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STATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES BY NON-STATE ACTORS

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I am pleased to have the opportunity this morning to speak on the relationship of the International Law Commission (ILC) Draft Articles to human rights, and, in particular, on state responsibility for human rights abuses committed by non-state actors. Some general

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international law practitioners have been known to comment that they are not sure just what the connection is; at the same time, human rights lawyers have tended to be unaware that the Draft Articles even exist. I am delighted that this panel offers the opportunity to bring together the human rights community and the more traditional international law communities for what I hope will be a fruitful exchange of information and ideas.

The question of state responsibility for human rights abuses by non-state actors is one of the burning issues among human rights law practitioners today. It has relevance, for example, in the area of state responsibility for violence against women, including domestic violence, trafficking in women for prostitution, and exploitative labor, among other areas. It has relevance in the area of slavery and contemporary forms of slavery, including bonded labor and child labor; in the area of private prisons; and in the area of private violence against racial, religious, ethnic and sexual minorities.

The notion that a state bears any responsibility for human rights abuses perpetrated by non-state actors, be they private individuals, groups of individuals, associations or companies, continues to cause debate. Frankly, this baffles me, for in my view the matter is settled, and the task that remains is how to determine just when state responsibility is triggered. But take, for example, a human rights textbook published only last year; its opening lines in its chapter on "State Action and Affirmative Duties" ask: "Does international human rights law obligate the state to protect individuals from harm by private actors? A cursory glance at human rights law might suggest that it does not."[1] My own cursory glance indicates that it does indeed, and I shall elaborate in a minute as to why.

I think one reason for this continued skepticism on the part of some, and great caution on the part of others, is that we ourselves were indoctrinated in law school with the belief that international law governs the conduct of state and state actors, and has little to do with non-state actors. And yet, as we heard at the plenary theme panel of this conference, when asked what role is left for the state given the increased role of the non-state actor in today's world, Peter Spiro pointed out that "one of the main roles of the state is that of protection."

But when the state does not provide that protection—from traffickers who prey on girls with impunity, from people who are enslaving other people, from individuals who attack lesbians or gay men with impunity, from companies that subject workers to staggeringly degrading conditions—then what, indeed, remains of the role that the state is to play?

There is a misconception, unfortunately still held among some international lawyers, that human rights law addresses government action but not government inaction, that human rights law developed in order to curb government abuses but not private abuses. I find this ironic, given that the first international human rights movement was the antislavery movement. It was the holding and trading of slaves, not by governments but private individuals and enterprises, that spurred this movement. So important is the right not to be held in slavery that it is placed in a prominent position in the Universal Declaration of Human Rights, in Article 4, immediately after the article proclaiming the right to life, liberty and security of the person, and near the article against torture. These rights—the right to life and the right not to be subjected to torture or other cruel treatment—are directly relevant to domestic violence and a host of other abuses often perpetrated by non-state actors.

The question arises, then: Under what circumstances is a state responsible when someone is held in slavery, for example, or tortured or beaten or trafficked, not directly by state agents, but by private individuals or enterprises? I will first discuss the relevant provisions of the ILC's Draft Articles on State Responsibility, then address state obligations

[1] INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: CASES, TREATIES AND MATERIALS 1170–71 (Francisco Martin et al. eds., 1997).

under human rights treaties as well as what has been termed the "due diligence" standard, and then raise some difficult issues that arise as we attempt to shape more precisely the contours of state responsibility in this area.

Under the Draft Articles, acts of private individuals not acting on behalf of the state are not attributable to the state. Nonetheless, state responsibility is triggered when the state breaches its obligation under international law. Article 16 provides that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation." Article 17 states that "[a]n act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, convention or other, of that obligation." Under an earlier article, the word "act" is interpreted as including "omission." It is the omission on the part of the state—not the act by the private actor—for which the state may be responsible.

A number of subsequent Draft Articles address a range of obligations relevant to human rights protection that might be breached: an obligation of conduct (Article 20), an obligation of result (Article 21), and an obligation to prevent a given event (Article 23). Circumstances relieving the state of responsibility include *force majeure* and fortuitous events (Article 31) and necessity (Article 33), but such circumstances do not necessarily preclude compensation for damage caused by the wrongful act (Article 35).

If a state engages in an internationally wrongful act—or omission—when it is in breach of an obligation of conduct, result or prevention, then what forms the substance of such obligations under international human rights law? We see from the Draft Articles that the duty that might be breached can come from a treaty or from customary international law.

Virtually all the main human rights instruments contain language creating positive obligations to control certain activities of private individuals so as to protect against human rights abuses. The International Covenant on Civil and Political Rights, for example, provides in Article 2 that states undertake not only to "respect" the rights in the Covenant (i.e., indicating that state agents are not to violate the rights articulated in the Covenant) but also to "ensure" those rights to all those within their territory and subject to their jurisdiction.[2] The American Convention on Human Rights contains a similar obligation to "ensure" rights.[3] The European Convention on Human Rights uses the term "secure,"[4] and the African Charter on Human and Peoples' Rights, "promote and ensure."[5] Under the Convention on the Elimination of All Forms of Discrimination Against Women, states undertake to "take all appropriate measures" to eliminate discrimination against women; specific obligations are then spelled out, using the "all appropriate measures" language.[6] Similar language is used in the Convention on the Rights of the Child.[7]

[2]International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976).

[3]American Convention on Human Rights, Nov. 22, 1969, 9 ILM 673 (entered into force July 18, 1978).

[4]European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222 (entered into force Sept. 3, 1953).

[5]African [Banjul] Charter on Human and Peoples' Rights, June 26, 1981, 21 ILM 59 (entered into force Oct. 21, 1986).

[6]Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 UNTS 14 (entered into force Sept. 3, 1981).

[7]Convention on the Rights of the Child, Nov. 20, 1989, 28 ILM 1448 (1989) (entered into force Sept. 2, 1990).

I have heard it said that if Article 2 of the International Covenant on Civil and Political Rights does indeed extend to protection against private abuses, it does so only to the extent that the abuse is grounded in discrimination. In other words, Article 2 must be read conjunctively instead of disjunctively. I believe that such an interpretation would lead to a manifestly absurd result. It would mean that the state has an obligation to ensure the right not to be subjected to torture, but only if the torturer tortures *because* of some discriminatory reason; if it is simply because the individual is a sadist, the state would have no obligation to act, whether the perpetrator is a state agent or not. The same holds true for the right to life. That right does not exist just in the face of someone who kills another because of racial bias, for example.

The language in these human rights instruments establishing the obligation to "ensure" or "secure" rights is vague, and raises several issues: Can a single failure to act constitute a breach of obligation, thereby giving rise to state responsibility? Is a pattern required instead? What about fault—need intent be shown in the failure to act, or willful neglect? Or negligence—should the failure to act be evaluated in light of a foreseeable risk of harm? What if the state could not foresee the harm, but only because of a failure to investigate?

The standard most frequently articulated has been drawn from traditional state responsibility doctrine governing protection of aliens from private violence—the "due diligence" standard. The Inter-American Court of Human Rights drew from this early body of law and applied the due diligence standard in the Velasquez-Rodríguez case in declaring that the government of Honduras would be responsible even if the seizure and disappearance of Manfredo Velasquez was caused by private persons unconnected with the government.[8] The due diligence standard also appears in the UN Declaration on the Elimination of Violence Against Women (G.A. Res. 48/104) and the Beijing Declaration and Platform for Action in addressing state responsibility for violence against women, and has been applied by the UN Special Rapporteur on violence against women.

Just what does "due diligence" entail? At present, there is no single agreed-upon definition of the term. In general, due diligence involves concepts of duty and failure to exercise due care, in other words, a negligence analysis, though views differ as to whether knowledge of the risk is required, or just foreseeability. The duty encompasses an obligation to marshal the full apparatus of the state to prevent, investigate, punish and compensate.

Over the course of the last century, states have been found responsible under a due diligence standard for inaction or inadequate action in a range of situations, including failure to provide police protection to prevent private violence, failure to investigate or to investigate adequately killings by private individuals, and failure to punish adequately or punish at all. A finding of state responsibility has been accompanied by a requirement that the state provide compensation.

An early case applying the due diligence standard, though one in which the injured party was a state, comes from the U.S. Civil War era. Just after the war, the United States claimed compensation against Great Britain for damage caused by a warship that had been built and equipped by non-state actors in British territorial waters. An arbitral tribunal found for the United States, applying a due diligence standard under which the action due was that commensurate with the risks that might result from a failure on the part of the state to act. This standard provoked immediate controversy, and over the years various other approaches have been used or suggested.

Time constraints prevent my elaborating on the various standards of due diligence. In the remaining time, I shall briefly address two areas that might be problematic in the effort

[8]Velásquez-Rodríguez Case, Inter-Am. C.H.R., ser. C, No. 4, July 29, 1988.

to hold states responsible for their omissions in respect of human rights abuses by private actors. One has to do with resources. If a state has very few resources, are we going to apply a different standard for human rights protection in that state from what might be applied in a state with more resources?

I have two responses to that question. One is that even in a state with very few resources, there is an obligation to allocate those resources on a basis of nondiscrimination. Nondiscrimination is a fundamental principle that undergirds virtually all human rights law. If resources are not allocated to protecting women, for example, from a host of possible abuses, I would argue that the allocation of resources is biased, and therefore the state may be told that it has failed to meet its obligation under international law.

My second response relates to the argument that a particular state's resources might be so few and the problems it faces so great that it simply cannot address those problems, and that we must therefore refrain from criticizing the state for its inaction. Such a situation has not, however, prevented states from being held responsible for allowing torture to continue, even in the case of very poor states with few of the resources necessary to take the steps to stem torture committed directly by state agents. Similarly, such situations should not prevent states from being held responsible for inaction in the face of, for example, abuses of physical and mental integrity committed by private individuals.

Finally, I realize that there are dangers in calling for more action on the part of the state in a world where the state is often the source of the problem when it comes to human rights violations. I am wary of the abuse of state power, and yet I have been talking about calling on states to exercise their power. I am also wary of calling upon states to enforce existing laws, for those laws may well be misguided. In Thailand, for example, where trafficking in girls and women for prostitution is a grave problem, a well-meaning government called on the government of Thailand to enforce its laws against prostitution. But enforcing the laws against prostitution meant rounding up the women, and rounding up the girls, and throwing them—not the traffickers—in prison.

The existence of such problems, however, does not mean that states should not be held accountable for failing to ensure rights. They simply emphasize the need for vigilance as we press for state responsibility for human rights abuses by non-state actors.

REMARKS BY BRICE CLAGETT*

When you are a claimant or representing a claimant, among the first questions you ask yourself are: Who has done the claimant wrong? What legal standards is that person or entity subject to? Where (if anywhere) can the claimant get jurisdiction over the alleged wrongdoer? Are there any codefendants whom the claimant might legally and usefully join with the alleged wrongdoer?

Such questions immediately raise the subject of attribution. That subject is dealt with in no fewer than eleven of the Draft Articles of the International Law Commission (ILC) Draft on State Responsibility—Articles 5 through 15, more than a sixth of the text. These articles attempt to wrestle with the often difficult and subtle question of when a particular act is to be regarded as an act of the state, and when not. Whether it is can raise both substantive issues of what is the governing law—if the relevant entity is a state, it is obviously subject to the rules of international law; if it is not a state, it may not be—as well as procedural and jurisdictional issues.

The Draft Articles largely approach the attribution question in terms of focusing on what is and what is not an "organ" of the state, acting as such. One problem is that the term

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