis* during situations of humanitarian crisis as being human rights law.

##### 11.2.3.3 The application of economic, social and cultural rights during non-international armed conflict

Having established that international human rights law as such may be applicable during non-international armed conflicts, the following section will address the application of economic, social and cultural rights. The rights usually forming the subject of debates concerning the *lex specialis* during armed conflicts are civil and political rights, such as the right to life and the prohibition of torture. This is perhaps due to the existence of concrete norms in humanitarian law which also provide rules on the use of torture and the

[67] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep 136, para 106.
[68] Marko Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011) 98-101.
[69] Heike Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11(2) Journal of Conflict and Security Law 265, 271, cited in Milanović, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' (n 68) 100.

taking of life,[70] although they differ from human rights law. However, the rights affected (and applicable) during armed conflicts are not limited to those whose subject matter is also dealt with by norms under humanitarian law. When non-international armed conflicts cause humanitarian crises that result in heavily reduced access to materials and services essential to a life of dignity, often referred to as 'subsistence rights' (such as healthcare, food, and water and sanitation), economic, social and cultural rights are of the utmost relevance.

It may well be argued that in relation to the provision of food and water during armed conflicts, international human rights law constitutes the *lex specialis*. As implied above, deciphering which norm/s form the *lex specialis* in a given circumstance will require an examination of which norms are the most developed. In the present context of subsistence rights, human rights law has not only been given more content than the relevant humanitarian law norms, but also provides (in theory) more extensive protection of access to essential materials and services.

For example, international humanitarian law rules do prohibit the use of starvation as a method of warfare and the targeting of essential resources (being classed as civilian objects),[71] thereby providing limited protection of materials. The rules on access to humanitarian aid are more developed for international armed conflicts. For non-international armed conflicts, however, the applicable treaty rules do not explicitly refer to humanitarian aid.[72] Regardless, the Swiss Federal Department of Foreign Affairs has

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[70] For example, Common Article 3 to the four Geneva Conventions provides for an absolute prohibition of torture, of which non-observance is considered a grave breach of international humanitarian law. See, e.g. Article 130 Geneva Convention III Relative to the Treatment of Prisoners of War.

[71] This is pursuant to the customary humanitarian rule that prohibits 'attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population' (see ICRC, 'Customary IHL - Rule 54: Attacks against Objects Indispensable to the Survival of the Civilian Population' <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule54> accessed 9 October 2017).

[72] Swiss Federal Department of Foreign Affairs, 'Humanitarian Access in Situations of Armed Conflict Handbook on the Normative Framework Version 1.0' (2011), 25-26 <https://www.eda.admin.ch/content/dam/eda/en/documents/publications/Menschenrechtehu

interpreted Common Article 3 to include a principle that civilian populations may not be intentionally subjected to situations that would, due to a lack of access to essential supplies, threaten their dignity or result in 'serious mental or physical suffering'.[73] However, these rules are constructed as 'negative' obligations – prohibitions of certain conduct requiring parties to refrain from interfering with access to essential supplies. While the same obligations can be found under economic, social and cultural rights, human rights law goes further, requiring States parties to not only respect the rights, but also *protect* and *fulfil* the rights by providing the means and/or substance for the right to be effectively realised.[74]

In addition, the rule in Common Article 3 relating to the lack of access to essential supplies is not buttressed by a wider range of provisions applicable during non-international armed conflicts. Indeed, humanitarian assistance (i.e. the provision of food, water and healthcare) as such is scarcely regulated during non-international armed conflicts, which may raise a presumption that human rights law constitutes the *lex specialis*. Provisions regulating humanitarian assistance during international armed conflicts can be found in (for example) Article 23 Geneva Convention IV and Article 70 Additional Protocol I.[75] However, other provisions relating to humanitarian assistance during non-international armed conflicts are limited to Article 18

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manitaerePolitikundMigration/Humanitarian-access-in-situations-of-armed-conflict-Handbook-on-the-Normative-Framework_en.pdf> accessed 9 October 2017.

[73] ibid 26.

[74] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton University Press 1980) 260; UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Final Report of Asbjørn Eide, Special Rapporteur for the Right to Adequate Food: The Human Right to Adequate Food and Freedom from Hunger' (1987) E/CN.4/Sub.2/1987/23. The obligation to fulfil forms part of the tripartite typology of obligations to respect, protect and fulfil human rights, deriving from constructions by Henry Shue and Asbjørn Eide as a way of giving content to economic, social and cultural rights. See also Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (1st edn, Cambridge University Press 2010) 242.

[75] ICRC, 'Q&A and lexicon on humanitarian access' (2014) <https://www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm> accessed 16 October 2017.

Additional Protocol II. The second paragraph of this article provides for the undertaking of humanitarian 'relief actions' (with the consent of the concerned State party) in the event that the 'civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival'. The very vagueness of this protection, extending to 'foodstuffs and medical supplies' suggests that the much more embellished human rights law would offer more protection for subsistence rights than humanitarian law. It may be argued that the Manual on the Law of Non-International Armed Conflict 2006 (the Manual) provides further detail in this respect.[76] The Manual is a restatement of the law applicable during non-international armed conflicts, though like the ICRC codifications of law, it is not legally binding. Chapter 5 of the Manual states that 'humanitarian assistance should be allowed and facilitated by those engaged in military operations whenever essential needs in an emergency are not being met' and provides more information on the definition of humanitarian assistance. The Manual still refrains from placing positive obligations on parties to the conflict to ensure that the essential needs are, in fact, met. Taken together with the lack of more detailed information on what constitutes essential foodstuffs etc., this contributed to the argument that the *lex specialis* in the present context is human rights law.

Despite the general applicability of economic, social and cultural rights in times of armed conflict, there are measures which States may take to restrict the scope of their obligations. These consist primarily of derogations and limitations of the rights. However, further support for the argument that human rights law constitutes the *lex specialis* in relation to a humanitarian crisis caused by a non-international armed conflict may be found in the non-limitation and non-derogability of subsistence rights in such a situation; as Amrei Müller has suggested, the legitimacy of invoking these methods during an armed conflict to limit the applicability of subsistence

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[76] Michael N Schmitt, Charles HB Garraway and Yoram Dinstein, 'The Manual on the Law of Non- International Armed Conflict With Commentary' (2006) (San Remo Manual) <http://www.iihl.org/wp-content/uploads/2015/12/Manual-on-the-Law-of-NIAC.pdf> accessed 9 October 2017.

rights is questionable.[77]

#### *11.2.3.3.1 Legitimate limitations of economic, social and cultural rights*

Legitimate limitations to economic, social and cultural rights are allowed under Article 4 of the ICESCR for the promotion of the general welfare in a democratic society, provided that they are not contrary to the nature of the right.[78] This sole reason justifying limitations is more restrictive than the several reasons found in the ICCPR.[79] Article 19 ICCPR on freedom of expression, for example, allows limitations for several reasons, including the respect of the rights or reputation of others, the promotion of national security or public order, or of public health or morals. Müller has persuasively argued that this reason effectively means that States may not limit the 'minimum core' of economic, social and cultural rights, since they would go against the nature of the rights.[80] In addition to these requirements, limitations to economic, social and cultural rights must be prescribed by law, proportionate to the aim pursued, and necessary in a democratic society. Furthermore, as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights state, '[Article 4] was not meant to introduce limitations on rights affecting the *subsistence* [...] of the person.'[81]

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[77] Amrei Müller applies the criteria for limitations and derogations to economic, social and cultural rights to be found legitimate to situations of armed conflict, and finds them to be met in very restricted circumstances: Amrei Muller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9(4) Human Rights Law Review 557.

[78] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNTS, vol. 993, 3. Legitimate limitations on human rights were discussed in Chapter 3.3.2.

[79] United Nations General Assembly, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force on 23 March 1976) UNTS vol. 999, 171.

[80] Müller (n 77) 575. The concept of a minimum core of human rights was introduced by the CteeESCR, and stipulate a minimum standard, or 'floor' of fulfilment of rights which no state party may fall below, regardless of the allowance in Article 2(1) of 'progressive realisation' of the rights enshrined in the ICESCR. See UN CteeESCR, 'General Comment No. 3: The Nature of State Parties' Obligations (Art.2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 10; see also Chapter 11.2.3.3.3, below.

[81] UN Commission on Human Rights, 'Note verbale dated 89/12/05 from the Permanent

Taken together with the nature of subsistence rights as providing for the basic necessities required for human existence and dignity, it can therefore be inferred that limitations on subsistence rights would not be considered legitimate.

##### *11.2.3.3.2 Derogations from economic, social and cultural rights*

The question of whether State parties may derogate from economic, social and cultural rights in times of public emergency has been a matter of much debate. Derogating from a right essentially allows States to put their obligations on hold for a specified period of time. As derogating is an extreme measure, whether or not a particular right may be derogated from, and under which circumstances, is usually laid down in the text of a human rights treaty. However, this is not the case for the ICESCR, which neither contains a derogation clause allowing for derogations, nor a provision prohibiting derogations. This is unlike the ICCPR, Article 4 of which specifies the conditions for derogations from its provisions, and prohibits derogations from several rights.[82] Nonetheless, the fact that there is no derogation clause in the ICESCR does not necessarily mean that States would be precluded from derogating from them

However, it *can* be inferred from the purpose of derogation clauses that at least some economic, social and cultural rights are non-derogable. According to Müller, this would extend to subsistence rights.[83] The purpose of derogations is not to allow States to decrease their attention to the rights, but (following the criteria of Article 4 ICCPR) must be to ensure that the State is in a position where it is capable of ensuring human rights and to restore a situation of normalcy.[84] This is evident from the requirement that a State be in a 'time of public emergency that threatens the life of the nation'

Mission of the Netherlands to the United Nations at Geneva addressed to the Centre for Human Rights' (8 January 1987) E/CN.4/1987/17, 47 (Limburg Principles).

[82] Article 4, paragraphs 1 and 2 ICCPR, respectively.

[83] Müller (n 77) 593.

[84] UN Human Rights Committee, 'General Comment No. 29: States of Emergency (article 4)' (31 August 2001) CCPR/C/21/Rev.1/Add.11, para 1.

before it may make derogations. Whilst it may be true that non-international armed conflicts may cause such a situation of public emergency, it cannot reasonably be expected that derogating from rights such as the right to food, water and healthcare, could help to restore the State to a situation of normalcy. On the contrary, reducing access to essential resources would aggravate, rather than ameliorate, a situation of public emergency.

Allan Rosas and Monika Sandvik-Nylund have also suggested that the relationship between subsistence rights and the right to life can contribute to the argument in favour of the non-derogability of subsistence rights.[85] Subsistence rights are of the utmost importance for the protection of human dignity and survival in emergency situations, and are interrelated with the right to life – a non-derogable right (to the extent that a life may not be arbitrarily taken).[86] This view is supported by several human rights bodies which, lacking jurisdiction over (or the justiciability of) economic, social and cultural rights, have interpreted the right to life to include subsistence rights. For example, the IACtHR has repeatedly read the right to life (protected by Article 4 of the American Convention on Human Rights),[87] to include healthcare as one of its essential attributes.[88] This reading is now 'solidly part' of the Court's jurisprudence, having been embellished upon in several cases.[89]

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[85] Allan Rosas and Monika Sandvik-Nylund, 'Armed Conflicts' in Allan Rosas, Catarina Krause and Asbjørn Eide (eds), *Economic, Social, and Cultural Rights: A Textbook* (Martinus Nijhoff 2001) 414.

[86] See Müller (n 77) 599.

[87] American Convention on Human Rights, "Pact of San Jose" (adopted 22 November 1969, entered into force 18 July 1978).

[88] See *The "Children's Rehabilitation Institute" v Paraguay*, IACHR (Ser. C) No. 112 (2 September 2004).

[89] E.g. *Yakye Axa Indigenous Community v Paraguay Interpretation of the Judgment on Merits and Reparation*, IACHR (Ser. C) No. 142 (6 February 2006), discussed in Tara J Melish, 'The Inter-American Court of Human Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 389.

*11.2.3.3.3 The nature of economic, social and cultural rights*

Whether or not the manner of using the right to life in this way is found to be persuasive for present purposes, the fact that Article 2(1) ICESCR allows economic, social and cultural rights to be progressively realised is also of relevance here.[90] The provision means that whilst some immediate measures have to be taken by States to contribute to the realisation of economic, social and cultural rights, their full realisation is not an immediate obligation. States must, however, make continuous and progressive measures to increase the realisation of the rights, depending on their available resources. While it may be argued that a State has less resources available during armed conflicts, which would naturally lead to a lesser degree of the rights' realisation, the UN CteeESCR has introduced a concept of 'minimum core obligations' of the Covenant rights.[91] Simply speaking, this means that there is a certain floor of human rights realisation that States must ensure, regardless of their particular domestic situation. In relation to the rights to food, water, and the highest attainable standard of health, which have been given more content through the CteeESCR's General Comment Nos. 12, 15 and 14 respectively,[92] the minimum core would arguably provide more protection of subsistence rights than the norms under humanitarian law, despite their progressive nature.

In addition, the CteeESCR has suggested that the notion of *progressive* realisation makes it extremely cumbersome for States to justify any retrogressive measures.[93] The extent to which this would also hold true

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[90] Article 2(1) requires States to 'take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'.

[91] UN CteeESCR, 'General Comment No. 3' (n 80) para 10.

[92] UN CteeESCR, 'General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)' (12 May 1999) E/C.12/1999/5; UN CteeESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' (20 January 2003) E/C.12/2002/11; and UN CteeESCR, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (11 August 2000) E/C.12/2000/4.

[93] The Committee stated that any retrogressive measures would 'require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available

during armed conflicts, during which time resources may need to be redistributed, is unclear. However, it may be deduced that at least the minimum core of subsistence rights may not be derogated from, even during situations of public emergency threatening the life of the nation. This conclusion is particularly significant when viewed in light of the below discussion on the absence of human rights obligations for NSAGs. If subsistence rights were derogable, it would mean that the obligations on the State and NSAGs would be more equal, and would provide some level of justification for the fact that individuals' rights were not being realised.

Overall, the above discussion demonstrates that the more elaborate standards relating to the provision of food, water and healthcare found within international human rights law makes these norms, rather than those found in humanitarian law, the *lex specialis* in the present context. This finding is strengthened by the conclusion that subsistence rights are non-derogable and may not be limited during non-international armed conflicts. Unfortunately, while this affords perhaps more protection to individuals within territory controlled by a State, it leaves individuals in areas controlled by NSAGs (as non-human rights obligations-holders) without human rights protection. Efforts to use human rights standards to remedy the gap in protection through the indirect application of human rights obligations to NSAGs will now be assessed.

## 11.3 Initiatives in place to improve non-State armed groups' compliance with international human rights standards

There have been numerous methods used to reduce the human cost of non-international armed conflicts, many of which also aim to more effectively govern the actions of NSAGs. The measures range from reports condemning the actions of the groups, to voluntary undertakings by NSAGs promising to adhere to particular international norms. Although the scope of the measures' contents also varies, the (potential) effect of each measure on the protection of human rights makes each example discussed below relevant to the present

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resources'. UN CteeESCR, 'General Comment No. 3' (n 80) para 9.

context. Several previous initiatives will now be assessed to determine the likelihood of similar approaches being able to improve the protection of subsistence rights during situations of humanitarian crisis.

### *11.3.1 Voluntary undertakings by non-State armed groups*

NSAGs with effective control over an area of territory sometimes voluntarily undertake activities that have the *de facto* effect of contributing to the realisation of human rights obligations, whether the group itself views its actions in this way or not.[94] Such activities range from the provision of some public services, such as water, education or healthcare, to the instatement of an internal justice system. NSAGs often undertake the activities in furtherance of their ultimate goal of either taking complete control over a territory and becoming the new governmental authority, or establishing a separate, smaller State within the territory of the State with which they are in a conflict. We can see examples of both of these instances if we look at the so-called Islamic State and the FARC, respectively. The mission of the Islamic State is to take control over a very large territory within the Levant, including Iraq and Syria.[95] Within a relatively short period of time, the group gained effective control over an area of Syrian territory, establishing a 'capital' known as Raqqa.[96] Although the Islamic State has now lost control over this area,[97] whilst in control, the group established what was essentially a State-like structure.[98] This involved the group re-securing the provision of

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[94] This is very similar to the situations in some of the cases discussed in Chapter 5 involving the provision of public services by private companies, which contributed to the fulfilment of human rights.

[95] Australian National Security, 'Australian National Security Database on Terrorist Organisations' <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/IslamicState.aspx> accessed 2 October 2017.

[96] Ben Hubbard, 'ISIS Tightens Its Grip With Seizure of Air Base in Syria' *The New York Times* (24 August 2014) <https://www.nytimes.com/2014/08/25/world/middleeast/isis-militants-capture-air-base-from-syrian-government-forces.html> accessed 2 October 2017.

[97] Jason Burke, 'Rise and fall of Isis: its dream of a caliphate is over, so what now? *The Guardian* (21 October 2017) <https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist> accessed 11 January 2018.

[98] Julien Barnes-Dacey, 'The Islamic State and the Struggle for Control in Syria' (2 October

some public services, for example installing new power lines and setting up a '*suq*' for locals to exchange goods, and reforming the education system.[99] The intentions of the group in doing these were most likely not related to human rights concerns. However, it could be argued that by providing the public services, the Islamic State did contribute to the provision of various human rights to (at least some) individuals within Raqqa, which the Syrian State was no longer able to fulfil itself. The humanitarian crisis in Raqqa nevertheless continued, as concerns of discrimination in the provision of the public services and the inability of the Syrian State (or indeed of third States) to exercise control or influence over the non-State armed group made it virtually impossible for external actors to improve the situation.

The situation regarding the FARC is somewhat different. At various points during its conflict with the Colombian government, the group has controlled several areas of land within Colombia (in 2001, the government even conceded 42,000 square kilometres to the FARC, although the group did not retain long-term control over the area[100]). The actions of the FARC within such areas have been surprisingly State-like, as the group:

> deliver[s] social services, including health care and education. They also practise restorative justice through their revolutionary courts, and have implemented agrarian reform by breaking up large ranches and turning over smaller plots to landless peasants. They also collect taxes from local businesses to fund schools and clinics.[101]

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2014) *European Council on Foreign Relations* 2 <http://www.ecfr.eu/article/commentary_the_islamic_state_and_the_struggle_for_control_in_syria325> accessed 2 October 2017.

[99] Aaron Zelin, 'The Islamic State of Iraq and Syria Has a Consumer Protection Office' *The Atlantic* (13 June 2014) <https://www.theatlantic.com/international/archive/2014/06/the-isis-guide-to-building-an-islamic-state/372769/> accessed 2 October 2017.

[100] Encyclopaedia Britannica, 'FARC: Colombian Militant Group' <https://www.britannica.com/topic/FARC> accessed 15 January 2018.

[101] Garry Leech, 'Farc Rebel Group in Peace Talks: Is Colombia's 50-Year War about to End?' *The Independent* (20 July 2013) <http://www.independent.co.uk/news/world/americas/farc-rebel-group-in-peace-talks-is-colombia-s-50-year-war-about-to-end-8722917.html> accessed 2 October 2017.

This shows that at least at times, the FARC has controlled a very well established, and fully-functioning community. The fact that the FARC has provided traditionally public services such as education and healthcare, which would normally fall within the remit of States' obligations to fulfil the rights to education and the highest attainable standard of health, suggests that the group is capable of fulfilling certain human rights within their controlled territory.

Voluntary undertakings in this manner can contribute to the practical realisation of subsistence rights, as many public services entail the provision of economic, social and cultural rights. However, the nature of the undertakings makes them very hard to regulate and monitor. The lack of a concrete agreement or obligation means that the NSAG providing the services may choose the extent to which it wishes to provide a particular service. This may in turn lead to discrimination in the provision of services.[102] Alternative initiatives that have been taken have therefore been necessary, and will be discussed in the following subsections.

*11.3.2 Action Plans and Deeds of Commitment*

There have been several initiatives taken by the United Nations and various NGOs to encourage NSAGs to adopt agreements specifying obligations with which they agree to comply. Most of the measures focus on humanitarian norms, rather than human rights law. This is logical, since NSAGs are subject to some humanitarian obligations, but the lack of pressure on groups to respect human rights norms distinctly from humanitarian norms could be a missed opportunity. Two of the largest initiatives taken to better govern the actions of NSAGs are the Security Council action plans and lists of shame (within the context of the recruitment and use of child soldiers), and Geneva Call's Deeds of Commitment. Lessons may be learned from these two

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[102] The provision of services other than healthcare and education by the FARC, such as housing, appears to be limited to its members. Indeed, the promise of a better standard of living is often cited as an incentive for joining the FARC (e.g. Council on Hemispheric Affairs, 'FARC – Rebels with a Cause?' (2010) <http://www.coha.org/farc-—rebels-with-a-cause/> accessed 2 October 2017).

examples as to the likely challenges to securing a human rights-specific undertaking by NSAGs. Indeed, experiences with the Action Plans and Deeds of Commitment can demonstrate whether a solution to the problem at hand (securing NSAGs' compliance with subsistence rights to alleviate humanitarian crises) may be found in these two measures.

#### 11.3.2.1 United Nations Action Plans

United Nations Action Plans were introduced after the General Assembly's Special Representative had identified six 'grave violations' towards children during armed conflict. Together with the lists of shame and various other initiatives, the Plans have formed the basis of the Security Council's action in this context.[103] This section will introduce the Action Plans and their relevance to the issue of non-State armed groups and human rights. The outcomes of the Plans will be discussed in Section 11.3.2.3.

In 2001 the Security Council adopted a resolution which urged the Secretary-General of the United Nations to publish a list of all parties to armed conflicts who were recruiting or using child soldiers incompatibly with applicable obligations under international law, and in relation to situations which were, or could have been, on the agenda of the Security Council.[104] As a consequence, with the intention of 'naming and shaming' armed forces, the first '1379 list' in 2002 contained 23 groups.[105] Further resolutions requested the Secretary-General to establish and implement a reporting mechanism on the use and recruitment of child soldiers.[106]

A further initiative by the Security Council – the 'Action Plan'

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[103] See UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Working with the Security Council to Protect Children' <https://childrenandarmedconflict.un.org/mandate/engagement-of-the-security-council/> accessed 2 October 2017.

[104] UN Security Council, Resolution 1379 (2001) S/RES/1379, para 16.

[105] UN Security Council 'Report of the Secretary General on children and armed conflict' (2002) S/2002/1299, para 5, cited in Rachel Harvey, 'Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law A Guide to International Humanitarian and Human Rights Law' (2003) International Bureau of Human Rights 29-30.

[106] See UN Security Council, Resolution 1539 (2004) S/RES/1539; and UN Security Council, Resolution 1612 (2005) S/RES/1612.

initiative – enables listed groups to have their names removed from the list of shame. The concept was developed in Security Council Resolution 1460 (2003)[107] and involves an agreement between the listed group and the Security Council. If appropriately implemented, this will result in the removal of groups from the 'list of shame'.[108] This is a positive development because it allows the NSAG to have some level of negotiation with the United Nations, which may prove to be crucial to the ultimate goal of halting their use of child soldiers. Rather than affording the groups legitimacy, the lists make an example of the groups and place them on the 'naughty step'. In contrast, the action plans allow NSAGs a certain degree of autonomy, almost an initiation into the 'adult' world of international subjects, enabling their participation and giving them a chance to prove themselves, whilst maintaining the 'training wheels' and the ability of the Security Council to reign them in should they fail to honour the agreement.[109] Despite the positive impact that the action plans can have, they are not able (nor are they intended) to have a broader impact on the enjoyment of human rights within an area controlled by a NSAG. Therefore, while they can contribute towards the governance of the actions of NSAGs, their specificity prohibits them from filling the governance gap in a more general manner. Within a multi-level governance approach to human rights this is not in itself a negative consequence, but it does point to the need to take further action to relieve situations of humanitarian crisis.

#### 11.3.2.2 Geneva Call Deeds of Commitment

Similar comments can be made in relation to Geneva Call's Deeds of Commitment. This section will introduce the Deeds of Commitment and their

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[107] UN Security Council, Resolution 1460 (2003) S/RES/1460.

[108] UN Office of the Special Representative of the Secretary General for Children and Armed Conflict, 'Identifying Parties to Conflict Who Commit Grave Violations Against Children' (2015) <https://childrenandarmedconflict.un.org/our-work/sg-list/> accessed 2 October 2017.

[109] The fact that the groups voluntarily choose and undertake the commitments in the Action Plans allows them to assume responsibility for their actions at an international level. This brings them one (small) step closer to experiencing the international law-making and responsibility of States.

relevance to the issue of non-State armed groups and human rights. The outcomes of the Deeds will be discussed in Section 11.3.2.3.

There are three types of Deeds of Commitment, dealing with anti-personnel mines, the protection of children from the effects of armed conflict, and the prohibition of sexual violence and gender discrimination, respectively.[110] The Deed relating to the protection of children has been a landmark development within the global campaign against child soldiers. The Deed is the first international instrument that NSAGs could voluntarily and unilaterally sign, and be judged upon their implementation thereof. The Deeds have been instrumental in raising awareness and encouraging NSAGs to consider the human rights impacts of their actions more concretely. In particular, the Deed for the prohibition of sexual violence and gender discrimination provides a substantial list of commitments to which the groups agree to adhere. These include certain provisions that would also fall under international human rights law, such as a prohibition of discrimination against women, and equal access to healthcare.[111] Additionally, the Deed does acknowledge that it is 'one step or part of a broader commitment' to human rights and humanitarian law.[112] Nonetheless, there is no direct reference to human rights obligations of NSAGs.

In contrast, the Deed on the protection of children does mention human rights in its main provisions, but restricts commitment to respect for the rights to life, human dignity and development.[113] It is of course

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[110] Geneva Call, 'Deed of Commitment' (2014) <http://genevacall.org/how-we-work/deed-of-commitment/> accessed 2 October 2017; Geneva Call, 'Syria: Geneva Call Trained Kurdish Authorities and Police Forces on International Humanitarian Norms' (2014) <https://genevacall.org/syria-geneva-call-trained-kurdish-authorities-police-forces-international-humanitarian-norms/> accessed 2 October 2017.

[111] Geneva Call, 'Deed Of Commitment Under Geneva Call for the Prohibition Of Sexual Violence in Situations of Armed Conflict And Towards the Elimination of Gender Discrimination' (2013) <https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf> accessed 2 October 2017, para 5.

[112] ibid para 9.

[113] Geneva Call, 'Deed of Commitment Under Geneva Call for the Protection of Children from the Effects of Armed Conflict' (2013) <https://www.genevacall.org/wp-

understandable that Geneva Call refrained from including a fuller range of human rights in the Deed. Given the worries of legitimising NSAGs by holding them to the same international obligations as States during armed conflicts (which has also contributed to the fact that rules of non-international armed conflicts are less expansive than those of international armed conflicts),[114] concerns that NSAGs do not have the capacity to fulfil human rights obligations to the same extent as States and the aim of the Deeds,[115] the focus on humanitarian norms is not misplaced. Nevertheless, as per the approach taken by the Inter-American Court (discussed above), which would read some economic, social and cultural rights into the right to life, the Deeds could be interpreted to impose obligations on NSAGs to contribute to the realisation of subsistence rights. But even if the Deeds were to be read as such, two main problems ensue. On the one hand, the commitment is to 'respect' the rights, which under international human rights law is an obligation to refrain from interfering with the enjoyment of human rights. Individuals in situations of humanitarian crisis, however, require their rights to be *fulfilled*. To summarise the discussion on this in Chapter 1.3.4, the obligation to fulfil requires obligation-holders to i) facilitate the realisation of rights by taking 'positive initiatives to enable the full enjoyment'; and ii) provide 'direct or indirect state services when individuals or groups are unable, for reasons beyond their control, to realise the right themselves by the means at their disposal'.[116] This goes considerably beyond an obligation to refrain from taking action, and cannot legitimately be read into a commitment to 'respect' rights.

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content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf> accessed 2 October 2017. The fact that these commitments are only mentioned in the preamble, rather than the substantive provisions, reduces their potential influence.

[114] Sivakumaran (n 12) 68-77.

[115] Moir, *The Law of Internal Armed Conflict* (n 4) 194, cited in Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 International Review of the Red Cross 491, 502.

[116] See respectively, UN CteeESCR, 'General Comment No. 12' (n 92) para 15; and UN CteeESCR, 'General Comment No. 13: The Right to Education (art.13)' (8 December 1999) E/C.12.1999/10, para 6.

#### 11.3.2.3 Outcome of the Action Plans and Deeds of Commitment

As has been indicated, while not unsuccessful, the outcomes of these two initiatives have not been as significant as one would have hoped. Unfortunately, as the Security Council noted in its Fifth Cross-Cutting Report, published in 2013, 'there has been little movement in getting non-state actors to agree to action plans' regarding child soldiers, compared to more successful efforts in relation to State forces.[117] Furthermore, as of 2011 less than 15% of NSAGs using child soldiers had agreed to one of the aforementioned action plans,[118] although in recent years there have been some signings of the Action Plans and consequent de-listing of NSAGs.[119] This suggests that the Action Plans are becoming increasingly useful in the effort to regulate the actions of NSAGs. The Deeds of Commitment dealing with anti-personnel mines in particular have received a significant number of signatures, while the other two Deeds have received much fewer.[120] There is no mechanism comparable to the removal of groups from the list of shame in relation to Deeds of Commitment. Nevertheless, Geneva Call has been extremely active in following up on the Deeds. For example, they have provided training for some NSAGs on how they can put their commitments

[117] UN Security Council, 'Security Council Report Cross-Cutting Report on Children and Armed Conflict' (2012) Security Council Report No. 3 <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_cac_2012.pdf> accessed 2 October 2017.

[118] See Watchlist on Children in Armed Conflict, 'Next Steps to Protect Children in Armed Conflict' (2011) <http://watchlist.org/publications/next-steps-to-protect-children-in-armed-conflict-june-2011/> accessed 2 October 2017, in Jérémie Labbeé and Reno Meyer, 'Engaging Nonstate Armed Groups on the Protection of Children: Towards Strategic Complementarity', International Peace Institute Issue Brief <https://www.ipinst.org/2012/04/engaging-nonstate-armed-groups-on-the-protection-of-children-towards-strategic-complementarity> accessed 2 October 2017, 6.

[119] So far, 26 groups have signed action plans (15 of which were NSAGs) with 9 having been de-listed (see UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, <https://childrenandarmedconflict.un.org/our-work/action-plans/> accessed 2 October 2017).

[120] For a list of which groups have signed which Deeds, see Geneva Call, 'Armed Non-State Actors' <https://genevacall.org/how-we-work/armed-non-state-actors/> accessed 2 October 2017.

into practice (e.g. in Syria),[121] and they continue to monitor groups to ensure that they are implementing the agreements.[122] This is an important step in being able to fulfil the Deeds' goals of holding NSAGs publicly accountable for their actions.[123] For NSAGs, signing a Deed of Commitment is one step towards acknowledging (albeit limited) international responsibility for its actions. The Deeds suggest that once engaged, NSAGs are willing and capable of taking commitments seriously. If groups are hoping to establish themselves as a legitimate authority, it is crucial for them to be seen to make a tangible effort to abide by international obligations to which they would be bound were they to succeed. This is all the more important in light of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, according to which an insurrection group that succeeds in becoming the legitimate authority of a State may be held, *ex post facto*, internationally responsible for any breaches of international law that may be attributed to it before it came into power.[124]

However, notwithstanding great expectations being placed on the United Nation's action to (for example) combat the use of child soldiers by NSAGs, reports show that the technique of naming and shaming has not been extremely successful. The most recent report of the Secretary-General on children and armed conflict reported that there are currently 56 groups in 14 countries (48 of which were non-State armed groups) that recruit or use child soldiers and had not taken measures within the previous year to improve the protecting of children (compared with eight groups that did take measures, of which only 3 were non-State armed groups).[125] A good number of these

[121] Geneva Call, 'Syria: Geneva Call Trained Kurdish Authorities and Police Forces on International Humanitarian Norms' (2014) <https://genevacall.org/syria-geneva-call-trained-kurdish-authorities-police-forces-international-humanitarian-norms/> accessed 2 October 2017.
[122] Geneva Call, 'Armed Non-State Actors' <https://genevacall.org/how-we-work/armed-non-state-actors/> accessed 2 October 2017.
[123] Geneva Call, 'Somalia' <https://genevacall.org/country-page/somalia/> accessed 2 October 2017.
[124] DASR (n 57) Article 10.
[125] The lists have been extended to include groups who show 'patterns of killing or maiming

groups have remained on the list for 5 years or more.[126]

So far, the Action Plans and Deeds may appear to be of limited value for the protection of human rights (and more specifically subsistence rights), particularly given their focus on humanitarian norms. However, their relevance for the protection of human rights could be increased by extending the commitments to cover more detailed human rights abuses.[127] Indeed, Soliman Santos has envisaged Geneva Call basing Deeds of Commitment on human rights in the future.[128] This could indeed be useful in terms of improving at least some NSAGs' protection of subsistence rights during humanitarian crises. A human rights-specific commitment could include a provision that NSAGs participating in an ongoing conflict (or conflicts) agree that, should a situation of humanitarian crisis arise, they will fulfil certain obligations relating to subsistence rights (i.e. the minimum core). This could go some way to rectifying the main problem of using Deeds to alleviate humanitarian crises – the lengthy process involved in their adoption and implementation. This approach would still require methods capable of providing a much more immediate response. Such methods will be discussed in the context of a multi-level governance approach in Sections 11.4 and 11.5, below.

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children'; 'patterns of committing sexual violence against children' (both mandated by UN Security Council, Resolution 1882 (2009) S/RES/1882); and 'recurrent attacks or threats of attacks on schools and hospitals, as well as on protected persons in relation to schools and hospitals' (UN Security Council, Resolution 1998 (2011) S/RES/1998). The list is available within the UN Security Council/General Assembly, 'Report of the Secretary-General on Children and Armed Conflict' (24 August 2017) A/72/361–S/2017/821. See also UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 'Action Plans with Armed Forces and Armed Groups' (2015) <https://childrenandarmedconflict.un.org/our-work/action-plans/> accessed 9 October 2017).

[126] UN Human Rights Council, 'Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy' (28 June 2012) A/HRC/21/38, Annex 1.

[127] Clapham, *Human Rights Obligations of Non-State Actors* (n 42) 292-293.

[128] Soliman M Santos, 'Geneva Call's Deed of Commitment for Armed Groups: An Annotation', in Geneva Call, 'Seeking Rebel Accountability: Report of the Geneva Call Mission to the MILF in the Philippines, 3-8 April 2002' (2002), cited in Clapham, *Human Rights Obligations of Non-State Actors* (n 42) 293.

### *11.3.3 Common Article 3 Special Agreements between States and non-State armed groups*

One example of such an agreement is a 'special agreement' adopted pursuant to Common Article 3 of the four Geneva Conventions. As mentioned above, unless Additional Protocol II applies, Common Article 3 is the only treaty norm applicable to non-international armed conflict. The provision encourages parties to non-international armed conflicts to bring other provisions of the Geneva Conventions into force through a special agreement. The agreements may state the law that parties are already bound to follow (declaratory agreements), or extend their legal obligations (constitutive agreements). Special agreements constitute clear commitments by parties to a conflict, providing an 'important basis for follow-up interventions to address violations of the law'.[129] The agreements can also potentially remedy the gap between law and practice that exists in relation to non-international armed conflicts, and the application of more extensive norms can ensure more equal protection of civilians during international and internal armed conflicts. Indeed, practice relating to special agreements shows that most agreements adopted involve those humanitarian norms concerning the protection of civilians.[130] However, for the purposes of protecting subsistence

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[129] ICRC, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' (2008) 16, <https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf> accessed 9 October 2017.

[130] This includes those agreements adopted explicitly pursuant to Common Article 3, but also those that despite not mentioning the provision, are made to fulfil the same objectives (i.e. to 'pu[t] in place additional humanitarian rules between the parties to the conflict'). Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 513. Special agreements between NSAGs and States that extend the protection of civilians during armed conflict include, for example, the 'Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines' <http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf> accessed 10 October 2017; and the 'Agreement between the Government of the Republic of Sudan and the Sudan People's Liberation Movement to Protect Non-Combatant Civilians and Civilian Facilities from Military Attack' (31 March 2002) <https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_020331_Agreement%20to%2

rights during humanitarian crises they are fundamentally limited by their restrictive scope of their coverage (i.e. the Geneva Conventions). Nonetheless, lessons may be learned from the agreements which have arguably been the inspiration for agreements through which NSAGs assume both humanitarian and human rights obligations, which will be discussed in the following section.

### *11.3.4 Human rights agreements*

Other than voluntary international commitments by NSAGs, there have also been several examples of human rights agreements between NSAGs and States.[131] Perhaps the most famous of these is the human rights agreement concluded between the Frente Farabundo Martí para la Liberación Naçional (FMLN) and the government of El Salvador in 1990.[132] The 'Acuerdo de San José sobre Derechos Humanos' included provisions that the NSAGs would comply with the same human rights obligations as the El Salvadorian State – a significant undertaking. The obligations of the FMLN in relation to particular human rights, for example the rights to freedom of association, expression and movement, are elaborated upon within the Agreement. Although the more specific obligations relate more to civil and political rights as opposed to economic, social and cultural rights, the agreement was very significant for two reasons. First, in terms of disregarding concerns of States that giving NSAGs direct human rights obligations would grant the groups

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0Protect%20Non-Combatant%20Civilians%20from%20Military%20Attack.pdf> accessed 11 January 2018. Both agreements are discussed in Clapham, Gaeta and Sassòli, 512-513.

[131] Agreements containing human rights provisions are not always labelled as 'human rights agreements' *per se*. However, there are several agreements between States and non-State armed groups that have been explicitly labelled as human rights (or human rights and humanitarian) agreements. Luisa Vierucci, 'International humanitarian law and human rights rules in agreements regulating or terminating an internal armed conflict' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 417-418.

[132] 'Acuerdo de San José sobre Derechos Humanos 1990' A/44/971-S/21541, S/21541. A translated version is available on the website of the United States Institute of Peace, 'Peace Agreements: El Salvador', Peace Agreements Digital Collection <https://www.usip.org/publications/2001/04/peace-agreements-el-salvador> accessed 13 October 2017.

unwelcome legitimacy,[133] and second in the fact that the United Nations endorsed and agreed to monitor implementation of the Agreement.[134] The recognition of the Agreement's preamble that the FMLN had the capacity to fulfil the human rights obligations is also worthy of note, especially given widespread opposition to horizontal effect for this reason.[135] Nonetheless, the agreement may not be as significant as expected in practice, given that, as Zegveld notes, the UN Observer Mission in El Salvador that was established by the UN to monitor the agreements' implementation 'made no attempt whatsoever to monitor FLMN's compliance with the human rights standards set forth in the agreement'.[136] This certainly calls into question the effectiveness of the agreement for protecting human rights in practice.

Another example of a bilateral agreement including human rights norms is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the National Democratic Front of the Philippines and the Government of the Philippines 1998.[137] This Agreement included a whole section dedicated to an impressive range of human rights to be protected.[138] Although a laudable effort and very much a

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[133] Through consenting to the agreement and acknowledging the fact that the FLMN has the capacity to fulfil the obligations. See Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 51. This concern is often at the forefront of States' minds in the context of direct horizontal effect. See Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) Yale Journal of International Law 37(1) 107, 108.

[134] A UN peacekeeping operation called the UN Observer Mission in El Salvador (ONUSAL) was established to monitor the agreement's implementation. Information on ONUSAL is available via the United Nations' Peacekeeping website. See 'El Salvador - ONUSAL: Background' <http://www.un.org/en/peacekeeping/missions/past/onusalbackgr2.html> accessed 10 October 2017.

[135] Zegveld (n 133).

[136] ibid 51.

[137] 'Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines' . As mentioned above, this agreement can also be considered a Common Article 3 agreement, due to the fact that it also incorporates several norms of humanitarian law to be applied during the conflict between the two parties.

[138] Part III of the agreement deals with 'Respect for Human Rights', including a list of 25

positive development in itself, the ensuing peace was not long-lasting, and renewed efforts at reconciliation between the parties repeatedly fell through.[139]

Overall, human rights agreements could be a good avenue for placing human rights obligations on NSAGs. However, their effectiveness in practice may be limited by lack of monitoring or, if the agreement is made at the end of hostilities (i.e. as an alternative to a peace agreement) a resumption of armed conflict that effectively renders the agreement void. Especially when considered in light of the reluctance of States to acknowledge the validity of declarations and agreements of NSAGs, it is clear that additional measures are desirable.

## 11.4 Multi-level governance, human rights and non-State armed groups

The multi-level governance approach to human rights explained in Chapter 9, if implemented well, could provide individuals with more protection for their rights from the activities of NSAGs during non-international armed conflicts. The following sections apply the multi-level human rights governance approach to the context of NSAGs and suggests measures that could be taken to move towards the implementation and operationalisation of a multi-level governance regime. While this could include direct legal human rights obligations for NSAGs, the suggestions below will look beyond this to include extra-legal and non-binding measures by different actors to improve the human rights impact of NSAGs.

### *11.4.1 The role of different actors within a multi-level governance approach*

This section will discuss the role of different actors in relation to non-State armed groups and human rights under a multi-level governance approach to human rights, and will suggest some measures that could be taken by the

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human rights to be included.

[139] For a summarised timeline of the conflict between the Government of the Philippines and (amongst other NSAGs) the National Democratic Front of the Philippines, see Tasneem Jamal, 'Philippines-CPP/NPA (1969 – 2017)' (*Project Ploughshares*, 2012) <http://ploughshares.ca/pl_armedconflict/philippines-cppnpa-1969-first-combat-deaths/> accessed 11 October 2017.

actors to improve human rights compliance by non-State armed groups. Suggestions are made in relation to local communities, States, international organisations and NGOs, business enterprises, specialised bodies under the United Nations, and NSAGs themselves.[140] However, they will not be dealt with in this chapter as the suggestions made focus on the specific context of NSAGs' impact on human rights during non-international armed conflicts.[141] The suggestions will be made in light of the previous discussion of initiatives that have been taken to improve NSAGs' compliance with human rights and

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[140] Private military security companies are private businesses that offer military-like services, and are often contracted by governments to conduct certain activities during armed conflicts. The companies have been highly criticised for the negative impact that they often have on the enjoyment of human rights. As with other non-State actors, the companies do not fall within the remit of international human rights law and cannot be held directly accountable for interfering with human rights. There now exists an 'International Code of Conduct for Private Security Service Providers' and the UN Human Rights Council established a working group for the development of a legally binding international instrument to regulate the activities of private military security companies. However, neither currently offer effective protection for individuals' human rights. See respectively International Code of Conduct for Private Security Service Providers' (9 November 2010) <https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf> accessed 16 January 2018; and UN Human Rights Council, Resolution 15/26, 'Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies' (7 October 2010) A/HRC/RES/15/26. For discussion, see War on Want, 'Mercenaries Unleashed: the brave new world of private military security companies' <http://www.waronwant.org/sites/default/files/Mercenaries%20Unleashed%2C%202016.pdf> accessed 16 January 2018; Mohamad Ghazi Janabay, *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts* (Springer 2016); Willem van Genugten, Nicola Jägers and Evgeni Moyakine, 'Private military and security companies, transnational private regulation and public international law: From the public to the private and back again?' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability For Human Rights* (Wolf Legal Publisher 2015); and Nicola Jägers, 'Regulating the Private Security Industry: Connecting the Public and the Private through Transnational Private Regulation' (2012) 6(1) Human Rights International Legal Discourse 56.

[141] While private military security companies are used during such conflicts, they are hired by States rather than NSAGs. The main binding international law regarding private military companies (often considered to be mercenaries) is the International Convention against the Recruitment, Use, financing and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001), which applied only to States.

will include activities at the local, national and international levels.

At the local level, it is members of local communities themselves that will best be able to determine the concrete needs on the ground for ensuring that individuals can enjoy their subsistence rights once a conflict is ongoing. There are many challenges for other actors to successfully undertake governance activities during non-international armed conflicts. For example, it may be difficult or dangerous simply to gain access to an area in which a non-international armed conflict is taking place in order to engage with actors there and carry out activities. The information that local communities and individuals can provide, which may be communicated through members of the local community itself,[142] is of vital importance for the media, NGOs that are involved in aid relief and (envoys of) international organisations such as peacekeeping forces. The knowledge may allow these external actors to better understand the situation on the ground and to offer the most appropriate aid or supplies to the local community.[143] Furthermore, beyond providing information to other governance actors, local communities often have the closest proximity to humanitarian crises and human rights violations that are caused by non-international armed conflicts. Correlatively, members of the community and local organisations are often the first actors to offer help and aid to those affected.[144]

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[142] The conflict in Syria, for example, has seen many pleas for help published on social media websites such as Facebook, requesting aid from the international community to improve the conditions of the humanitarian crisis. See e.g. Kareem Shaheen, '"Save Us": Aleppo Civilians Plead for Help as Airstrikes Resume' *The Guardian* (14 December 2016) <https://www.theguardian.com/world/2016/dec/14/aleppo-civilians-plea-as-airstrikes-resume-syria> accessed 10 October 2017.

[143] See e.g. ICRC, 'Humanitarian access in armed conflicts: the key role of local actors' (18 September 2017) <https://www.icrc.org/en/event/humanitarian-access-armed-conflicts-key-role-local-actors> accessed 16 January 2018.

[144] See e.g. Oxfam, 'How do you deliver lifesaving aid in an armed conflict? Support local responders.' (4 October 2017) <https://www.oxfamamerica.org/explore/stories/how-do-you-deliver-lifesaving-aid-in-an-armed-conflict-support-local-responders/> accessed 16 January 2018; and Oxfam, 'Missed Out: The role of local actors in the humanitarian response in the South Sudan conflict' (April 2016) <https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/rr-missed-out-humanitarian-response-south-sudan-280416-en.pdf> accessed 16 January 2018.

Business enterprises may similarly have a role at the local level under a multi-level governance approach to human rights (vis-à-vis NSAGs). The role of businesses during armed conflicts for what concerns human rights has been the subject of much discussion, as they can have both positive and negative effects on humanitarian situations.[145] The negative effects of businesses are caused, for example, by them committing corporate war crimes or pillaging local communities and taking much-needed resources such as food.[146] During non-international armed conflicts in particular, businesses may negatively affect human rights by colluding with NSAGs that themselves fail to respect human rights standards and aggravate situations of humanitarian crisis.[147] However, businesses can also function as 'suppliers of commodities and services that are vital to the war effort or *indispensable to civilian survival*' and increasingly work together with humanitarian agencies and NGOs to ameliorate human suffering during armed conflicts.[148] An example of this was seen in Zimbabwe, where national and international companies paid their employees with crucial resources such as food and other essential items when, due to inflation, national currency was becoming almost worthless.[149] Under a multi-level governance approach, such measures could be taken (depending on the availability of resources) by businesses operating during non-international armed conflicts, particularly in those areas controlled by NSAGs. The connections between businesses operating locally and other humanitarian actors is also crucial to the coordination of governance activities, and could be envisaged by partnerships

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[145] For an interesting discussion of the role of businesses during armed conflicts, see Hugo Slim, 'Business actors in armed conflict: towards a new humanitarian agenda' (2012) 94(887) International Review of the Red Cross 903. See also Institut Català Internacional per la Pau, 'Companies in conflict Situations: Building a Research Network on Business, Conflicts and Human Rights' (2013) ICIP Research 01 <http://icip.gencat.cat/web/.content/continguts/publicacions/arxius_icip_research/web_-_icip_research_num_01.pdf> accessed 16 January.
[146] Slim (n 145) 912-913.
[147] See ibid 912.
[148] ibid 913 [emphasis added].
[149] ibid.

between such businesses and humanitarian organisations operating locally.[150]

Another measure that could help to coordinate governance activities, particularly between the local level and national/international levels, is country visits by UN special rapporteurs to areas in which NSAGs are active (although not necessarily in which non-international armed conflicts are taking place). Notably, country visits involve the rapporteur engaging not only with the parties involved in the conflict but also the local populations. A relevant example of this is Philip Alston's country visit to Sri Lanka in 2005 where he carried out research into the activities of (among others) the LTTE (the main NSAG operating in the territory) for what concerned extrajudicial, summary or arbitrary executions.[151] Alston's subsequent report included recommendations for improving the impact that the LTTE had on human rights, including action that should be taken by various actors, such as local police officers, the national government and the LTTE itself.

At the national level, States would have an important role under a multi-level governance approach to human rights for what concerns NSAGs. States should at a minimum be more willing to make agreements, such as those discussed in Sections 11.3.3 and 11.3.4 with NSAGs (preferably including human rights standards to be respected by both parties) and to engage with them meaningfully. One such type of agreement is short-term ceasefire agreements, which will be discussed in depth in Section 11.5.

At the international level, international organisations or NGOs (or indeed more likely the two kinds of actors together) could adopt a set of human rights principles for NSAGs to adhere to during non-international armed conflicts. A document like this could be akin to the UNGPs[152] which were drafted by John Ruggie acting as a UN Special Rapporteur, with the

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[150] For a discussion of how to make businesses part of humanitarian action, see ibid 916-918.

[151] UN Commission on Human Rights, 'Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka (28 November to 6 December 2005), Philip Alston' (27 March 2006) E/CN.4/2006/53/Add.5.

[152] UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) A/HRC/17/31.

input of a very large number of stakeholders, but which were subsequently endorsed by the UN General Assembly.[153] Lessons could be learned from the weaknesses of the UNGPs to strengthen such a document for NSAGs. In particular, the guidelines could be more forward-looking, including human rights responsibilities for NSAGs that have not necessarily already been established (the UNGPs were intentionally conservative in that they were restricted to what was already accepted by States rather than pushing to increase the scope of human rights protection owed by business enterprises).[154] Such multi-stakeholder initiatives are important under a (good) multi-level governance approach as suggested in Chapter 9, as they can help to improve coordination between different actors as well as increase the participation of different actors in governance activities at the international level.

More specialised bodies established under the auspices of the UN could also have a large role in clarifying the human rights standards to which NSAGs should adhere. For example, the UN human rights monitoring bodies could adopt a general comment on NSAGs and human rights, similar to that adopted by the UN CteeESCR for businesses and human rights discussed in Chapter 5.3.1.[155] However, as seen in Chapter 5, the bodies have to date been restrictive in looking at the responsibilities of entities other than States, usually staying within the realm of State obligations. UN Charter-based bodies may be better suited to laying down more concrete standards for NSAGs and human rights, particularly given the attention that has been paid to the subject by special rapporteurs in the past (such as Philip Alston, mentioned above).[156]

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[153] UN Human Rights Council, Resolution 17/4 (2011) A/HRC/RES 7.

[154] John Ruggie explains the reasons behind this in the report that included the UNGPs. See UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) A/HRC/17/31.

[155] UN CteeESCR, 'General Comment No. 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24.

[156] UN Commission on Human Rights, 'Addendum to the Report of the Special Rapporteur

International NGOs such as the ICRC and Geneva Call already contribute substantially to better human rights protection during non-international armed conflicts. The ICRC in particular plays a crucial governance role vis-à-vis NSAGs. The Geneva Conventions mandate the ICRC with activities such as visiting prisoners of war, organising relief operations, helping with the reunification of families and conducting a range of humanitarian activities during international armed conflicts, while the Conventions simply allow the ICRC to do the same in non-international armed conflicts.[157] However, the ICRC's activities go beyond this. The organisation regularly publishes scholarly articles in the 'International Review of the Red Cross'. Several issues of the publication have focused on NSAGs, with an issue in 2011 on 'Engaging armed groups' that very extensively examined how to better engage with NSAGs to improve their compliance with international law – something that the ICRC does in practice on a regular basis. Although its main focus is on international humanitarian law, the ICRC (as well as Geneva Call) may be uniquely positioned to engage with NSAGs on human rights issues as well. Such efforts are crucial in a multi-level governance that adheres to good governance principles as it would ensure the participation of NSAGs. Effective engagement of NSAGs may also contribute to the transparency of a multi-level governance system because it may make it easier to encourage or educate NSAGs on how to make sure that their decision-making for what concerns human rights (e.g. in the provision of certain services) is transparent.[158]

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on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka (28 November to 6 December 2005), Philip Alston' (n 151).

[157] Office of the United Nations High Commissioner for Human Rights, 'International Legal Protection of Human Rights in Armed Conflict' (2011) 13-14 <http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf> accessed 11 October 2017.

[158] For a discussion of the ways in which NGOs and NSAGs often interact, particularly in relation to efforts that NGOs make to improve NSAGs' compliance with international law, see United States Institute of Peace, 'NGOs and Nonstate Armed Actors Improving Compliance with International Norms' (2011) Special Report No. 284 <https://www.usip.org/sites/default/files/sr284.pdf> accessed 16 January 2018.

NSAGs themselves of course have a central role in a multi-level governance approach to human rights in the context of non-international armed conflicts. It is crucial that they continue to (for example) sign up to (and even more importantly) implement Deeds of Commitment and work towards getting themselves removed from the lists of the Security Council. NSAGs should also be willing to learn about international human rights law and standards, so that they can try to minimise the detrimental effect that this will have on human rights, particularly if they do gain effective control over part of a State's territory. This would also require other actors to explain the relevant human rights standards to the NSAGs, and perhaps even to gather information from the State regarding the implementation of human rights in that area – more activities that could be undertaken by NGOs.

As discussed in Chapters 9 and 10, one of the main challenges to applying a multi-level governance approach to human rights is the need for cooperation and coordination between different actors and governance activities. In the context of NSAGs, this is no different. Cooperation between NSAGs and States in a conflict with one another is particularly challenging. If a conflict is especially intense, the parties may be unwilling to cooperate with one another. This means that the input of external, neutral actors, such as other States, could be instrumental.[159] In terms of coordination, given the number of aid and other non-governmental organisations that research and/or comment on the activities of NSAGs (in general as well as relating to human rights specifically), it is important to foster open communication between them. While many organisations publish reports publicly, increased knowledge-exchange and collaboration directly between organisations could allow them to respond more quickly to crisis situations, discover new challenges and pool resources where relevant. These measures would of

[159] This is already seen regularly in the context of ceasefire and peace agreements which are often mediated by this parties. For example, the peace agreement reached between the FARC and the Colombian government were mediated by Norway and Cuba. See Renata Segura and Delphine Mechoulan, 'Made in Havana: How Colombia and the FARC Decided to End the War' (2017) <https://www.ipinst.org/wp-content/uploads/2017/02/IPI-Rpt-Made-in-Havana.pdf> accessed 13 October 2017.

course also contribute to enhanced transparency of a multi-level governance system. Coordination between activities could also be improved by a greater awareness by actors of what other actors are doing to improve the respect of human rights by NSAGs, and mainstreaming efforts where possible. Ultimately, the 'cluster approach' to the multi-level governance of human rights that was suggested in Chapter 9 would be a very important tool for creating a framework according to which governance and human rights activities and responsibilities could be distributed.

Ultimately, while it is clear that many actors have taken a range of measures to improve the human rights impact of NSAGs, the biggest challenge appears to be holding NSAGs accountable. The lack of adequate follow-up and enforcement of agreements with and undertakings by NSAGs makes it very difficult to ensure their accountability; while some of the measures discussed above have the potential to increase the accountability of NSAGs, it seems that most measures depend on the willingness of groups to comply with standards. Outside of the context of international criminal law, there is no effective mechanism for coercing NSAGs into complying with standards, even if they have voluntarily undertaken to do so. In addition, most of the measures that could improve accountability are not concerned with human rights specifically, and can only have an impact on the accountability of NSAGs for human rights to the extent that standards included in the measures overlap with human rights standards. As explained above, this is woefully limited in the context of subsistence rights. The next section will introduce the idea of including human rights provisions within ceasefire agreements to increase accountability of NSAGs and their protection of human rights, as part of a multi-level governance approach to human rights.

## 11.5 A new measure: human rights provisions within ceasefire agreements between States and non-State armed groups

Chapter 9 introduced the multi-level governance approach suggested by the present book. Under such an approach, both legal and extra-legal measures are taken to achieve the common goal of protecting human rights. It was shown in Section 11.2 that while international human rights law (and

subsistence rights in particularly) apply during non-international armed conflicts, their direct application to NSAGs remains problematic and is by no means established under international law. Furthermore, although they are certainly of value, the existing measures for encouraging NSAGs to comply with human rights standards discussed above face several challenges, for example engagement with NSAGs and State recognition of agreements. As explained in Chapter 9, it is important to incorporate and strengthen existing mechanisms and initiatives into a multi-level governance approach to human rights. In light of this, it is suggested that an existing measure that is already accepted by States and NSAGs – short-term ceasefire agreements – could be used under a multi-level governance approach to human rights. It is proposed in this section that such ceasefire agreements could contain human rights provisions particularly aimed at improving the protection of subsistence rights during humanitarian crises caused by non-international armed conflicts. The measure is envisaged as a joint governance activity undertaken at the national level between at least two actors (States and NSAGs) who would constitute the parties to the agreements.[160] In the following sections, the nature and content of ceasefire agreements are explained, followed by an evaluation of the advantages and disadvantages of using ceasefire agreements in the manner suggested.

*11.5.1 The nature and content of ceasefire agreements*

The term 'ceasefire agreement' refers to an agreement between two parties engaged in conflict with each other to end hostilities. Ceasefire agreements may take several forms, cover different scopes of content and durability, and have different purposes. For example, an agreement may aim to establish peace through a complete cessation of hostilities (also referred to as 'peace agreements'). Ceasefire agreements may also be made as a way of temporarily ceasing hostilities in order to enable the parties to a conflict to negotiate a full peace agreement. Alternatively, a ceasefire agreement may

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[160] Other actors, such as bodies established by the UN for monitoring a ceasefire agreement, may also be involved in the governance activity (see below).

be more limited in temporal scope. Such agreements are often adopted for humanitarian purposes, to allow civilians temporary relief from hostilities in order to get access to essential materials (such as those seen between Hamas and Israel).[161]

The recommendations of using ceasefire agreements will focus on short-term ceasefire agreements, although peace agreements and long-term ceasefire agreements could also be used in a similar manner. In the present context of mitigating humanitarian crises, short-term ceasefire agreements are the most relevant as they may be able to provide more immediate relief for affected individuals – peace agreements and long-term ceasefire agreements can certainly have a greater impact when successfully implemented, but can take many years of negotiation to come to fruition and face many challenges in implementation. Indeed, taking the example of the Colombian government, various attempts at negotiating a peace agreement with the FARC took place over decades, and the final agreement has already faced many challenges that have slowed down its implementation.[162]

Before evaluating the use of ceasefire agreements under a multi-level governance approach to human rights, a brief note must be made regarding their legal status. Since the '*Armed Activities Case*' before the International Court of Justice, the status of peace agreements has been in doubt.[163] In this case, the Court effectively 'downgraded' the status of peace agreements from legally binding instruments to '*modus operandi*'.[164] The reasoning for this seems to have been to prevent States from relying on peace agreements to

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[161] Noting in particular a 72-hour ceasefire agreement adopted between the parties with the aid of Egypt, in August 2014. See Jason Burke and Patrick Kingsley, 'Israel and Hamas Agree Egyptian Proposal for 72-Hour Gaza Ceasefire' *The Guardian* (10 August 2014) <https://www.theguardian.com/world/2014/aug/10/gaza-israel-hamas-agree-72-hour-ceasefire-egyptian-proposal> accessed 11 October 2017.

[162] Christopher Vasquez, 'The Hardest Part Is Yet to Come for Colombia's Peace Agreement' *World Policy Blog* (7 March 2017) <http://www.worldpolicy.org/blog/2017/03/07/hardest-part-yet-come-colombia's-peace-agreement> accessed 13 October 2017.

[163] International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* 2005 ICJ Rep 168.

[164] ibid para 99.

escape international responsibility for wrongful acts (an argument on which Uganda was relying in the case).[165] Andrej Lang has argued that the Court's judgment was also based on a reluctance to engage with the issue of the status of NSAGs under international law,[166] which would be unavoidable, should agreements signed by NSAGs constitute a legally binding document. However, the legal status of the kinds of *ceasefire* agreements between States and NSAGs focused on in the current chapter remains somewhat anomalous.[167] Even though many of these agreements do not fall within the realm of public international law, it is still possible for NSAGs to conclude legally binding agreements with States (for example by 'including a third state party as a guarantor or using a Security Council Resolution'[168]).

Ceasefire agreements generally consist of three core elements, which provide for: '(1) a cessation of hostilities, (2) the separation of forces, and (3) the verification, supervision, and monitoring of the agreement'.[169] A key component to the success of ceasefire agreements is to 'clearly indicate the rights and obligations of the parties'.[170] This component is of particular relevance here, as it suggests that some level of detail concerning the rights and obligations is required. This supports (in light of the above discussion as to the relevant *les specialis*) an argument that human rights norms, rather than humanitarian norms should be included in the agreement to improve the protection of subsistence rights. The legal status of the agreements proposed

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[165] Andrej Lang, '"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the Armed Activities Case: The Role of Peace Agreements in International Conflict Resolution' (2008) 40 New York University Journal of International Law and Policy 107, 109.
[166] ibid 125.
[167] See Philipp Kastner, *Legal normativity in the resolution of internal armed conflicts* (Cambridge University Press 2015) 13-14.
[168] The Public International Law & Policy Group, 'The Ceasefire Drafter's Handbook: An Introduction and Template for Negotiators, Mediators, and Stakeholders' (2013), 7 <http://www.publicinternationallawandpolicygroup.org/wp-content/uploads/2013/10/PILPG-Ceasefire-Drafters-Handbook-Including-Template-Ceasefire-Agreement.pdf> accessed 11 October 2017.
[169] ibid 1.
[170] ibid 1-2.

will therefore depend on the situations of their adoption.

*11.5.2.1 Advantages of using ceasefire agreements as tools for compliance under a multi-level governance approach to international human rights*

One advantage of using ceasefire agreements, as suggested above, concerns the fact that their use is already widely accepted by both States and NSAGs, reflected in the prevalence of their adoption.[171] In light of the reluctance of States to endorse NSAGs' unilateral declarations or agree to Common Article 3 Special Agreements (premised on a concern that to do so would 'grant a degree of legitimacy' upon the group),[172] the acceptance by both actors is crucial.

Including human rights obligations in ceasefire agreements that are already being negotiated would also be less resource-intensive and faster than the adoption of (for example) a new agreement specifically for the protection of human rights. In particular, short-term ceasefire agreements may be used to place economic, social and cultural (or subsistence) rights obligations on NSAGs and States alike in order to provide some relief from situations of humanitarian crisis. This could include the provision of public services that NSAGs sometimes undertake to provide (as seen in Section 11.3.1) including, *inter alia*, water and housing. The extent of obligations included in a cease-fire agreement would depend on the situation on the ground, determined by the needs of the local communities affected by the humanitarian crises as well as the resources and capacity of NSAGs and States to provide the services. In current practice, ceasefire agreements often

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[171] In relation to the conflict in Myanmar alone, for example, between 2011 and 2014, ceasefire agreements were adopted between the government and 14 non-State armed groups. Min Zaw Oo, 'Understanding Myanmar's Peace Process: Ceasefire Agreements' (2014) Swiss Peace 2/2014, 7 <http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Catalyzing_Reflections_2_2014_online.pdf> accessed 11 October 2017.

[172] ICRC, 'ICRC Q&A and Lexicon on Humanitarian Access' (17 June 2014) 17 <https://www.icrc.org/eng/resources/documents/article/other/humanitarian-access-icrc-q-and-a-lexicon.htm> accessed 11 October 2017.

include provisions that, although humanitarian in nature, relate to economic, social and cultural rights (for example relating to the delivery of aid).[173] Making the human rights aspects of these provisions explicit could be a reasonable way of placing more direct human rights obligations on NSAGs in a position to contribute to the fulfilment of subsistence rights. This is especially true given that there are already some ceasefire agreements that include human rights-related provisions and work towards the protection of international humanitarian law and humanitarian aid.[174] For example, the (long-term) agreement between the Government of Nepal and the Communist Party of Nepal provides an expansive list of human rights obligations for both parties, ranging from the right to life and the prohibition of torture to the right to food and the right to health.[175] As such, including more context-specific and detailed human rights obligations for NSAGs in short-term ceasefire agreements would not be an excessive development. Furthermore, using short-term ceasefire agreements in this way could lead to more human rights agreements, or indeed to long-term ceasefire agreements that contain human rights provisions.[176]

In addition, the agreements would only affect the specific NSAG subject to the agreement. On the one hand, this should mollify State concerns that more general human rights agreements for NSAGs would either grant them legitimacy or move too far towards treating them as subjects of international law (as discussed in Chapter 2 of this book). As such, the agreements would not raise concerns regarding changes to the international

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[173] For example, a local ceasefire agreement adopted in Damascus. See 'Truce in Damascus District Allows in Aid: Monitor' (12 November 2014) *Reuters* <http://www.reuters.com/article/us-syria-crisis-damascus/truce-in-damascus-district-allows-in-aid-monitor-idUSKCN0IW0QP20141112> accessed 11 October 2017.

[174] ibid.

[175] 'Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines' (n 130).

[176] The agreement between the Government of Nepal and the Communist Party of Nepal, for example, provides an expansive list of human rights obligations for both parties, ranging from the right to life and the prohibition of torture to the right to food and the right to health. ibid.

legal framework, as would a more general legally binding human rights instrument for NSAGs. On the other hand, ceasefire agreements can include conflict-specific details. This is crucial when dealing with different groups, their mode of operations and the specific challenges faced in trying to improve access to subsistence rights in a particular area (especially when under the control of a NSAG).

A further advantage to using ceasefire agreements is the huge symbolic value that they would have. From the perspective of NSAGs, they could be a way for them to prove that they have both the willingness and capacity to act as a State-like entity by fulfilling certain human rights standards. Whether or not this is desirable from an objective perspective, the group may enhance its reputation both with the individuals over which they exercise control, and the international community at large. Ceasefire agreements would nevertheless fall short of changing the groups' status under international law, and since NSAGs already conclude ceasefire agreements, no developments in the international legal framework would be necessary.

Furthermore, and of great importance, the agreements could result in increased accountability for NSAGs, which is extremely important under the multi-level governance approach suggested by this book. Victims would not be able to receive the same redress for violations of ceasefire agreements by NSAGs as they would against a State under international human rights law (i.e. bringing a complaint before a human rights treaty monitoring body or court). However, since many ceasefire agreements are monitored by the United Nations (which would ideally be the case for the agreements proposed here), it may be possible for them to gain some degree of redress. The type of redress available would of course depend upon the provisions and circumstances under which the agreement is drafted and the extent to which the parties would consent to be monitored. The fact that the agreements require consent from both parties would, however, increase the legitimacy of the obligations placed on the parties.[177] Concerns as to the (particularly

[177] The argument here is that 'international norms that affect non-state actors [...] are in need of the latter's participation in order to be legitimate'. Cedric Ryngaert, 'Imposing International

procedural) legitimacy[178] of direct human rights obligations for NSAGs could be mitigated by the inclusion of the NSAG in the drafting process, and ultimately by their consent in the adoption of the ceasefire agreement. As well as improving transparency and accountability, this may also make NSAGs more likely to observe the obligations to which they commit themselves. Indeed, the importance of engaging with non-State actors before requiring certain behaviour of them has been repeatedly stressed.[179] The importance of engagement is reflected through the work of Geneva Call, which has 'demonstrate[d] that constructive engagement with [armed non-State actors] can be effective and can yield tangible benefits for the protection of civilians'.[180] In the Report of the Secretary-General on the Protection of Civilians in Armed Conflict it was further emphasised that '[i]mproved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-State armed groups'.[181] Such engagement between States and NSAGs, which can be achieved through the use of short-term ceasefire agreements containing human rights provisions, can not only have positive effects on the protection of civilians and their human rights, but also constitute a participatory method for governing the conduct of NSAGs. As explained in Chapter 9, this is crucial to a good, multi-level governance approach to international human rights.

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Duties on Non-State Actors and the Legitimacy of International Law' in Math Noormann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Routledge 2010) 73.

[178] See ibid.

[179] See United Nations Secretary-General Ban Ki-moon, 'Remarks to the UN Security Council on November 9, 2011, during the open debate on protection of civilians' (2011) SG/SM/13932, cited in Labbeé and Meyer (n 118) 1.

[180] Pascal Bongard, Humanitarian Practice Network, 'Engaging Armed Non-State Actors on Humanitarian Norms: Reflections on Geneva Call's Experience' (2013) Humanitarian Exchange Magazine 58.

[181] 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (11 November 2010) S/2010/579, para 52, cited in Vincent Bernard, 'Editorial' (2011) 93(883) International Review of the Red Cross 581.

Finally, from the perspectives of States, the agreements may be more palatable than the adoption of a more general agreement imposing human rights obligations on NSAGs. Indeed, in adopting an agreement they could be seen to be fulfilling their own due diligence obligations; adopting an agreement with a NSAG which would compel the group to protect human rights within the territory they control could be considered a means of encouraging NSAGs to respect human rights. In this way, although the idea of acknowledging that NSAGs are capable of fulfilling some human rights obligations may not be attractive to States, doing so in a way which allows the NSAG to be held accountable may actually work in their favour.

##### *11.5.2.2 Disadvantages of using ceasefire agreements as tools for compliance under a multi-level governance approach to international human rights*

While the inclusion of economic, social and cultural rights obligations in ceasefire agreements has many advantages, they unfortunately also have some drawbacks. Most of these relate not to the use of the agreements *per se*, but to issues of their adoption and enforcement.

Perhaps the greatest disadvantage is the fragile nature of ceasefire agreements. Practice shows that the rate of violation of ceasefire agreements is very high. It is therefore likely that future agreements including human rights obligations would also be breached. However, there are techniques relating to the drafting and implementation of ceasefire agreements that can mitigate these risks. For example, it has been suggested by Nicholas Haysom and Julian Hottinger, that drafting provisions within ceasefire agreements as precisely as possible (in terms of the obligations and geographical and temporal scope) can facilitate effective implementation.[182] Effective implementation often relies on a monitoring mechanism for a ceasefire agreement.[183] Unfortunately, such a mechanism would be less amenable for

[182] Haysom and Hottinger's suggestions are made on the basis of both practical experience and research into the failings of ceasefire agreements. Nicholas Haysom and Julian Hottinger, 'Do's and Don'ts of Sustainable Ceasefire Agreements' (2004) 2 Peace Appeal Foundation.
[183] ibid.

the short-term ceasefire agreements in question. This constitutes a disadvantage of their use related to their short-term nature, which could prevent the agreements from having a long-term impact on economic, social and cultural rights realisation. Providing a long-term solution is not the intention behind the suggestion, however. Instead (and contrary to common ideas of seeing economic, social and cultural rights as long-term goals to be achieved in the future), one aim of the agreements is to place more focus on the potential of economic, social and cultural rights to contribute to solving very immediate problems.

A further disadvantage of the proposal is that although ceasefire agreements and peace agreements have been adopted between State and non-State groups in the past,[184] the addition of human rights provisions in the agreements may perturb NSAGs. This will of course depend on the individual group, their aims and motivation, and how important third-party opinions are to them. A group that seeks to establish itself as a new State, for example, may be more willing to take on these typically State obligations. This is evident from examples such as the National Liberation Front of Algeria and the Palestine Liberation Organization.[185] Other groups who have an ideology less in line with the established global political system (for example those that operate outside of the legal regime and effectively disregard the international framework in place) may not consider such influences to be important.[186] In these cases, other initiatives would have to be contemplated. However, it is crucial to acknowledge that the proposed idea of including some human rights provisions in ceasefire agreements is not envisaged as a panacea. Rather, it is intended to supplement and complement existing initiatives, forming one part of a multi-faceted governance solution.

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[184] In Burma, for example, a group of 'ceasefire groups' emerged after the signing of several agreements between state and NSAGs. See Human Rights Watch, 'The Recruitment and Use of Child Soldiers in Burma' (2007) 95 <https://www.hrw.org/report/2007/10/31/sold-be-soldiers/recruitment-and-use-child-soldiers-burma> accessed 11 October 2017.

[185] Noelle Higgins, 'The Application of International Humanitarian Law to Wars of National Liberation' (2014) <http://www.jha.ac/articles/a132.pdf> accessed 26 January 2018, 24-26.

[186] See Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015).

The potential lack of political will of NSAGs and States alike to adopt the kind of ceasefire agreement suggested is a problem faced throughout the international human rights system. For example, the will of States to ratify human rights treaties (especially relating to economic, social and cultural rights) has been a challenge since their inception.[187] In particular, moving from ratification as a form of lip service to the implementation of concrete human rights standards has been a constant challenge. However, the potential to have the agreements monitored by the United Nations, or by a different external monitoring body (perhaps Geneva Call),[188] would prove instrumental in ensuring that the obligations are followed.

### 11.6 Concluding reflections on non-State armed groups, human rights and multi-level governance

This chapter discussed a prevalent and persistent challenge faced during non-international armed conflicts – the protection of individuals' rights vis-à-vis NSAGs, particularly during humanitarian crises. The current international law framework, including international humanitarian and criminal law as well as international human rights law, do not afford individuals consistent or comprehensive protection for their human rights. Specifically, although human rights more generally and economic, social and cultural rights in particular were shown to be applicable during non-international armed conflicts, there is very little mention of them even in initiatives that have been taken to better regulate the activities of NSAGS during non-international armed conflicts. The discussion of initiatives showed that they focus predominantly on international humanitarian law, which is understandable given the direct application of some humanitarian law rules to NSAGs. However, they do little to improve the protection of individuals' human

[187] In relation to economic, social and cultural rights, this is evident in the fact that despite its adoption in 1966, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights did not enter into force until 2013 (UN Treaty Collection Database).
[188] Geneva Call's experience in engaging with NSAGs and monitoring the implementation of Deeds of Commitment could prove invaluable in both the drafting and supervision of the ceasefire agreements suggested.

rights.

To improve the situation, the multi-level governance approach suggested in Chapter 9 was applied to the context of NSAGs, bearing in mind the good governance principles of transparency, accountability and participation. It can be concluded that while multi-level and multi-actor activities can already be found in this context, many more governing activities need to be taken. In particular, efforts need to be continued to engage effectively with NSAGs and to coordinate governance activities in the context of non-international armed conflicts and human rights. An important change to make would be for actors on the international level (e.g. States and international organisations) to better clarify which human rights standards constitute the *lex specialis* during non-international armed conflicts and to work towards including them explicitly in future initiatives aimed at regulating NSAGs.

One particular method that was suggested could be seen as having an important place within a multi-level governance approach in the context of NSAGs – ceasefire agreements that include human rights provisions. The measure builds on existing tools, taking advantage of the fact that they are often adopted by States and NSAGs to mitigate the negative effects of humanitarian crises during non-international armed conflicts. Ceasefire agreements have a great potential to introduce the idea of human rights obligations for NSAGs without requiring an unreasonable burden on the international community.

# Conclusions and recommendations

**1. General remarks**

This study was conducted in response to the growing power and influence and (negative) impact of non-State actors in relation to human rights and the lack of clarity regarding their position under international human rights law. As explained in the introduction to this book, a wide range of non-State actors have a direct bearing on the enjoyment of human rights. On many occasions, the lack of direct international human rights obligations for non-State actors has failed to result in their legal responsibility at the international level. As we have learnt through history, major reforms in international law are often only made at huge human expense – the current international human rights law framework and regime, for example, were established in reaction to the atrocities of World War II. Albeit on a different scale, a huge number of people are suffering at the hands of non-State actors, becoming victims of human rights interference for which they cannot claim redress. However, binding international law is still waiting for correlative reforms.

Various chapters of the present book have shown that actors within the existing legal framework are not blind to the impact of non-State actors, and various entities have taken action to try to prevent and remedy human rights interference by non-State actors, particularly in relation to business enterprises. However, the entities are often constrained by their mandates or the cases that appear before them (the UN human rights treaty monitoring bodies and regional and national courts/commissions) and their competence to deliver binding judgments (again, the UN human rights treaty monitoring bodies, as well as various NGOs and international organisations). The result, as will be explained further below, is insufficient protection of individuals' rights vis-à-vis non-State actors. While there have been steps towards

concrete, binding obligations for business enterprises on various levels, there is still some way to go before this will yield concrete results for human rights protection. In the meantime, and outside of the context of business enterprises, individuals will have to rely on other, non-binding measures to ensure the protection of their human rights. This book has suggested a new, multi-level governance approach to the protection of international human rights within which new and pre-existing measures outside of the framework of binding international human rights law could together form a comprehensive, inclusive and more effective system for the protection of human rights.

This chapter summarises the findings of this study, highlights the study's contributions, suggests further research that could be undertaken and makes final recommendations to a variety of actors.

## 2. Conclusions on the nature and scope of international human rights obligations

Part 1 of this book provided the theoretical framework within which the remainder of the study was conducted. Accordingly, Chapters 1-3 answered the two research questions: 'What is the nature and scope of international human rights law and obligations and have they traditionally allowed space for non-State actors?'; and 'What is the 'horizontal effect' of international human rights law, and how is it related to the nature of human rights obligations?'. The questions were answered with reference to examples from the abundance of scholarly works and case law on the issues. Overall, there have been considerable developments in the way in which human rights law obligations have been classified, as well as in relation to the horizontal effect of human rights.

In terms of international human rights law obligations, since the inception of international human rights law as we know it, crucial developments have been made in classifying, breaking down and giving content to obligations. The tripartite typology of human rights is largely to thank for this. Initially proposed in a more scholarly context, the typology has had, and will continue to have, huge practical implications. For example,

it enables the UN human rights treaty monitoring bodies in particular to give further content to human rights obligations, which paves the way for more clarity and allows States to better understand what is expected of them under the relevant human rights treaties. From the perspective of victims, it also makes it easier for them to know for what kind of State behaviour they can claim a violation of their rights. The typology was used as a conceptual tool throughout the book. From a conceptual point of view, the biggest advantage of the typology is probably that it transcends undesirable distinctions and hierarchies between different human rights.

Despite the developments concerning the classification of human rights and their obligations, the scope of who is subject to these obligations has not undergone similar expansion. Indeed, the vertical application of international human rights law still dominates. There are several reasons why the legal framework has not yet expanded to include human rights obligations for non-State actors, at the centre of which is State sovereignty. For the most part, States remain unwilling to place non-State actors on a level legal playing field as themselves by making them full subjects of international law. There are also concerns that to do so would legitimise the harmful actions of non-State actors, or, from scholars' points of view, that placing direct human rights obligations on non-State actors would allow States to hide behind them to avoid complying with their own obligations.

Whatever the reason for the lack of direct international human rights obligations for non-State actors (i.e. direct horizontal effect), support for them has certainly been growing in recent years. Horizontal effect can be described as the direct application of international human rights vis-à-vis a non-State actor. This allows victims whose rights have been negatively affected by non-State actors to hold them directly accountable – to bring a legal complaint against the non-State actor for not complying with human rights standards. At the international level, within international human rights law, this is not yet possible. However, significant moves towards direct horizontal effect have been made, particularly in the context of business and human rights (e.g. the drafting of a binding treaty on business and human rights). Soft law instruments in this area have also played an important role,

with documents such as the UN Guiding Principles on Business and Human Rights having unequivocally established a business responsibility to respect human rights. Further moves towards direct horizontal effect have happened outside of the human rights law framework at the international level (e.g. in private arbitrations) and at the national level through cases and legislation. These developments do not invalidate the claim, however, that there is currently no direct horizontal effect of international human rights law at the international level. The question also remains at the international level whether imposing direct human rights obligations on non-State actors would be legitimate. At least in relation to some actors and under certain circumstances (e.g. after a participatory drafting process), legitimacy should not pose an obstacle to achieving direct horizontal effect.

Under indirect horizontal effect, which has evolved in the absence of direct horizontal effect, States are held directly and internationally responsible for the conduct of non-State actors that interfere with the enjoyment of human rights. Simultaneously, an *indirect*, international obligation to act in a human rights-compliant manner is placed on non-State actors. The obligation placed on States often requires them to place direct obligations (or at least standards of behaviour) on non-State actors at the national level. A central obligation placed on States in this regard is the duty of due diligence, which is known in public international law more generally as well as having been developed specifically in the context of international human rights. The obligation is closely connected to the tripartite typology of human rights and actually falls under State's 'obligation to protect'. Indeed, the typology is more closely connected to non-State actors than may initially be expected.

Several instruments, including the UNGPs and the UN Guiding Principles on Extreme Poverty and Human Rights[1] uphold the responsibility

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[1] Office of the United Nations High Commissioner for Human Rights, 'Guiding Principles on Extreme Poverty and Human Rights' (2012), adopted by the UN Human Rights Council, 'Final draft of the guiding principles on extreme poverty and human rights', submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' (18 July 2012) A/HRC/21/39.

of non-State actors to 'respect' human rights. Reference to a responsibility of non-State actors to 'protect' human rights is less common, and sometimes seems to have been fused with their responsibility to respect human rights.[2] A responsibility to fulfil human rights has not yet been proffered at the international level, although there appears to be a move towards an obligation for States to mobilise the resources of non-State actors in order to comply with their own obligation to fulfil, thus recognising the positive practical impact that non-State actors can have on the enjoyment of human rights. These initial findings concerning the horizontal effect of international human rights law were discussed in Chapter 3 and provide an answer to the research question: 'What is the 'horizontal effect' of international human rights law, and how is it related to the nature of human rights obligations?'.

## 3. Conclusions on the horizontal effect of international human rights

### *3.1 Findings on the horizontal effect of international human rights*

The theoretical framework established in Part 1 was relied on heavily in the remainder of the book, particularly in Chapters 4-8, which addressed the research question: To what extent, and how, is the horizontal effect of international human rights reflected in international, regional and national legislation, jurisprudence and scholarly works? The analyses conducted in Chapters 4-8 demonstrated that the movement towards the direct horizontal effect of human rights witnessed in Chapter 3 in relation to some non-State actors cannot be said to apply across the board. The chapters comprised the study's comparative analysis, which took place on two levels. First, the legislation and jurisprudence concerning horizontal effect were compared

[2] This is certainly true in relation to the UN Guiding Principles on business and human rights, which detail the 'due diligence' responsibilities of businesses under the responsibility to respect human rights (whereas for States this typically falls under the obligation to protect human rights). See UN Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights, John Ruggie: Implementing the United Nations "Protect, Respect and Remedy" Framework, John Ruggie' (21 March 2011) A/HRC/17/31.

across the international, regional and national levels. Second, within these levels, comparisons were made between the approaches to horizontal effect taken by different human rights adjudicatory bodies. While the examples of horizontal effect (whether direct or indirect) within legislation was more limited at the international and regional levels, the analyses yielded particularly significant results for what concerns the application of horizontal effect in jurisprudence on all levels.

The findings of the chapters have already been summarised and critically discussed in Chapter 8, which identified the three main kinds of indirect horizontal effect employed at the international, regional and national levels. The first and most common kind was 'diagonal indirect horizontal effect'. We can see, in the vast majority of cases at the international and regional level, the State's positive obligation to protect individuals being applied to create indirect international obligations for non-State actors. At the international level and within the Inter-American human rights system much emphasis has been placed on States' due diligence obligations. On many occasions, States have been held accountable for not having fulfilled certain procedural obligations vis-à-vis non-State actors – notably obligations to prevent, investigate and punish non-State actors that interfere with the enjoyment of human rights. A specific State obligation to regulate non-State actors has also developed at the international and regional levels. This obligation requires States to regulate certain private entities (for the most part, privatised companies or companies providing public services) to ensure that they respect human rights. The obligation to regulate (as indeed the obligation to protect more generally) could also be considered as an indirect obligation for non-State actors to respect human rights.

The second kind of indirect horizontal effect found in practice was categorical indirect horizontal effect. This has been applied at the international and national levels, where in certain limited circumstances, a non-State actor can be re-categorised as a State actor for the purposes of human rights. Within the United Kingdom where this form of horizontal effect is provided for in legislation (Section 6(3)(b) HRA 1998), its application in practice has not been very consistent, and has been criticised

by scholars. Compared to diagonal indirect horizontal effect, which has at least clarified State obligations in relation to non-State actors and human rights, categorical indirect horizontal effect as applied in the UK has failed to clarify the precise circumstances under which a non-State actor can be considered a 'public authority' and therefore be held responsible for violations of human rights contained in the ECHR. At the international level the extreme rarity with which categorical indirect horizontal effect has been applied prevents the conclusion being drawn that this is a fully established approach at that level.

The third type of indirect horizontal effect identified through the analyses is 'value-driven indirect horizontal effect'. This has been used almost exclusively at the national level, where the laws being applied are not human rights laws *per se* (as is the case at the international and regional levels), but rather private laws that are interpreted so as to be compliant with the human rights found in the ECHR. Value-driven indirect horizontal effect features regularly in UK common law cases where (for example) existing causes of action have been incrementally developed so as to ensure the compliance of the common law with the ECHR. The source for this kind of horizontal effect is the obligation of domestic courts in the UK not to act in a way that is contrary to the ECHR, found in Section 6(3)(a) Human Rights Act 1998. Value-driven indirect horizontal effect has been applied with regard to various human rights found in the ECHR, with case law regarding each right having been developed in a slightly different way. It is also possible to see this approach to a limited extent in the jurisprudence of the ECtHR itself.[3]

*3.2 Problems with the application of horizontal effect in human rights law*

There are several key limitations to indirect horizontal effect and the way in which it has been applied in practice. First, the adjudicatory bodies rarely lay down clear standards of conduct expected of non-State actors, but

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[3] See Chapters 6 and 8 discussing the case of *Pla and Puncernau v Andorra*, App No. 69498/01 (2004).

(understandably, given their mandate and competence) focus solely on the conduct expected of States. Whether this means that non-State actors would be expected to meet the same standards as States to respect human rights remains to be seen. Further, the reasoning of the bodies at the international level often leaves the source or basis of diagonal indirect horizontal effect unclear, as the treaty bodies have not tended to explain on which sources of international law they rely. This is changing though, as more recent general comments in particular include references to relevant and varied sources of international law.

To some extent, the lack of a clear legal basis in the reasoning of the treaty bodies can also be said of the reasoning of bodies at the regional level. The basis of the ECtHR's 'positive obligations' doctrine, for example, has been debated by scholars.

A further point to make here is that the bodies examined rarely engage with scholarly discussions. Given that, at least at the national level, scholars have been instrumental in identifying types of horizontal effect and developing theories thereof, this is quite problematic; together with the lack of source, the reasoning of the bodies does not make it clear which approach is being taken in a particular case. At the international level, this has led to a lack of conceptual clarity. Indeed, although the bodies examined have not avoided discussing non-State actors where necessary, they rarely seem to have engaged with 'horizontal effect' as a concept at all.

Additional issues of conceptual clarity at the international level derive from the fact that the treaty bodies engage with concepts such as attribution, but do not make it clear whether they follow the International Law Commission's Draft Articles on Responsibility of the State for Internationally Wrongful Acts.[4] However, at least in the most recent general comment of the UN CteeESCR, which directly referenced several provisions

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[4] International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) Vol. II Part Two Yearbook of the International Law Commission (as corrected) A/56/10 30-143 (DASR). As explained in Chapter 4 of the present book, the provisions within the DASR pertaining to attribution are considered to have obtained the status of customary international law.

of the DASR,[5] this does seem as though it might be changing. At the regional level while there is also very little, if any direct engagement with horizontal effect as such and the discussions of due diligence are less clear than other bodies, the ECtHR has developed a clear doctrine of positive obligations which includes action that has to be taken by States to protect individuals from the harmful conduct of non-State actors.

Another problem is that although horizontal effect as applied in practice does provide some clarity for States, non-State actors and victims, it still does not allow victims *direct* redress against the actor that caused the interference with their human rights. It also cannot lead to accountability of the State or non-State actor in every case. This is due, for example, to the fact that the obligations under diagonal indirect horizontal effect are obligations of conduct, not result, meaning that it is the measures taken by States to try to protect individuals from non-State actors, rather than successful protection itself, that determines whether the obligations have been complied with.

Moreover, as shown in the analyses, indirect horizontal effect as applied by the bodies examined does not cover all non-State actors. This is linked to the final, and significant problem with the current application of horizontal effect – that the courts and other human rights adjudicatory bodies are limited by their mandates and (with the exception of the treaty bodies' general comments) by the kinds of cases that are brought before them. Unless a case against a particular actor or regarding a certain issue related to non-State actors' impact on human rights is brought before a body, it is not possible for them to apply the relevant law horizontally. Although the international treaty bodies can choose to address issues that they regard as pressing through their general comments, and have indeed used this to implicitly consider matters of horizontal effect in the past, they are still limited in their work by what would be considered as legitimate within their mandates. The treaty bodies are tasked with monitoring the implementation

[5] See UN CteeESCR, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', 10 August 2017, E/C.12/GC/24.

of specific human rights treaties which, as shown in Chapter 4, contain very limited reference (if any) to private actors or to horizontal effect. If the bodies were to begin addressing direct human rights responsibilities/obligations for non-State actors under the treaties, not only would this be considered to go beyond their mandate, but also beyond the limits of treaty interpretation allowed for under the Vienna Convention on the Law of Treaties.[6]

Taken together, the analyses in Chapters 1-8 highlight the limitations of the current legal approach to non-State actors and human rights. In short, there are significant gaps in human rights protection, in the identification of concrete standards of behaviour expected by non-State actors, and in the ability of victims to gain redress for interferences with their human rights. One of the main contributions of the present study is therefore the critical analysis of horizontal effect as applied in practice, as well as the identification of the limitations of the current legal approach to human rights and non-State actors at the international level.

It is certainly time to look beyond law not only in an effort to fill the gaps in 'hard' law, but as a proper approach in itself. In other words, we should not view governance approaches and activities as an option to fall back on when law does not solve an issue, but start from the opposite perspective – one that begins by taking governance approaches, *within which* legal approaches can also be taken. Starting directly and singularly from a legal perspective actually has the effect of viewing the issue of non-State actors and human rights through blinkers and automatically encourages the notion that extra-legal or non-binding activities are second-rate or stop-gap options. The approach taken to non-State actors and human rights should be much more holistic and inclusive than this.

## 4. Conclusions on a multi-level governance approach to non-State actors and human rights

Taking the findings of Chapters 1-8 as a starting point, the book then

[6] United Nations, Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) UNTS vol. 1155, 331.

addressed the research question: 'Moving beyond horizontal effect through human rights law, how can a governance approach to human rights be envisaged?'.

A governance approach to international human rights was thoroughly explained in Chapter 9, which then suggested that a more specific, multi-level governance approach that adheres to principles of good governance should be taken.

Taking a governance, rather than a legal approach to human rights allows non-State actors to be placed squarely within the human rights regime. As Chapter 9 explained, governance goes 'beyond government' and involves many activities by non-State actors. The importance of adherence to good governance principles throughout a governance system (i.e. in the drafting, adoption, implementation and enforcement of standards) was also emphasised in Chapter 9. Good governance, which requires transparency, accountability and participation, has a very close link with human rights. The connections have been highlighted by several international institutions, including the UN Human Rights Council, and are particularly visible through the lens of human rights-based approaches. Each good governance principle can be found in the elements of HRBAs, which can be used by all relevant actors as a conceptual framework to ensure good human rights governance on all levels.

There are two core aspects of multi-level governance – the multi-level and the governance. The multi-level aspect is quite self-explanatory, and in the context of international human rights would apply on four main levels – the international, the regional, national and local. The governance aspect of the multi-level governance approach suggested follows the definition of governance provided in Chapter 9 – it includes both legal and extra-legal measures, by State and non-State actors, for the common purpose of protecting human rights.

A quick note must be made on the two types of multi-level governance which were discussed in Chapter 9. The distinction between Type I and Type II lies in their organisational structure. Type I seems to fit the current legal approach, where tasks are delineated clearly between territorial

levels. The 'jurisdictions' in Type II multi-level governance are more flexible and there is no central authority determining how governance tasks are allocated to different actors within the system, who can participate on a voluntary and *ad hoc* basis. Within Type II multi-level governance regimes, the jurisdictions are task-specific, or content-specific, and are divided on the basis of what needs to happen on each level. This means that some actors operate on more than one level but within the same topic area. It was argued in Chapter 9 that the flexibility of Type II (since intersecting membership between jurisdictions is allowed) means that it is a more organic type of governance and may be more suited to the ever-changing global environment. Indeed, Type II multi-level governance better reflects the current international human rights governance regime, although it was seen in Chapter 9 that although there are multi-level and multi-actor governance activities, measures need to be taken before the regime can be called one of 'multi-level governance' *per se*.

In this vein, there are several challenges to following a multi-level governance approach and establishing a true multi-level governance regime. A particular challenge is coordination, between actors and their activities. Some suggestions to improve coordination were provided in Chapters 9, 10 and 11, and are summarised below (Section 7). Another challenge is the allocation of tasks, which in Type II multi-level governance can be particularly difficult in order not to duplicate efforts or leave governance gaps. In this respect, the principle of subsidiarity, which dictates that the lowest competent authority should perform a task, could be helpful. It is also possible, of course, for actors to form a network with which to organise and even authorise themselves, or for an overarching governing body that exists on a certain level to authorise actors to perform certain tasks. The latter option would also answer some questions of the legitimacy of multi-level governance regimes, although the former could also borrow from collaborative governance and transnational network theories. Finally, it is helpful to use the work of Hanssen and others, who have identified different strengths of coordination. The creation of synergies and communication between actors as well as the converging of behaviour of different actors can

occur through hierarchical instruments (i.e. by a governing body) or through self-regulation. As will be shown in Section 7, measures that could be taken to overcome challenges to and of multi-level governance would also ensure better adherence to principles of good governance. The measures, taken together with those in Chapters 10 and 11, answer the research question: 'What kind of measures can be taken under a multi-level governance approach to human rights in order to better protect individuals' rights from non-State actors?'.

## 5. Conclusions regarding the case studies

Having suggested that a multi-level governance approach be taken to international human rights, Chapters 10 and 11 discussed and applied the approach to the context of two specific non-State actors, the World Bank and non-State armed groups, respectively. While the suggestions made in the case study chapters are specific to the two actors, the findings in Chapter 9 could equally be tested and applied to other non-State actors too (see Section 6). The conclusions drawn in Chapters 10 and 11 show that although the World Bank and non-State armed groups may be very different types of entity, the same governance system, if correctly implemented, could help to improve their impact on the enjoyment of human rights.

### *5.1 The World Bank, international human rights law and multi-level governance*

The World Bank is a difficult entity to pin down in terms of human rights compliance. The organisation has a clear relationship with human rights and has been repeatedly targeted by human rights experts for its lack of real engagement with human rights in its policies and operations. This is despite the fact that the Bank appears to consider the realisation of human rights to be an important factor in the eradication of poverty – the Bank's ultimate goal. However, finding a legal (or indeed extra-legal) way in which to establish that the Bank has human rights obligations or to persuade the Bank that it should engage with human rights, is not easy. The examination of legal arguments that are often put forward in this respect found them to be insufficient to establish a clear obligation to this effect. As an international

organisation, the World Bank does not have direct human rights obligations, although it has been mentioned on occasion by the UN human rights treaty bodies. An academic initiative in the form of the Tilburg Guiding Principles on the World Bank, the IMF and Human Rights in 2003 claimed that the organisation has an obligation to 'take full responsibility for the respect of human rights when its projects, policies or programmes negatively impact or undermine the enjoyment of human rights'.[7] An alternative approach is to view the Bank as having to act in compliance with the human rights obligations of its individual Member States, although this was also found to be inadequate and insufficiently convincing. The most convincing source of obligations for the World Bank under international human rights law was found to be customary international law, which is by now quite widely agreed to apply to international organisations. However, whether international human rights have reached this status (bar the narrow range of human rights considered to be *jus cogens* norms) is still a matter of debate.

The fact that the legal arguments for the World Bank to comply with human rights standards are not fully convincing is very problematic in light of the Bank's relationship with human rights. Chapter 10 showed that there are several aspects of the Bank's operations and practices that can have a negative impact on human rights, and that despite some improvements (e.g. the inclusion of policies such as free, prior and informed consent in the revised environmental and social safeguard policies), the Bank does not provide for the protection of human rights in its own policies and programmes.

In light of these findings, it was suggested in Chapter 10 that the connections between the World Bank's good governance approach and human rights should be utilised. It was therefore proposed that a 'human rights-based approach' should be used as the basis for the Bank to explicitly include human rights considerations in its policies and operations, or to

[7] Willem van Genugten and others, 'Tilburg Guiding Principles on World Bank, IMF and Human Rights' in Willem van Genugten, Paul Hunt and Susan Matthews (eds), *World Bank and Human Rights* (Wolf Legal Publishers 2003) para 5.

instrumentalise human rights within the organisation. The Bank has made efforts to conform to principles of good governance, and has made particular progress towards transparency and accountability. However, it still has some way to go before it can be said to operate in full compliance with good governance, which as shown in Chapter 9, is very closely linked to human rights. While the arguments that the Bank has legal human rights obligations were found to be less persuasive, the arguments for the Bank to take a HRBA were more so.

The multi-level governance approach to human rights should also include adherence to the principles of good governance. The application of the approach to the World Bank highlighted several shortcomings of the Bank's practice in this respect, particularly in relation to the Inspection Panel and the review of the environmental and social safeguard policies. The suggestions that were offered in Chapter 10 proposed measures and activities that could be taken by the range of actors connected to the Bank's operations in order to move towards a multi-level governance regime. The final recommendations are summarised in Section 7, below.

### *5.2 Non-State armed groups, international human rights law and multi-level governance*

The second case study, discussed in Chapter 11, concerned very different entities from the World Bank. Rather than working together with and consisting of States, non-State armed groups are very often characterised by their opposition to States and their desire to become the governmental authority in a particular area. However, as with the World Bank, the law applicable to non-State armed groups, which often operate in times of non-international armed conflict, is a subject of much debate. Firstly, the question arises whether human rights law even applies during armed conflicts. Secondly, if this is the case, are non-State armed groups subject to human rights obligations? The second question is particularly interesting in light of the fact that non-State armed groups are certainly bound by at least some norms of international humanitarian and international criminal law. Within the specific context of Chapter 11 – the mitigation of humanitarian crises

caused by non-international armed conflicts – it was found that human rights law does indeed apply at such times, and could even be said, in relation to subsistence rights, to constitute the *lex specialis*. An argument was also made that subsistence rights are non-derogable and should be upheld in full during conflicts. Nonetheless, even though non-State armed groups feature in one UN human rights treaty (the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict[8]) and have been mentioned by several UN human rights treaty monitoring bodies in cases as well as general comments, they are, by their nature, non-State actors. Consequently, they do not have binding or direct human rights obligations at the international level.

The measures taken to try to improve non-State armed groups' compliance with standards of international law have had mixed results, and have mostly focused on specific thematic areas, such as the recruitment and use of child soldiers, that are dealt with under international humanitarian, rather than human rights law. The measures include the United Nation's Action Plans, Geneva Call's Deeds of Commitments and special agreements under Common Article 3 to the Geneva Conventions, and even general human rights agreements. The outcome of the measures suggests a need to take additional, complementary measures. The multi-level governance approach suggested in Chapter 9 and applied to non-State armed groups in Chapter 11 would allow for such measures to be taken, whilst strengthening the coordination, participation, transparency and accountability of measures already underway. The final recommendations offered by this study in relation to non-State armed groups will be discussed in Section 7, below.

## 6. Contributions of the study and suggestions for future research

This study makes several contributions to law and governance studies by answering the primary research question of: 'How are interferences with human rights caused by non-State actors dealt with under international

[8] See Article 4 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000, entered into force 12 February 2002).

human rights law and practice, and how could a multi-level governance approach apply to better protect individuals' human rights from the harmful conduct of non-State actors?'.

As well as contributions made by the book as a whole, individual chapters within the present study contribute in their own right to scholarly discussions and provide various (governance) actors with suggestions as to how human rights could better be protected vis-à-vis non-State actors. For example, the up-to-date review and critique of the tripartite typology of State obligations under international human rights law provides an overview of how human rights are delineated. Further, in Chapter 3 the study provided a current explanation of the horizontal effect of human rights at the international level. Although 'indirect horizontal effect' is not unknown within scholarly works on the horizontal effect of human rights international level, Chapter 3, together with Chapters 5 and 8, provided an in-depth understanding of what this term means. Similar contributions are made concerning the regional level in Chapters 6 and 8.

Chapter 5 built on and updated several scholarly works concerning the application of horizontal effect by the UN human rights treaty monitoring bodies (e.g. Andrew Clapham's rigorous study in his seminal book *Human Rights Obligations of Non-State Actors*). As well as providing a thorough analysis and comparison of the ways in which different human rights systems deal with the issue of non-State actors and human rights, this chapter highlighted the limitations of the current, legal approach to human rights and non-State actors, explained above.

The findings in in Chapters 4-8 are naturally limited by the sources analysed and may have been slightly different had, for example, the practice of all of the UN human rights treaty monitoring bodies been analysed. Finally, the national level analysis is very much an overview of the situation regarding horizontal effect in the United Kingdom, and may be very different in other national systems. Within the timeframe of the study, a more exhaustive analysis was not possible. The results of the analyses nevertheless remain valid and contribute to the legal scholarship on non-State actors and human rights; it is likely that the types of indirect horizontal effect found in

the practice of the systems examined are present in the practice of those bodies not examined at the international level. A systematic analysis of the practice of these bodies could be conducted in future research, perhaps in order to form a comprehensive database on the application of horizontal effect at the international level (or indeed at the regional and even national levels). Given that the findings of Chapters 4-8 showed that there are different approaches taken by the bodies examined depending on the actor in question as well as the right at stake, future research could perhaps be structured with this in mind.

As stated in Section 5, the findings of the case study chapters are more or less confined to the context of the actors they address. However, the multi-level governance approach itself should be applicable to a wide range of non-State actors. Further research could therefore conduct more case study analyses pertaining to different kinds of non-State actors (e.g. NGOs) in order to test the approach suggested in Chapter 9 of this study and to make suggestions specific to each kind of non-State actor.

## 7. Final recommendations to different actors

Throughout the study, various recommendations for action that should be taken by different actors were made. The recommendations, as well as several additional recommendations, are explained in this section. The actors included are: States; the United Nations (and the human rights treaty monitoring bodies in particular); non-governmental organisations, regional and national adjudicatory bodies; the World Bank; and non-State armed groups. General recommendations for all actors and from a more normative perspective are also included in this section. It is important to highlight that the recommendations in this section are not exhaustive and are mostly tailored to the case studies examined. The recommendations are therefore simply examples of the type of action that needs to be taken by the actors to better protect human rights under a multi-level human rights governance regime.

### *7.1 States (and State actors)*

States should fulfil their obligation to protect individuals' rights from the

harmful actions of non-State actors. In particular, States should ensure that all State actors are familiar with the requirements of the duty of due diligence to investigate, prevent and punish human rights abuse by non-State actors. In this context, States should ensure that appropriate measures are taken at the domestic level to implement the findings of the human rights treaty monitoring bodies and regional human rights courts, as set down both in cases and in general comments. Particular attention should be paid to preventative measures to proactively protect rights. States should also regulate non-State actors effectively, making sure that when they delegate tasks for the fulfilment of human rights to private actors, that the private actors will uphold the same human rights standards as would be expected of the State.

In relation to the World Bank, States should ensure that local populations are provided with better opportunities to have a voice in decision-making processes e.g. the poverty reduction strategy papers, and work together with the Bank to allow individuals better access to remedy when their rights are violated by a Bank-related programme or project. States should also ensure that representatives of the State act in compliance with the State's human rights obligations when acting on their behalf in the World Bank, as well as in other international organisations.

In relation to non-State armed groups, States should be willing to enter into agreements with the groups and to engage with them meaningfully. In order to do so, States should reach out to third parties that may be able to mediate between themselves and the groups. In particular, in situations of humanitarian crisis, States should seek enter ceasefire agreements that include human rights provisions and allow for the immediate subsistence needs of the affected population to be provided for, with a view to establishing long-term agreements to this effect.

### *7.2 The United Nations*

The United Nations has a huge role to play in the protection of human rights. Different actors operating under the auspices of the UN could take measures under a multi-level governance approach to human rights. Given that reference has been made throughout this book to the work of the Human

Rights Council focus on the practice of the UN human rights treaty monitoring bodies in Chapters 5 and 8, the following recommendations focus only on the role of these two actors.

### 7.2.1 The Human Rights Council

The Human Rights Council has already taken a great deal of measures in relation to non-State actors, particularly regarding business and human rights.[9] Lessons could be learned from action in this area and adapted to the context of other non-State actors. This could be particularly helpful in relation to non-State armed groups.[10] For example, the Human Rights Council could adopt, together with help from academia, experts, NGOs (particularly the ICRC and Geneva Call) and with the participation of non-State armed groups, a set of human rights principles for the groups to adhere to during non-international armed conflicts. These could take a similar format to UNGPs which were unanimously endorsed by the Human Rights Council and adopted with the input of many different stakeholders and ultimately gained the support of many State and non-State actors. Another option would be to establish working groups on the protection of human rights vis-à-vis certain non-State actors, as it has done in relation to transnational business enterprises. Again, this would be very useful in relation to non-State armed groups, and could clarify the human rights obligations, if any, of the groups under international human rights law.

Within the ambit of the Human Rights Council, the special rapporteurs, which have contributed very significantly to research on non-State actors and human rights, should continue to conduct such research and make recommendations to States and other relevant actors concerning the compliance of non-State actors with international human rights standards. An

[9] This includes, for example, the endorsement of the UNGPs and the establishment of the open-ended inter-governmental working group transnational corporations and other business enterprises with respect to human rights, discussed in Chapter 3.

[10] Such an approach may be less appropriate with regards to the World Bank, which as a single, international organisation is of a very different nature and on a different footing than non-State armed groups and business enterprises.

example of such action – the report by Philip Alston in his capacity as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions – was discussed in Chapter 11.[11] As well as being an important measure for engagement of actors such as non-State armed groups, the activities of Special Rapporteurs can also contribute to better coordination between different actors.

#### 7.2.2 International human rights treaty monitoring bodies

First, the bodies could better explain or better reference sources of law in their views on individual complaints but in particular in their general comments. Chapter 5 showed that this is beginning to happen, and is important for improving the persuasiveness of the bodies' findings and recommendations. This measure would be particularly important for what concerns the bodies' use of the term 'attribution', and the problems that this has caused in the clarity of their findings (see above). Another option for the bodies would be to engage with scholarly debates in their general comments, which could be a further step to that which they have recently made by referring on several occasions to academic works regarding non-State actors and human rights.

Second, the bodies could make their reasons for not addressing an issue more specific. In some instances the bodies have mentioned that they cannot address a certain issue because it was not contested by the parties to an individual complaint. However, it could also be useful for them to explain if their reason for not engaging with something is due to the constraints of their mandate.

Third, the treaty bodies should make themselves aware of the practice of other UN treaty bodies, in order to be able to keep their language consistent when using the same concepts as the other bodies. This could help clarify responsibilities for States and non-State actors, as well as make the findings

[11] This report was adopted by the Human Rights Commission, the predecessor of the Human Rights Council, in 2005. UN Commission on Human Rights, 'Addendum to the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Sri Lanka (28 November to 6 December 2005), Philip Alston' (27 March 2006) E/CN.4/2006/53/Add.

of the bodies more accessible, especially for claimants of human rights violations.

Finally, the bodies could adopt a general comment to address the State and non-State obligations/responsibilities in relation to specific non-State actors, much like General Comment No. 24 of the UN Committee on Economic, Social and Cultural Rights. Given that several bodies have referred to 'obligations' of non-State armed groups and the World Bank in the past, it is certainly conceivable that they could adopt general comments pertaining to these two actors.

*7.3 Regional and national (human rights) courts*

The shortcomings of the work of regional and national human rights courts were found to be quite similar to those of the UN human rights treaty monitoring bodies. For this reason, the recommendations are also similar and will not be explained in detail here. Put simply, the bodies should provide a better explanation of or reference to sources of law that they use and be more explicit in their application of the relevant law, for example by explain their methods more thoroughly. There could also perhaps be more communication and coordination between the regional and national systems (amongst themselves), although it is important that the systems are able to stay true to the specific values of their particular region/nation.

*7.4 Non-governmental organisations*

As explained in Chapters 9, 10 and 11, NGOs already have an important role in the protection of international human rights which would continue in a multi-level human rights governance regime. It is therefore important that NGOs keep contributing as they already do to the protection of international human rights, by, for example, providing shadow reports to the UN human rights treaty monitoring bodies, submitting amicus curiae briefs on behalf of individuals regarding complaints of human rights violations, drafting guidelines/principles for various actors on human rights protection, and providing various non-State actors with concrete guidance as to how they could better respect/protect human rights. In particular, NGOs could help organisations and actors such as the World Bank to develop and

operationalise HRBAs.

NGOs should also continue to share information on and increase public awareness of non-State actors and human rights. In the context of the World Bank this could include bringing issues to the attention of the Inspection Panel. Further, in relation to the World Bank, NGOs could try to foster more coordination between the Bank and different actors, perhaps acting as intermediaries in communication between actors. In a similar vein, NGOs could also help to foster engagement between the Bank and other actors, such as the UN human rights treaty monitoring bodies and local communities.

In relation to non-State armed groups, NGOs also play a central role in human rights governance. Where possible, the ICRC should perform the tasks that it is mandated to do during international armed conflicts (i.e. visiting prisoners of war, organising relief operations and helping the reunification of families, and a rage of humanitarian activities) during non-international armed conflicts as well. The ICRC should also continue raising awareness and publishing scholarly works on non-State armed groups. Such efforts would help the transparency of human rights governance and perhaps contribute to coordination between different actors.

All NGOs working in relevant fields should try to engage with non-State armed groups on human rights issues as well as humanitarian ones, and perhaps even offer training and help them understand international human rights law and what it means. This is particularly important in relation to those groups trying to gain the control of, or already with control over a certain area of territory). This could be an important step in establishing better coordination between non-State armed groups and other actors, as well as increasing the likelihood that human rights may be better protected during humanitarian crises.

NGOs should also foster communication and try to coordinate activities with one another to avoid the duplication of efforts and gaps in activities. This could also allow them to respond more quickly to situations, discover new challenges and pool resources and efforts, which in turn, if other NGOs and other actors became aware of what was being done to

improve human rights protection, would also improve coordination and transparency.

*7.5 The World Bank*

The main recommendation for the World Bank is to take a HRBA. As explained in Chapter 10, this would help with its adherence to the principles of good governance as well as the fulfilment of its own mandate and goals. Chapter 10 highlighted the 'added value' of human rights for eradicating poverty, including as shown through empirical research in the specific context of the World Bank, such as that of Daniel Kaufmann.

Simply speaking, adopting a HRBA would require the bank to: (1) ensure that all activities within development cooperation should aim to 'contribute directly to the realization of one or several human rights'; (2) allow human rights principles to guide their programmes during all stages of the process, comprising 'planning and design (including setting of goals, objectives and strategies); implementation, monitoring and evaluation'; and (3) accept that the 'relationship between individuals with valid claims (rights-holders) and State and non-State actors with correlative obligations (duty-bearers) is determined by human rights', and work to strengthen the capacity of each.[12] It would further require the Bank to act in compliance with the principles of:

(a) Universality:
(b) Indivisibility;
(c) Participation and consultation;
(d) Non-discrimination;
(e) Accountability;
(f) Transparency; and

[12] The Statement was adopted following an 'Inter-Agency Workshop on a Human Rights-Based Approach' in May 2003. See United Nations Development Group, 'The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies' (2003) <https://undg.org/document/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies/> accessed 12 November 2017.

(g) Do no harm or do less harm.[13]

As part of a multi-level governance approach, the World Bank should also engage meaningfully with actors such as the international human rights treaty monitoring bodies, human rights experts and bodies.[14] As mentioned above, it was shown in Chapters 5 and 10 that the Bank has been referred to on occasion. In light of this, if the Bank were to engage with the bodies and perhaps ask for guidance, as well continuing to seek the guidance of individual experts such as those that provided guidance regarding the recent review of the safeguard policies, it could help the organisation to identify which standards should be included in their policies, and how.

The World Bank should also strengthen the powers, independence and transparency of its Inspection Panel, as well as its transparency, for example by strengthening the operational policies of the Panel. Crucially, references to human rights within the environmental and social safeguard policies should be strengthened as part of the HRBA explained above. This would also strengthen the ability of the Inspection Panel to protect human rights.

Although the grievance redress service had not been used at the time of writing, as well as an important measure for participation and accountability, this could form an important link between the Bank and local communities, so should be used and reviewed on a regular basis. Further in the context of communication with other actors, contact points or persons could be established within the Bank to liaise with other actors for what concerns human rights.

Further, the World Bank should be mindful of human rights when entering into public-private partnerships and when working together with

[13] UN Human Rights Council, 'Final research-based report of the Human Rights Council Advisory Committee on best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations' (10 February 2015) A/HRC/28/76 para 40. See also Marlies Hesselman and Lottie Lane, 'Disasters and Non-State Actors' (2017) 26(5) Disaster Prevention and Management 526, 528-529.

[14] UN General Assembly, 'Report of the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston' (4 August 2015) A/70/274 para 78.

private companies and the commercial banks and private sector investors that often co-finance loans with the World Bank. To this end, the Bank should carefully consider which private actors it enters into partnership with, to avoid working with those which have a bad human rights record.

Finally, in order to improve transparency, the World Bank should publish periodic reports on the activities that it is taking for the protection of human rights.

*7.6 Non-State armed groups*

As explained in Chapter 11, there are several measures that non-State armed groups could take under a multi-level governance approach to international human rights. The main recommendation made is for non-State armed groups involved in a non-international armed conflict that creates a situation of humanitarian crisis to adopt ceasefire agreements with other parties to the conflict which include human rights provisions. As this recommendation was also explained above in relation to States, it will not be explained further here.

Non-State armed groups should also continue to sign up to Deeds of Commitment, and focus on implementing them successfully. Similarly, those groups on the list of the Security Council should work towards having themselves removed. If a non-State armed group hopes to gain control of an area or even replace the government of a State, it needs to be willing and make an effort to learn about international human rights law and the kinds of measures it should be taking to protect human rights, during armed conflicts but also in times of peace. In order to do so, the group could reach out to organisations such as NGOs, as mentioned above. This could also be done with regards to the adoption and with implementation of any agreements that non-State armed groups make with States, in which case the organisations could function as mediators, as well as the commitments that the groups sign up to (such as the Deeds of Commitment).

*7.7 Business enterprises*

Recommendations for activities under a multi-level governance approach to international human rights by business enterprises were suggested in Chapter 11. In particular, businesses operating in an area in which a non-international

conflict is ongoing should avoid colluding with non-State armed groups that are exacerbating situations of humanitarian crisis and preventing the enjoyment of human rights. Further, businesses should take the positive step of working together with humanitarian agencies to act, where possible, as suppliers of important commodities such as food, water and healthcare.

### *7.8 General recommendations*

As well as measures that should be taken by each actor under a multi-level governance approach to international human rights, there are several that should be taken by *all* actors within the regime. Following Hanssen and others' ladder of coordination discussed in Chapter 9, this includes measures for improved coordination, knowledge-sharing and transparency. This could be achieved through Carol Harlow and Richard Rawlings' 'accountability networks', or the partnership agreements in the European Commission's White Paper on Multi-Level Governance. Such agreements could be, for example, between the UN and civil society at the international level, and could improve accountability for non-State actors, as well as the legitimacy of and coordination within the governance system. Another important measure would be for international conferences to bring different actors together, in order to improve knowledge-sharing, communication and coordination between the actors. A good example of such a conference is the annual UN Forum on Business and Human Rights, in which over 2000 stakeholders participated in 2017.

Another, and perhaps the most significant general recommendation suggested in Chapter 9 of this book, relates to the coordination of governance activities and actors and the establishment of task-specific jurisdictions (following the argument that a Type II multi-level governance system is best suited to the governance of international human rights). It may be possible to do this along the main thematic areas of human rights, based on the core UN human rights treaties. The areas could be labelled as: economic, social and cultural rights, civil and political rights, the elimination of racial discrimination, the elimination of discrimination against women, the rights of children, the rights of migrant workers, the rights of people with

disabilities, the prohibition of torture and other cruel, inhuman and degrading treatment and the protection of people from enforced disappearance. It is also possible that specific human rights that are included in several of the core treaties would form a subset of the governance of international human rights which would be divided into task-specific jurisdictions. The jurisdictions themselves could roughly be divided into efforts to draft, adopt, implement and enforce human rights standards relating to each thematic area. Different actors could, as they do now, volunteer to take part in a particular governance jurisdiction according to their interests and expertise. Each jurisdiction could be coordinated by an allocated actor. In this sense, the United Nations 'Cluster Approach' to disaster response, which was adopted in 2005 in recognition of the need for better coordination between disaster sectors, could be extremely useful.[15]

Finally, general recommendations concerning more normative issues can also be made in light of this study's findings. For example, the obligations of State when they are acting as members of international organisations, such as the World Bank should be clarified, as well as the effect that this has on the Bank's own activities. In a similar vein, it is necessary to clarify the obligations of the World Bank, and indeed other international organisations, under international human rights law.

## 8. Final thoughts

All in all, the international community seems to be at a cross-roads for what concerns international human rights and non-State actors. Given the rate at which and the seriousness of interferences with human rights that are caused by non-State actors globally, which reach into even very remote areas of the globe, it is crucial that action is taken. While international human rights law may be a promising avenue for some actors, it is unlikely, and to some extent

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[15] The cluster approach is depicted in Figure 9.5. The original figure can be found at Inter-Agency Standing Committee, 'Reference Module for Cluster Coordination at Country Level (revised July 2015)' <https://interagencystandingcommittee.org/iasc-transformative-agenda/documents-public/reference-module-cluster-coordination-country-level> accessed 9 April 2018.

also undesirable, that binding instruments will be adopted in the near future that can address interferences by the wide range of non-State actors that currently operate. Although legal practitioners may be more limited by their mandates/competence, legal scholars should address the issue with an open mind. They should be willing to borrow from other fields (such as governance studies/political science) in order to establish a comprehensive, inclusive and effective system for human rights governance that is capable of addressing current and future challenges to the protection of human rights – a multi-level governance regime.

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# Samenvatting

Veel niet-statelijke actoren kunnen het genot van mensenrechten enorm beïnvloeden. Dit geldt met name voor niet-statelijke entiteiten die publieke functies uitoefenen, die controle hebben over een territorium, of die invloed hebben op staten bij de goedkeuring en uitvoering van nationale wetten en beleidsmaatregelen. Desondanks hebben niet-statelijke actoren momenteel geen directe verplichtingen onder internationale mensenrechtenwetgeving; het huidige internationale juridische kader voor mensenrechten blijft gericht op de staat, met de positieve verplichting om de mensenrechten van individuen te beschermen tegen het schadelijke gedrag van niet-statelijke actoren.

De belangrijkste onderzoekvragen van deze studie zijn: 'Hoe worden schendingen van mensenrechten (mede veroorzaakt) door niet-statelijke actoren behandeld in internationale mensenrechtenwetgeving en -praktijk, en hoe zou een *multi-level governance*-benadering toegepast kunnen worden om de mensenrechten van individuen beter te beschermen tegen het schadelijk gedrag van niet-statelijke actoren?' Om dit laatste te bereiken, is in de studie gekozen voor een '*law and governance*-benadering', die verder kijkt dan alleen juridische oplossingen voor het bewerkstelligen van betere mensenrechtenbescherming. De theoretische, vergelijkende en kritische analyses van verschillende mensenrechtenstelsels op internationaal, regionaal en nationaal niveau bieden een grondig inzicht in de positie van niet-statelijke actoren in internationale mensenrechtenkaders en de uitdagingen die de huidige wettelijke kaders ondervinden bij het beschermen van personen tegen inmenging door niet-statelijke actoren. Deze bevindingen worden gebruikt als basis om te suggereren dat er een *multi-level governance*-benadering van internationale mensenrechten moet worden gevolgd, waarin juridische en extra-juridische maatregelen worden genomen om niet-statelijke actoren aan te moedigen mensenrechtennormen te volgen. Twee *case-studies* over

respectievelijk de Wereldbank en niet-statelijke gewapende groeperingen, onderzoeken de huidige juridische en praktische tekortkomingen in mensenrechtenbescherming, en laten zien hoe een *multi-level governance* benadering kan bijdragen aan het oplossen hiervan.

**Deel 1** levert het theoretische raamwerk voor de studie, met name de aard en omvang van mensenrechtenverplichtingen en de mate zij al dan niet ruimte laten voor niet-statelijke actoren. Dit deel van het onderzoek beantwoordt de vragen: 'Wat is de aard en reikwijdte van internationale verplichtingen op het gebied van de mensenrechten en bieden ze ruimte voor verplichtingen voor niet-statelijke actoren?'; en 'Wat is het horizontale effect van internationale mensenrechtenwetgeving en hoe verhoudt dit zich tot de verschillende soorten mensenrechtenverplichtingen?'

**Hoofdstuk 1** gaat kritisch in op de classificaties en de aard van mensenrechtenverplichtingen. In het bijzonder wordt de tripartiete typologie van mensenrechten besproken die van toepassing is op alle mensenrechten: de verplichting om mensenrechten te respecteren, te beschermen en te vervullen. Door deze typologie kunnen staten (als plichthouders) beter begrijpen wat er van hen verwacht wordt in het kader van de relevante mensenrechtenverdragen, en wordt het gemakkelijker voor slachtoffers van mensenrechtenschendingen om te weten op welk soort gedrag zij staten kunnen aanspreken. De *typologie* wordt gedurende de hele scriptie als een conceptueel hulpmiddel gebruikt.

**Hoofdstuk 2** gaat over de traditionele, op de staat gerichte benadering van mensenrechten, die ertoe heeft geleid dat verplichtingen verticaal zijn en door de staat verschuldigd zijn aan individuen. In dit hoofdstuk is onderzocht waarom staten en de academische wereld terughoudend zijn om niet-statelijke actoren als subjecten binnen de reikwijdte van internationale mensenrechtenwetgeving te brengen. De meest belangrijke redenen zijn de soevereiniteit van de staat en het voorkomen dat staten zich achter de verplichtingen van niet-statelijke actoren kunnen verschuilen om niet aan eigen verplichtingen te voldoen.

**Hoofdstuk 3** legt uit wat het 'horizontale effect' van internationale mensenrechtenwetgeving eigenlijk is. Het 'directe horizontale effect', dat

omschreven kan worden als de directe toepassing van internationale mensenrechten tussen niet-statelijke actoren wordt eerst uitgelegd. Direct horizontaal effect stelt slachtoffers wier rechten negatief zijn beïnvloed door niet-statelijke actoren in staat hen rechtstreeks aansprakelijk te stellen – dat wil zeggen om een juridische klacht in te dienen tegen de niet-statelijke actor wegens het niet naleven van mensenrechtennormen. Binnen de internationale mensenrechtenwetgeving is dit nog niet mogelijk. Er zijn echter aanzienlijke stappen gezet in de richting van een direct horizontaal effect, met name in de context van het bedrijfsleven en de mensenrechten. '*Soft law*'-instrumenten op dit gebied spelen een belangrijke rol. Hierin wordt de verantwoordelijkheid voor bedrijven om mensenrechten te respecteren ondubbelzinnig vastgesteld. Verdere stappen richting direct horizontaal effect zijn te vinden buiten het kader van internationale mensenrechtenwetgeving op internationaal niveau (bijvoorbeeld in internationaal privaatrecht) en op nationaal niveau (op basis van wetgeving en jurisprudentie).

Deze ontwikkelingen doen niet af aan de bewering dat er momenteel geen direct horizontaal effect is van internationale mensenrechtenwetgeving op internationaal niveau. De vraag blijft ook op internationaal niveau of het opleggen van directe mensenrechtenverplichtingen aan niet-statelijke actoren legitiem zou zijn. Ten minste met betrekking tot sommige actoren en onder bepaalde omstandigheden, kan direct horizontaal effect als legitiem worden geconstrueerd.

Bij afwezigheid van een direct horizontaal effect, is er een zogenaamd 'indirect horizontaal effect' ontstaan, waarbij staten rechtstreeks en internationaal verantwoordelijk worden gesteld voor het gedrag van niet-statelijke actoren die het genot van mensenrechten schaden. Tegelijkertijd wordt een indirecte, internationale verplichting opgelegd aan niet-statelijke actoren om op een mensenrechtenconforme manier te handelen (wat een indirect horizontaal effect is). De verplichting die aan staten wordt opgelegd, vereist namelijk vaak dat zij directe verplichtingen (of tenminste gedragsnormen) aan niet-statelijke actoren op nationaal niveau opleggen. Een centrale verplichting die in dit verband aan de staten wordt opgelegd, is de plicht tot zorgvuldigheid, die valt onder de 'beschermverplichting' van staten.

Verschillende internationale instrumenten hebben de tripartiete typologie toegepast op niet-statelijke actoren waarbij de nadruk ligt op het 'respecteren' van de mensenrechten. Verwijzingen naar een verantwoordelijkheid van niet-statelijke actoren om de mensenrechten te 'beschermen' is minder gebruikelijk en lijkt soms op een (mede)verantwoordelijkheid om de mensenrechten te respecteren. Een verantwoordelijkheid om de mensenrechten te vervullen is nog niet op internationaal niveau ondersteund, hoewel er voor staten een verschuiving lijkt te zijn naar een verplichting om middelen van niet-statelijke actoren te mobiliseren om aan hun eigen verplichtingen om te vervullen te voldoen.

Nadat de parameters van het kader voor de rechten van de mens in deel 1 zijn vastgesteld, gaat het onderzoek verder met de behandeling van verplichtingen/verantwoordelijkheden van niet-statelijke actoren in recht en praktijk (delen 2 en 3). **Deel 2 en 3** beantwoorden de derde onderzoeksvraag: 'In welke mate en hoe wordt het horizontale effect van mensenrechten weerspiegeld in internationale, regionale en nationale wetgeving, rechtspraak en wetenschappelijke werken?'.

**Deel 2** bestaat uit de hoofdstukken 4 en 5, waarin het horizontale effect van internationale mensenrechten op internationaal niveau aan de orde komt. Ten eerste worden in **hoofdstuk 4** voorbeelden van horizontale effecten besproken die te vinden zijn in de internationale wetgeving, met name in internationale mensenrechtenverdragen. Hoewel er geen direct horizontaal effect wordt gevonden, toont de analyse een interessante, zij het beperkte, (chronologische) verschuiving naar meer expliciete opname van verantwoordelijkheden/verplichtingen voor niet-statelijke actoren in internationale mensenrechtenwetgeving. Het sterkste voorbeeld werd gevonden in een verdrag dat bepalingen bevat die sterk zijn geworteld in internationaal humanitair recht in plaats van mensenrechtenwetgeving – artikel 4 van het facultatief protocol bij het Verdrag inzake de Rechten van het Kind – dat bepaalt dat niet-statelijke gewapende groeperingen moeten afzien van het werven of gebruiken van kindsoldaten. Aangezien niet-statelijke gewapende groeperingen echter geen partij bij het verdrag kunnen worden, blijft de bepaling van beperkte waarde.

**Hoofdstuk 5** van het boek bestaat uit een vergelijkende analyse van de manier waarop vijf verdragsorganen van VN mensenrechtenverdragen horizontaal effect toepassen in hun 'Algemene Commentaren' en in 'Zienswijzen' met betrekking tot individuele klachten. Ondanks het ontbreken van een direct horizontaal effect in de relevante verdragen, heeft ieder orgaan zich gebogen over situaties waarin inmenging in mensenrechten werd veroorzaakt door niet-statelijke actoren. In veel gevallen hebben verdragsorganen een beschermverplichting voor staten erkend om individuen tegen het schadelijke gedrag van niet-statelijke actoren te beschermen, hoewel de inkleuring van de verplichting verschilde naargelang welke niet-statelijke actor de schade had veroorzaakt. Hoewel de instanties nogal wat details hebben verstrekt over de '*due diligence*-verplichtingen' van staten, hebben ze zich grotendeels niet beziggehouden met de gedragsnormen die door niet-statelijke actoren zelf worden verwacht. De redenering van de vijf VN-mensenrechtenverdragsorganen wordt bekritiseerd in dit hoofdstuk.

**Deel 3** gaat naar het regionale en nationale niveau, bestaande uit twee hoofdstukken met kritische en vergelijkende analyse. **Hoofdstuk 6** bevat de analyse van wetgeving, jurisprudentie en literatuur gerelateerd aan drie regionale mensenrechtensystemen: (1) het Europese systeem onder de Raad van Europa; (2) het Afrikaanse systeem onder de Afrikaanse Unie; en (3) het Inter-Amerikaanse systeem. Uit de analyse bleek dat de verantwoordelijkheden van niet-statelijke actoren soms in de wetgeving worden genoemd, hoewel dit meestal alleen voor individuen geldt. Uit de jurisprudentie blijkt dat de regionale mensenrechtenorganen steeds meer bereid zijn zich in te laten met de mogelijkheid van mensenrechtenschendingen door niet-statelijke actoren, hoewel de terminologie verschilde naargelang welke actor werd besproken en binnen welk regionaal systeem.

In **hoofdstuk 7** wordt een analyse van het horizontale effect op nationaal niveau uitgevoerd, waarbij het horizontale effect wordt onderzocht zoals toegestaan door de Human Rights Act 1998 (de Mensenrechtenwet) van het Verenigd Koninkrijk (VK). De wetgeving, literatuur en de praktijk van de Britse rechterlijke macht worden kritisch beoordeeld. Er lijkt geen haalbaar

argument te zijn dat er een direct horizontaal effect is op grond van de Mensenrechtenwet. Er zijn echter twee belangrijke manieren gevonden waarop mensenrechtennormen kunnen worden gehandhaafd ten opzichte van niet-statelijke actoren. Ten eerste maakt de Mensenrechtenwet het in bepaalde situaties mogelijk dat niet-statelijke actoren als '*public authorities*' worden beschouwd en daarom de mensenrechten moeten naleven zoals vastgelegd in het Europees Verdrag voor de Rechten van de Mens (EVRM). In de praktijk is de jurisprudentie hierover inconsistent en worden de precieze omstandigheden waaronder een niet-statelijke acteur als een overheidsinstantie kan worden beschouwd, niet verduidelijkt. Ten tweede, vanwege de verplichting van binnenlandse rechtbanken in het VK om niet te handelen op een manier die in strijd is met het EVRM, heeft de Mensenrechtenwet toegestaan dat mensenrechtennormen worden opgenomen in *common law*-zaken tussen twee niet-statelijke actoren. Deze aanpak is toegepast met betrekking tot diverse mensenrechten die worden gevonden in het EVRM, wat leidt tot verschillende uitkomsten.

De bevindingen van de hoofdstukken 5-7 vormen de basis van **deel 4** van het boek, dat de hoofdstukken 8-11 bevat en twee onderzoeksvragen beantwoordt: 'Naar een horizontaal effect in mensenrechtenwetgeving: kan een bestuurlijke benadering van mensenrechten worden overwogen''?; en 'Wat voor activiteiten kunnen worden genomen op basis van een *multi-level governance*-benadering van mensenrechten om de rechten van personen beter te beschermen tegen niet-statelijke actoren?'.

**Hoofdstuk 8** bestaat uit een kritische reflectie op de analyse van het horizontale effect van internationale mensenrechten op internationaal, regionaal en nationaal niveau. Het hoofdstuk identificeert drie soorten 'indirect' horizontaal effect: (1) diagonaal indirect horizontaal effect; (2) categorisch indirect horizontaal effect; en (3) waarde-gedreven indirect horizontaal effect. Diagonaal indirect horizontaal effect verwijst naar de toepassing van de beschermverplichting van staten op een manier dat deze indirecte internationale verplichtingen voor niet-statelijke actoren creëert. Dit was de meest gebruikte aanpak. Op internationaal niveau en binnen het inter-Amerikaanse mensenrechtensysteem is veel nadruk gelegd op de *due*

*diligence* verplichtingen van de staten, met name de verplichting om schendingen van niet-statelijke actoren te voorkomen, te onderzoeken en te bestraffen. Een specifieke verplichting van de staat om ervoor te zorgen dat bepaalde niet-statelijke actoren mensenrechten respecteren door deze te reguleren, heeft zich ook op internationaal en regionaal niveau ontwikkeld. Deze verplichting kan ook worden beschouwd als een indirecte verplichting voor niet-statelijke actoren om de mensenrechten te respecteren. Categorisch indirect horizontaal effect is van toepassing in situaties waarin een niet-statelijke actor opnieuw kan worden gecategoriseerd als een overheidsactor voor de doeleinden van mensenrechten. Dit omvat situaties waarin een niet-statelijke actor een quasi-overheidsfunctie of zelfs deze status heeft aangenomen. Hoewel dit op nationaal niveau veel voorkomt op grond van de Human Rights Act van het VK, is deze methode op een veel beperkter niveau toegepast op internationaal niveau en helemaal niet toegepast op regionaal niveau. Het waarde-gestuurde indirecte horizontale effect is ook bijna uitsluitend op nationaal niveau toegepast, waarbij de toegepaste wetten geen mensenrechtenwetgeving zijn (zoals op internationaal en regionaal niveau), maar eerder privaatrechtelijke wetten die zo worden geïnterpreteerd dat ze voldoen aan de mensenrechten in het EVRM.

Hoofdstuk 8 identificeert verschillende beperkingen van indirect horizontaal effect zoals toegepast in de onderzochte systemen. Sommige beperkingen komen voort uit de redenering van de instanties (bijvoorbeeld de rechtsgrondslag voor de redenering zijn niet altijd gegeven), terwijl andere te wijten zijn aan de beperkingen van de mandaten van de organen. Uiteindelijk is de mate van bescherming die het huidige horizontale effect van internationale mensenrechtenwetgeving biedt, onvoldoende.

De bevindingen en kritieken in hoofdstuk 8 zijn de basis voor **hoofdstuk 9**, waarin een *governance*-benadering van de internationale mensenrechtenwetgeving wordt geïntroduceerd. Het hoofdstuk suggereert dat met name een aanpak op basis van *multi-level governance* wordt gevolgd. Het hoofdstuk stelt dat *governance*-benaderingen en -activiteiten niet als een terugvaloptie moeten worden beschouwd wanneer de wet een kwestie niet oplost, maar dat *governance*-benaderingen vanaf het begin moeten worden

gevolgd; juridische oplossingen zouden deel moeten uitmaken van een bredere, *governance*-benadering van internationale mensenrechten. Het hoofdstuk laat zien dat een *governance*-benadering van mensenrechten toestaat dat niet-statelijke actoren volledig onder het mensenrechtenregime vallen – *governance* gaat '*beyond government*' en omvat niet alleen de activiteiten van de overheid, maar ook van niet-statelijke actoren. Hoofdstuk 9 betoogte dat alle betrokken actoren zich moeten houden aan de beginselen van '*good governance*': transparantie, verantwoording en participatie en dat *good governance* nauw verbonden is met mensenrechten. Deze connectie is vooral zichtbaar door de lens van mensenrechtenbenaderingen, die door alle relevante actoren kunnen worden gebruikt als een conceptueel kader om te zorgen voor goed mensenrechtenbeheer op alle niveaus.

De *multi-level governance*-benadering heeft twee kernaspecten: het '*multi-level*' en het '*governance*' (bestuur) aspect. Het *multi-level* aspect spreekt voor zich en zou in het kader van de internationale mensenrechten van toepassing zijn op vier hoofdniveaus: het internationale, het regionale, het nationale en het lokale niveau. Het '*governance*' aspect omvat zowel juridische als extra-juridische activiteiten, door statelijke en niet-statelijke actoren, met het gemeenschappelijke doel van bescherming van de mensenrechten. Er zijn ook twee soorten *multi-level governance* (Type I en Type II), die zich onderscheiden door hun organisatiestructuur. Het blijkt dat een Type II *multi-level governance* meer geschikt is voor het besturen van internationale mensenrechten. De reden hiervoor is dat de organisatie van Type II *multi-level governance* flexibeler is dan Type I-systemen en dat er geen centrale autoriteit is die bepaalt hoe bestuurstaken worden toegewezen aan verschillende actoren binnen het systeem, die op vrijwillige en ad-hoc-basis kunnen deelnemen. Type II *multi-level governance*-regimes zijn namelijk op een taak-specifieke manier georganiseerd en activiteiten worden verdeeld over niveaus op basis van wat er op elk niveau moet gebeuren. Dit betekent dat sommige actoren op meer dan één niveau opereren, maar binnen hetzelfde onderwerp.

Verschillende uitdagingen voor het volgen van een *multi-level governance*-benadering en het instellen van een echt *multi-level governance*-

regime worden ook besproken in hoofdstuk 9, inclusief de coördinatie tussen actoren en hun activiteiten en de toewijzing van taken aan verschillende actoren. Manieren om deze uitdagingen aan te pakken zijn voorgesteld, bijvoorbeeld door gebruik te maken van het subsidiariteitsbeginsel, netwerken te vormen tussen actoren, of een overkoepelend bestuursorgaan op te richten op bepaalde niveaus om actoren toe te staan bepaalde taken uit te voeren. Ten slotte worden suggesties gegeven voor activiteiten die moeten worden genomen om te komen tot een benadering van internationale mensenrechten op meerdere niveaus.

**Hoofdstuk 10** gaat in op de eerste *case-study* van het boek: de Wereldbank, als internationale organisatie. Ten eerste wordt de relatie tussen de Wereldbank en mensenrechten uitgelegd vanuit drie perspectieven: (1) de rechtspositie – of de Bank kan worden geacht bestaande verplichtingen te hebben krachtens internationale mensenrechtenwetgeving; (2) de eigen positie van de Wereldbank – hoe de Bank haar relatie met en rol in de bescherming van internationale mensenrechten voor ogen heeft; en (3) de relatie tussen het beleid en de praktijken van de Bank en de mensenrechten – hoe haar attitudes worden weerspiegeld in haar beleid en hoe de activiteiten van de Bank in de praktijk van invloed zijn op het genot van mensenrechten. De analyse toont aan dat, behalve voor een beperkt aantal mensenrechtennormen in het internationaal gewoonterecht en voor dwingende normen van internationaal recht (*jus cogens)*, de Bank niet kan worden geacht directe verplichtingen te hebben op grond van internationale mensenrechtenwetgeving. De Bank erkent zelf het belang van mensenrechten met betrekking tot haar doelstelling om armoede uit te bannen, maar heeft onvoldoende stappen ondernomen om mensenrechtennormen op te nemen in haar eigen beleid en programma's. Hoofdstuk 10 beveelt aan dat de Bank een op mensenrechten gebaseerde benadering gaat volgen, die nauw verbonden is met haar huidige pleidooi voor een aanpak van goed bestuur. Ten slotte wordt de *multi-level governance*-benadering van Hoofdstuk 9, toegepast op de Wereldbank om suggesties te doen voor manieren waarop de naleving van mensenrechtenstandaarden door de Bank zou kunnen worden verbeterd. Hoofdstuk 10 bespreekt ook verschillende uitdagingen om een *multi-level*

*governance*-benadering of -regime vorm te geven en te implementeren. Hier worden aanbevelingen gedaan met betrekking tot verschillende actoren, waaronder samenwerking met mensenrechtenorganen en -deskundigen ten behoeve van advies, het versterken van de bevoegdheden, onafhankelijkheid en transparantie van het inspectiepanel van de Bank en het zorgvuldig kiezen van partnerschappen met particuliere actoren om te voorkomen dat zij samenwerken met degenen die een slecht mensenrechten stat van dienst hebben.

**Hoofdstuk 11** bevat de tweede *case-study*: niet-statelijke gewapende groeperingen. Als eerste analyseert dit hoofdstuk de manier waarop internationaal recht de acties van niet-statelijke gewapende groeperingen tijdens een niet-internationaal gewapend conflict reguleert. De analyse gaat na hoe internationale humanitaire, strafrechtelijke en mensenrechtelijke wetgeving van toepassing is op niet-statelijke gewapende groeperingen tijdens niet-internationale gewapende conflicten. Nadat de toepasbaarheid van de mensenrechtenwetgeving meer in het algemeen is vastgesteld, richt het hoofdstuk zich op die mensenrechten die met name in het geding zijn tijdens humanitaire crises – '*subsistence rights*' die vallen onder de categorie economische, sociale en culturele rechten. Het hoofdstuk beargumenteert dat de toepasselijke normen met betrekking tot *subsistence rights* zijn te vinden in de internationale mensenrechtenwetgeving, wat de *lex specialis* is in deze kwestie, in plaats van het internationale humanitaire recht. De analyse van zowel het rechtskader als initiatieven die zijn genomen om niet-statelijke gewapende groeperingen aan te moedigen de mensenrechten te respecteren, leveren een adequate bescherming op voor personen die met dergelijke conflicten worden geconfronteerd. De *multi-level governance*-benadering wordt vervolgens toegepast op niet-statelijke gewapende groeperingen en er worden aanbevelingen gedaan om actie te ondernemen om tot een dergelijke aanpak over te gaan. Deze omvatten activiteiten van verschillende actoren zowel binnen als buiten het internationale mensenrechtenrechtenkader. Met name de potentiële rol van mensenrechtenbepalingen in staakt-het-vuren-overeenkomsten wordt beoordeeld, omdat zij een benadering op meerdere niveaus van de mensenrechten in de context van niet-statelijke gewapende

groeperingen en humanitaire crises kunnen ondersteunen.

Tot slot worden in de 'Conclusies en Aanbevelingen' de bevindingen van de hoofdstukken 1-11 samengebracht en aanbevelingen gegeven voor verschillende actoren om te komen tot een *multi-level governance*-benadering van internationale mensenrechten. Dit omvat de VN-toezichtsorganen voor mensenrechtenverdragen, de VN-Mensenrechtenraad, regionale mensenrechtenverdragsorganen en nationale rechtbanken, niet-gouvernementele organisaties, de Wereldbank, niet-statelijke gewapende groeperingen en bedrijven. De aanbevelingen omvatten het explicieter maken van benaderingen ten aanzien van het horizontale effect van internationale mensenrechtenwetgeving, het leren van succesvolle activiteiten met betrekking tot bedrijven om zo ook andere actoren aan te moedigen om te voldoen aan mensenrechtennormen, en het verbeteren van betrokkenheid en informatie-uitwisseling tussen verschillende actoren betrokken bij mensenrechtenbeheer.

Al met al lijkt de internationale gemeenschap op een kruispunt te staan voor wat betreft internationale mensenrechten en niet-statelijke actoren. Gezien de toenemende omvang en ernst van gedragingen van niet-statelijke actoren wereldwijd die leiden tot mensenrechtenschendingen, is het van cruciaal belang dat meer actie wordt ondernomen. Hoewel internationale mensenrechtenwetgeving voor sommige actoren een veelbelovend pad kan zijn, is het onwaarschijnlijk en in zekere mate ook onwenselijk dat in de nabije toekomst bindende instrumenten zullen worden aangenomen die schendingen kunnen aanpakken door het brede scala van niet-statelijke actoren. Hoewel juristen die in de praktijd werken misschien beperkt zijn door hun mandaat/bevoegdheid, moeten zeker academici dit probleem met een open geest behandelen en buiten het typisch juridische kader moeten kijken. Ze zouden bereid moeten zijn om van andere disciplines te lenen om een alomvattend, inclusief en effectief systeem voor mensenrechtenbeheer in te stellen dat in staat is om de huidige en toekomstige uitdagingen voor de bescherming van mensenrechten aan te pakken – een *multi-level governance*-regime.